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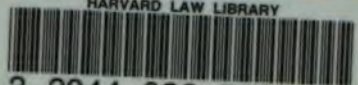
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A TREATISE

ON THE LAW OF

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INSTRUCTIONS TO JURIES

IN CIVIL AND CRIMINAL CASES

WITH FORMS OF INSTRUCTIONS
APPROVED BY THE COURTS

BY THE

EDITORIAL STAFF OF THE WEST PUBLISHING COMPANY

UNDER THE SUPERVISION OF

HENRY E. ^{duccia}RANDALL

VOLUME IV

1922

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INST. TO JURIES

(3475)*

CHAPTER CLXIV

HOSPITALS

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3089. Same—Burden of proof.

3090. Liability for unlawful detention of patient.

3091. Liability of charitable hospital for injuries to visitor.

§ 3086. Liability for negligence in care of patient

§ 3086(1). Illinois

The court instructs the jury that, while it was the duty of the defendant to exercise ordinary and reasonable care and caution to prevent injury to plaintiff, yet the defendant was not required by law to be on its guard against the unusual, extraordinary, or not reasonably to be expected; and if you believe from the evidence in this case that it was not reasonably to be expected by the defendant that an occurrence such as the one which resulted in injury to the plaintiff would take place, then the defendant, under the law, is in no manner liable for said occurrence.¹

The court instructs the jury that there is no proof in this case that plaintiff's suffering and unhealthful condition were in any manner increased or aggravated through any negligence upon the part of the defendant subsequent to the time of the origin of the fire by which plaintiff was burned. Therefore, unless the greater weight of the evidence shows that the origin of the fire by which plaintiff was burned was due to the negligence of the defendant, it is your duty to return a verdict of not guilty.²

The court instructs the jury that, if you believe from the evidence in this case that the plaintiff lighted a match for the purpose of seeing what time it was by his watch, and that the fire by which the plaintiff was injured originated from such match, then the law exempts the defendant from any liability to plaintiff for injuries caused by such fire.³

§ 3086(2). Virginia

The jury are instructed that, if the defendant accepted the plaintiff as a patient, and undertook to give him such care, nursing and

¹ *Croupp v. Garfield Park Sanitarium*, 147 Ill. App. 7.

² *Croupp v. Garfield Park Sanitarium*, 147 Ill. App. 7.

³ *Croupp v. Garfield Park Sanitarium*, 147 Ill. App. 7.

attention as was reasonably necessary, in view of his known condition, and negligently failed to keep and perform its undertakings, then in that case the defendant is liable for any injury which naturally resulted from such failure.⁴

§ 3087. Same—Negligence in applying hot water bag

The jury are instructed that, if you believe from the evidence in this case that the plaintiff intrusted himself to the defendant's hospital for treatment, then the plaintiff, while under the care of the defendant, had a right to expect of the defendant and its employees in charge of the institution ordinary care and skill in nursing and treatment, such as his case required, and such degree of ordinary care and diligence should be in proportion to the physical or mental ailments of the patient; and if you further believe from the evidence in the case that said hospital, its servants or employees, did not exercise such ordinary care and diligence as was required by the condition of the plaintiff's health, and either negligently applied, or permitted to be applied, to his person a hot water bag, which resulted in injury to him, you must find for the plaintiff.⁵

§ 3088. Same—Contributory negligence of patient

The court instructs the jury that, even though you believe from the evidence in this case that there was a match in the bed in question, and that such match caused the injuries to plaintiff, yet, if you further believe from the evidence that the plaintiff himself negligently dropped or placed such match in said bed, then the defendant cannot, under the law, be held liable for the consequences of the fire started by such match.⁶

§ 3089. Same—Burden of proof

The court instructs the jury that, before the plaintiff can recover in this case for any injuries sustained through the ignition of the bandages and dressings on plaintiff's person, he must prove by a preponderance or greater weight of the evidence each of the following propositions: (1) That at the time of the occurrence in question there was a match in the bed in which the plaintiff was. (2) That the defendant knew of the presence of such match in said bed, or by the exercise of ordinary care and caution on its part would have known of such presence. (3) That said match ignited and thereby caused the injuries to the plaintiff. (4) That plaintiff himself was not guilty of any negligence which proximately con-

⁴ Tucker Sanatorium v. Cohen, 106 S. E. 355.

⁵ Tucker Sanatorium v. Cohen (Va.) 106 S. E. 355.

⁶ Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7.

tributed to bring about his injuries. The burden of proving each and every one of the foregoing propositions is upon the plaintiff. If the plaintiff has failed to prove by a preponderance of the evidence any one or more of these propositions, or if the evidence on any one or more of said propositions is evenly balanced, or preponderates in favor of the defendant, then and in such case you have no discretion, and under the law the defendant cannot in such circumstances be held liable for any injuries sustained by the plaintiff through the ignition of said bandages and dressings.⁷

§ 3090. Liability for unlawful detention of patient

You are instructed that, if the plaintiff was ——— years of age, unmarried, and was there in the hospital, and she subsequently applied to the authorities of the hospital for, and demanded, her release—demanded that she be allowed to go from the institution and be allowed and suffered to leave there—and after such demand made, if you find it, and after it was communicated by the nurses, or through the proper channels, to ———, she, either by words, or by locking doors, or by anything that comes up to the definition of imprisonment, that I have given you, was imprisoned, so that she was unable to carry out her desires and wishes in that regard, then if you find these facts, after that, the court charges you, as a matter of law, that she would be wrongfully imprisoned and restrained of her liberty, unless, although you were to find that she was in the institution, and that she was demanding to be released, which demand was properly communicated to the hospital authorities, you were to further find to your satisfaction that she was so nervous from any ailment or disease and so irrational that there was reasonable probability that, if so released at the time, she would do herself some bodily harm. Under such circumstances the hospital would have the right to detain her and restrain her, under the law of necessity and humanity, until that condition of reasonable apprehension of doing herself bodily harm had passed. And within that rule or limitation it would not be a wrongful and unlawful imprisonment. Now it is for you, gentlemen, to say, from the testimony, how this matter is. Even though she went in under this paper, if you find, as she contends, that she was perfectly rational, and knew what she was doing—what she wanted and did not want—and she wanted to leave the institution, and expressed it to the hospital authorities, and the hospital authorities knew of that fact, and then after that restrained her of her liberty, then it would be in law, as I am holding, wrongful detention, unless they

⁷ Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7.

were justified in restraining her under those rules of humanity and regard for her welfare, that I have just given you.⁸

§ 3091. Liability of charitable hospital for injuries to visitor

The court instructs the jury that, if they believe from the evidence that the plaintiff on ———, accompanied at her request a sick friend to the defendant's hospital for treatment, that the condition of her friend was such as to render it reasonably necessary for the plaintiff, or some one else, to accompany her, then the defendant owed to the plaintiff the duty to exercise ordinary care to have its premises in reasonably safe condition for the visit; and, if the defendant negligently failed to perform that duty, and, as the proximate consequence thereof, the plaintiff, while exercising due care, was injured, then the defendant is liable for the injuries sustained.⁹

⁸ *Cook v. Highland Hospital*, 84 S. E. 352, 168 N. C. 250, L. R. A. 1915D, 611, Ann. Cas. 1917C, 158.

⁹ *Hospital of St. Vincent of Paul in City of Norfolk v. Thompson*, 81 S. E. 13, 116 Va. 101, 51 L. R. A. (N. S.) 1025.

CHAPTER CLXV

HUSBAND AND WIFE

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A. REPRESENTATION OF ONE SPOUSE BY OTHER IN RELATIONS
WITH THIRD PERSONS

§ 3092. Agency of husband for wife

§ 3092(1). Arkansas

You are instructed that, if you find from the testimony that the plaintiff's husband made the application for the policy sued on in this case, then she is bound by the statements made by her husband as though she had made them herself.¹

§ 3092(2). Illinois

You are instructed that the rule of law is that what one does by an agent is the same as if done by himself, and if the jury believe, from the evidence in this suit, that J. H. S. was the agent of his wife, E. S., then whatever said J. H. S. may have done within the scope of his agency, as her agent, was the same as if done by herself.²

§ 3093. When husband deemed agent of wife, so as to charge her
with his negligence

You are instructed that the obtaining by the husband of food or medicine for his wife, with her knowledge and approval, does not of itself constitute such husband the agent of the wife in such sense as to charge her with his negligence. In order to make him the agent of the wife in this transaction, she must have selected the medicine, directed that he should purchase it, and he must have had nothing to do in the matter, except by her procurement and direction. What he did in this matter simply in the discharge of his duty as a husband was not done as the agent of his wife, and his negligence in his duties as a husband are not chargeable to his wife.³

You are instructed that the next question for you to determine will be whether Mrs. ———, by herself or by her agent, contributed by her negligence to bring about the result; for if she contributed by her negligence to bring it about, then the defendant is not liable. But it is urged that she is bound by the act of her husband as her agent. Now, if he was her agent, under the rules I will give you, then she is bound, and such an act would be an act to prevent recovery in this case. But I say to you, that a purchase for his wife, made in the discharge of his duty as a husband, does not constitute him the agent of his wife; that in order to make the husband the agent of his wife, he must, by her procurement and

¹ Queen of Arkansas Ins. Co. v. Dumas, 168 S. W. 561, 113 Ark. 598.

² Smith v. Wise, Stigleman & Co., 58 Ill. 141.

³ Davis v. Guarnieri, 15 N. E. 350, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

direction, and under her authority and control, have gone and made this purchase; and that if he simply went in the discharge of his duty as a husband, he was not her agent in such a way that any carelessness of his could be attributed to her. If he was under her direction and control in such a way as to make him her agent, then, of course, his carelessness is her carelessness; and if he contributed by his negligence, then the plaintiff cannot recover here, for the plaintiff can recover here because the woman could have recovered if she had lived.⁴

§ 3094. Agency of wife for husband—Liability of husband for goods sold wife

§ 3094(4). New York

The jury are instructed that the plaintiff must prove, in order to recover in this action, that the goods sold and delivered were necessary and suitable to the condition in life of the defendant's wife and that she was not otherwise provided for by her husband.⁵

The jury are instructed that, if you believe from the evidence that, prior to the purchase of the goods mentioned in the evidence from plaintiff by the wife of defendant, the defendant had given notice to plaintiff not to sell to his wife on his account, you must, in order to find for plaintiff, believe from the evidence either that the defendant subsequently promised to pay for the goods so purchased, or that the articles furnished were necessary and suitable to the wife's condition in life, and that she was not otherwise provided for by defendant.⁶

§ 3094(2). Oregon

You are instructed that although a husband supplies his wife with articles necessary to her station in life, he may render himself liable for articles purchased upon his credit, if he clothes her with an ostensible agency by an apparent authority to contract for goods for his credit by paying such bills previously incurred.⁷

You are instructed that, if notice not to extend credit is relied upon as a defense, defendant must prove that he gave actual notice to the plaintiff, or its officers, not to extend any further credit to his wife. Notice to some one who is not in authority, and of which the plaintiff has no actual notice, is insufficient to exonerate defendant from his liability. The burden of proof is upon defendant.⁸

You are instructed that, even though actual notice may have

⁴ Davis v. Guarnieri, 15 N. E. 350, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

⁵ Arnold v. Allen, 9 Daly (N. Y.) 198.

⁶ Therlott v. Bagloli, 22 N. Y. Super. Ct. 578.

⁷ Meier & Frank Co. v. Mitlehner, 146 P. 796, 75 Or. 331.

⁸ Meier & Frank Co. v. Mitlehner, 146 P. 796, 75 Or. 331.

been given, yet, if you find that, subsequent to said notice, defendant knew of the purchases made by his wife, against his will, and paid for same, you may find from such facts that defendant ratified the purchases, and is liable therefor. Ratification may be presumed from his subsequent conduct, as, for instance, acquiescence and assent, or failure to complain.⁹

B. SEPARATE ESTATE OF WIFE

Charges against estate, see post, §§ 3100-3106.

§ 3095. What constitutes

The court instructs the jury that, if you believe and find from the evidence that all or part of the property in controversy was purchased by plaintiff with money which was given to her by her husband, then the same, together with all income, increase, and profits thereof, together with all other money or property which was received from other sources and which she earned by her own work, became and continued her separate property; and you are further instructed that the fact that the husband used or cared for any or all of said property does not prove that the wife transferred same to her husband, but the same remained her separate property, unless the jury find she gave any interest in said property to her husband in writing. If you find the facts to be as above, then the law is that plaintiff was the owner of the property and entitled to the possession of the same.¹⁰

§ 3096. Presumption that property of wife acquired with means furnished by husband

The court instructs the jury that if they believe from the evidence that at the time of the acquisition by the plaintiff, Mrs. J. B., of the property levied on and sold under the execution of defendant, her husband, G. B., was insolvent, then the presumption of law is that he furnished her with the means to purchase or acquire such property, and that such property is therefore subject to be levied on for his debts contracted prior thereto, and that the burden of showing that he did not in fact furnish her with the means to acquire said property is upon the plaintiff to prove affirmatively, by a preponderance of evidence, to the satisfaction of the jury, that he did not do so.¹¹

§ 3097. Presumption from possession of husband

You are instructed that, when there is a controversy as to whether property belongs to the husband or wife, the possession of the

⁹ *Meier & Frank Co. v. Mittlehner*, 146 P. 796, 75 Or. 331.

¹⁰ *Doherty v. Doherty*, 134 S. W. 1112, 155 Mo. App. 481.

¹¹ *Hoge v. Turner*, 32 S. E. 291, 96 Va. 624.

husband is not adverse to the wife, and such possession is not evidence of the husband's title.¹²

§ 3098. Right of wife to control

The jury are instructed that in ——— a married woman has the same right to own, control, and dispose of both real and personal property, as if she were single, and she is entitled to the same protection, with relation thereto, as are men or unmarried women.¹³

C. COMMUNITY PROPERTY

§ 3099. Presumptions

The jury are instructed that, when property is deeded to either husband or wife during marriage, such property is presumed by law to be community property, and all effects possessed by husband and wife at the death of either shall be regarded as community effects or gains, unless the contrary be satisfactorily proved.¹⁴

D. CONTRACTUAL LIABILITY OF WIFE TO THIRD PERSONS

§ 3100. Estoppel of wife to resist liability

See, also, post, § 8104(2).

You are instructed that, if you find from the evidence in this case that plaintiff loaned the money to Mrs. ——— on the representations made by her husband, in her presence, that she desired the money for the purpose of making a payment on a mortgage against her own property, and that plaintiff relied on those representations—and I add these words, "in good faith, supposing them to be true"—then it is immaterial as to what became afterwards of the money. Whether it was applied for the benefit of her separate estate or not, you must find for the plaintiff.¹⁵

§ 3101. Liability of wife predicated upon agency of husband

The court instructs the jury that there is no presumption of agency from the relationship of husband and wife. A husband may act as agent for his wife, but in order to bind her he must be previously authorized to act, or after his acts have been done, she must ratify them after receiving full knowledge thereof; and to establish such agency the evidence must be clear, satisfactory, and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of the relationship of husband and wife.¹⁶

¹² Anglin v. Thomas, 37 So. 784, 142 A.Ja. 264.

¹³ Fike v. Ott, 107 N. W. 774, 78 Neb. 439.

¹⁴ Wood v. Dean (Tex. Civ. App.) 155 S. W. 363.

¹⁵ Vosburg v. Brown, 78 N. W. 886, 119 Mich. 697.

¹⁶ Western Carolina Realty Co. v. Rumbough, 90 S. E. 931, 172 N. C. 741.

The court instructs the jury that the allegation substantially is this: • That the defendants agreed with the plaintiff that if the plaintiff would secure a tenant for the building described in the complaint, who was willing to take the same for a period of ——— years and pay the sum of \$——— per annum rental therefor, they, the defendants, would pay to the plaintiffs ——— per cent. monthly on the rental for their services in procuring a tenant and collecting the rent for the building. The plaintiffs alleged further that they procured a tenant to whom the lease was made upon the terms fixed by the defendants, and that they have failed to pay to the plaintiffs the commissions due on the rental value for certain months, and that they are entitled to recover against these defendants the amount so alleged to be due. These allegations are denied by the defendants. They deny that any contract was made between the defendants or either of them and the plaintiffs, and deny therefore that any liability exists as to them.¹⁷

The court instructs the jury that the plaintiffs are required to satisfy you by the greater weight of all the evidence that such a contract was made by the defendant, or at least by one of the defendants, in order to entitle them to an affirmative answer to this issue. If you find from the evidence and its great weight that the defendants, ——— and his wife, made the contract as alleged, your answer to the first issue will be merely "Yes." Unless you find by the greater weight of the evidence that the contract was made by these defendants, or at least one of them, you will answer it "No." If you find that the contract was made by one and not by the other, your answer to the issue in that event will be "Yes," naming the defendant by whom you find the contract to have been made.¹⁸

The court instructs the jury that the plaintiffs contend that the defendant husband came to the office of the plaintiffs and, after negotiating directly with one member of the firm, entered into a contract with them to the effect that, if the plaintiffs would procure a tenant or lessee for a certain lot and building in the city of ——— for a stated period at an agreed price, the defendants would pay to the plaintiffs ——— per cent. monthly on the rental value. That after this proposal was made by said defendant, on behalf of himself and his wife, the plaintiffs procured a lessee, and the property in question was leased for a period of ——— years at the annual rental of \$———; that under the terms of the contract the plaintiffs were to receive monthly ——— per cent. on the annual rental value. Plaintiffs contend that the monthly rental value

¹⁷ Western Carolina Realty Co. v. Rumbough, 90 S. E. 931, 172 N. C. 741.

¹⁸ Western Carolina Realty Co. v. Rumbough, 90 S. E. 931, 172 N. C. 741.

is \$——, and that the amount due per month is —— per cent. of this amount, or —— for each month; and that for certain months they have not received the amount due, and they are entitled to recover the aggregate of the amount for the months for which there is an arrearage of rent. The plaintiffs further contend that, at the time the contract was made, the defendant represented not only himself for his individual benefit, but his wife also, and that he was the agent of his wife in making the contract, representing not only himself, but her, and that they are entitled to recover, not only against him, but against his wife also. On the other hand, the defendants contend that there was no liability on the part of either of the defendants, the husband did not make the alleged contract, that he did not represent his wife, that he had no authority to represent her, and for that reason they insist there can be no liability on the part of either one, and that your answer to the issue should be "No." ¹⁹

The court instructs the jury that, in passing upon these contentions you may consider evidence tending to show whether or not the contract was in fact made by the husband and the plaintiff; unless you find that such contract was made by him either in his representative capacity, or in his own individual capacity and his representative capacity, you will answer the first issue "No." If you find that the contract was made by him, you will then consider evidence tending to show whether it was made for the benefit of his wife as her agent, and also for his individual benefit, and in passing upon the question as to whether or not he acted in the capacity of agent for his wife you may consider evidence tending to show whether or not he had this property in his charge for some time preceding the date of the alleged contract; any declaration made by the feme defendant in regard to the contract, which was in fact made between the defendants and the lessee; the length of time the defendant husband negotiated in the deal or trade concerning the property together with the circumstances arising from the evidence, for the purpose of finding out whether or not, if you find such contract was made, the wife either previously appointed her husband for the purpose of effecting such transaction, or whether after the transaction was effected she in fact ratified it with full knowledge of what had been done.²⁰

The court instructs the jury that, if you find from the evidence that the defendant husband was a duly authorized agent of his wife for leasing the property, doing such things as were necessary to make a valid and satisfactory lease, and while engaged in the scope

¹⁹ *Western Carolina Realty Co. v. Rumbough*, 90 S. E. 931, 172 N. C. 741.

²⁰ *Western Carolina Realty Co. v. Rumbough*, 90 S. E. 931, 172 N. C. 741.

of his agency, made a contract with the plaintiff realty company, by the terms of which the realty company was to procure a lessee and for an agreed term at a stipulated rental price, and the realty company did in fact find such lessee to whom the lease was executed and who complied with the agreed terms; and if you further find that the defendant husband, on behalf of himself and also on behalf of his wife and for the benefit of both, and for the benefit of course of each, contracted to pay the realty company ——— per cent. monthly on the rental value as consideration of the services rendered, your answer to the first issue will be "Yes."²¹

The court instructs the jury that, if you find from the evidence that the defendant husband was the duly authorized agent of his wife, for the purpose of effecting a lease, you will then find that he had general power to do what was usual and necessary to carry on the business intrusted to him; that is, to do those acts and make those contracts usually done and made by other agents in the same line of business, under the same circumstances.²²

The court instructs the jury that there is no evidence that the defendant wife made any contract personally with the plaintiffs, relative to the renting of her property mentioned in the complaint, and before the jury will be authorized in finding that she made such contract, they must find by the greater weight of the evidence, the burden being upon the plaintiffs, that the husband was authorized by her to make the contract alleged by the plaintiff or that she ratified such contract with full knowledge of the same.²³

§ 3102. Ratification by wife of husband's acts

You are instructed that a wife may adopt or ratify acts done or contracts made by her husband in respect to her separate estate without authority, and in case of of such ratification she is as fully bound as if her husband had been her duly authorized agent in the first instance; and such ratification may be shown or effected by acquiescence on the part of the wife.²⁴

§ 3103. Liability of wife on contract of husband

I will instruct you that, where a man is married, any contract which he enters into involving a money transaction is presumptively for the benefit of the community; that is, presumptively for the benefit of himself and his wife, and any indebtedness in-

²¹ *Western Carolina Realty Co. v. Rumbough*, 90 S. E. 931, 172 N. C. 741.

²² *Western Carolina Realty Co. v. Rumbough*, 90 S. E. 931, 172 N. C. 741.

²³ *Western Carolina Realty Co. v.*

Rumbough, 90 S. E. 931, 172 N. C. 741.

²⁴ *Jordan v. Delaware & A. Telegraph & Telephone Co. (Del.)* 75 A. 1014, 1 Boyce, 107.

curred in that way would be prima facie an indebtedness of the community. There is no question of law there because the defense has offered no evidence to show that this is not a community debt; hence, if you find that the contract was made and the services performed, your verdict will be for the plaintiffs in the sum of \$——, and against both the defendants.²⁵

§ 3104. Liability for debts of husband

§ 3104(1). Alabama

The court instructs the jury that, even though the defendant Mrs. —— did not buy the stock of goods in ——, and did not authorize her husband or any other person to buy them for her, and though the debt was not originally hers, yet if the stock of goods so purchased was afterwards brought to —— and placed in the business then owned and being conducted by defendant Mrs. ——, with her knowledge and consent, and if she sold or disposed of or got the benefit thereof, and thereafter, with knowledge of all the facts and circumstances surrounding the borrowing of the money in question and the purchase of the goods therewith, agreed to pay plaintiff the money thus borrowed, and executed the notes sued on for that purpose, in that event she would be liable, and the jury would be authorized to find a verdict against her and in favor of the plaintiff.²⁶

§ 3104(2). Missouri

The jury are instructed that, if they believe from the evidence that Mrs. ——, wife of ——, gave money belonging to her to her husband, and permitted him to invest the same in a stock of goods, wares, and merchandise, and to hold himself out to the public as the owner thereof, and to engage in business as a retail merchant in the city of —— in his own name, and that the said husband purchased goods, wares, and merchandise as such merchant, and afterwards became a bankrupt, then the facts that the money invested in said goods belonged to his wife, and that she signed the note to the defendant bank, is no defense to this suit.²⁷

§ 3104(3). New Mexico

The court instructs the jury that by the laws of —— a married woman is not responsible for the debts of her husband, and, before they can find the issues against the defendant ——, they must find

²⁵ Peacock v. Ratliff, 114 P. 507, 62 Wash. 653.

²⁶ Meyrovitz v. Levy, 63 So. 963, 184 Ala. 293.

²⁷ Million v. Commercial Bank of Boonville, 141 S. W. 453, 159 Mo. App. 601. The proceeds of the stock of

goods had been paid over to the defendant bank, which held a claim against the husband, and the trustee in bankruptcy of the husband sued to subject such proceeds to the claims of all the creditors.

that she was the sole contractor, and that the goods were sold to her, and not her husband.²⁸

§ 3105. Prohibition against wife becoming surety for husband

§ 3105(1). Alabama

The court charges the jury that, while the wife may borrow money on her own account and loan or give it to her husband, yet, if the money is borrowed by the wife from the husband's creditors, and it is the intention of the contracting parties at the time that this money is to be used to pay his debts, and it is, in fact, so used, such transaction is in violation of our statute, and the wife's note given for money so loaned cannot be enforced.²⁹

§ 3105(2). Georgia

The jury are instructed that a married woman cannot bind herself or her separate estate by any contract of suretyship. If she undertakes such a contract, it is void and cannot be enforced. There is no dispute in this case but that this defendant is a married woman, ——— being her husband at the time she signed the notes sued on, and there is no dispute but that both of them signed on the face of the notes as joint makers; but under the plea the question you are to decide in this case is whether they were joint obligors, or whether the money was loaned for her benefit, or whether it was loaned for the benefit of her husband and she simply became surety for him. If she did become security for him, she is not liable on these notes. If she did enter into the contract with him for the money to be used for herself, she would be liable. If she contracted with him for the money to be used for their joint benefit, the benefit of both of them, she would be liable, and hence it becomes purely a question of fact whether she was surety or not.³¹

§ 3105(3). Kentucky

You are instructed that, although the name of ——— appears as joint principal in said note, yet if the jury believe from the evidence that at the time of the execution of the note sued on she was the wife of the defendant ———, and that the money for which the note was executed was borrowed by the said husband, and used by him in his individual business, and no part thereof received by the said wife, or used for her benefit, or by her individually, or received by her, then in that event she is the surety of her husband, ———, and the jury will so find.³²

²⁸ *Holmes v. Tyler*, 45 P. 1129, 8 N. M. 613.

²⁹ *Staples v. City Bank & Trust Co.* 70 So. 115, 194 Ala. 687.

³¹ *Harden v. Harden*, 105 S. E. 869.

³² *Black v. McCarley's Ex'r*, 104 S. W. 987, 126 Ky. 825.

§ 3105(4). *Pennsylvania.*

The jury are instructed that, the law is that a married woman cannot become surety. She may create a loan for herself, and do what she pleases with the money after she borrows it, but she cannot become surety; and, if a married woman makes an agreement in which she undertakes to become surety, it is void. The question, therefore, in the case is whether she made an obligation to pay \$—— loaned to her, or was to pay only in the event that —— failed to pay.³³

§ 3105(5). *South Carolina*

This is a suit by the plaintiff against the defendant, Mrs. ——, to recover the amount due upon a promissory note which is set out in the complaint. It is conceded in the argument that Mrs. —— signed the note, but it is contended that she signed the note as surety to her husband. That is the first question for you to consider. You will remember that the plaintiff testified that he lent the money to the defendant herself. On the other hand, the defendant testified that she signed the note as surety to her husband. If she did negotiate the loan, and signed the note as principal, she would be liable. If she did not sign it as principal, but as surety to her husband, she would not be liable, under the statute law of this state. If you find that she signed it as surety, you need not go any further. She could not be liable.³⁴

§ 3106. *Same—Burden of proof*

The court charges the jury that the burden is upon the defendant Mrs. —— to prove that she signed the notes sued on in this case, as the surety of her husband and codefendant, ——, and unless you are reasonably convinced from all the evidence in this case that she has borne that burden, your verdict will be for the plaintiff.³⁵

E. CRIMES OF HUSBAND AGAINST WIFE

§ 3107. *Liability for wife beating*

Communication of disease as constituting assault on wife, see ante, § 853.

The court instructs the jury that the object of the statute is to prevent a man, living with a woman in the relation of husband and wife, and supposed to be his wife, from assaulting, striking, and beating her.³⁶

The court instructs the jury that, if you find from the evidence that a marriage was solemnized between the accused and the prose-

³³ *Class & Nachod Brewing Co. v. Rago*, 87 A. 704, 240 Pa. 470.

³⁴ *Jacobs v. Gilreath*, 22 S. E. 757, 45 S. C. 46.

³⁵ *Meyrovitz v. Levy*, 63 So. 963, 184 Ala. 293.

³⁶ *State v. Collins* (Del.) 99 A. 87, 6 Boyce, 260.

cuting witness, and that they lived and cohabited together as husband and wife, holding themselves out as such to their relatives, friends and neighbors, then the court instructs you that they were and are husband and wife within the legislative intendment and purpose of the statute, though there was, at the time of the alleged assault, a pre-existing marriage between the accused and another woman.³⁷

The court instructs the jury that if you find that the accused did enter into matrimonial relations with the prosecuting witness, and that he did assault, strike and beat her as charged in the indictment, then your verdict should be guilty; for whether he was, or was not, prior thereto married to another woman, or whether the latter marriage had been dissolved, is immaterial. If, however, you find that the marriage relation did not exist between the parties here, or, if it did, that the alleged assault, was not made, your verdict should be not guilty.³⁸

F. CRIMINAL LIABILITY FOR ABANDONMENT OF WIFE AND NON-SUPPORT

§ 3108. Elements of offense

§ 3108(1). Michigan

The court instructs the jury that before the husband can be convicted of this offense you must be satisfied beyond a reasonable doubt, that is, a moral certainty, that he not only refused to provide necessary and proper shelter, food, care, and clothing for his wife and child, but that he willfully and unlawfully deserted and abandoned them. This means more than going away; more than mere separation. It means in this case, that is, abandonment and desertion under this statute means, to be separate from wrongfully, without intention of again resuming the marital relation. The offense charged in the information consists of two elements: First, an act of desertion and abandonment; second, the following up of such an act of desertion and abandonment by failure to provide the necessary and proper shelter and food. In this case, to convict, you must find an act of desertion and abandonment of the wife and child, plus a refusal or neglect to provide for them.³⁹

§ 3108(2). Nebraska

You are instructed that abandonment, under the statutes upon which this prosecution is based, is an actual, willful desertion, followed by a willful neglect or refusal to contribute to the support of the wife, and there can be no conviction, even if there is an aban-

³⁷ State v. Collins (Del.) 99 A. 87, 6 Boyce, 280.

³⁸ State v. Collins (Del.) 99 A. 87, 6 Boyce, 280.

³⁹ People v. Schelske, 153 N. W. 781, 187 Mich. 497.

donment as above defined without good cause, unless such actual, willful desertion is followed by a willful neglect and refusal to contribute to such wife's support without good cause. The state must prove these several facts beyond a reasonable doubt, and, in addition to this proof, must prove, beyond a reasonable doubt, that at or about the time alleged the defendant was possessed of money, property, or other means available for the maintenance and support of such wife, or had at least the earning capacity and the opportunity to work at the times alleged and at the times alleged refused, without good cause to maintain and support such wife.⁴⁰

You are instructed that primarily it is the duty of the husband to provide reasonable support for his wife, and that any willful failure and refusal without good cause so to do constitutes a breach of his duty in that regard, and if he also has abandoned his wife, without good cause, then he has committed a desertion as that term is used in the statutes and as set out in the first paragraph of these instructions. The expression "without good cause" does not mean that the husband can abandon his wife or neglect or refuse to provide for her, for some trivial reason; before the law justifies him in so doing, he must have some substantial reason or cause which would cause or justify the ordinary person to neglect one of his most important duties.⁴¹

§ 3109. Liability of husband after separation from wife

§ 3109(1). Kansas

The jury are instructed that the chief object of the law is to compel the husband, when able, to support his family, and if the husband separates from his wife, leaving her in destitute or necessitous circumstances, it is his duty to provide for her where she is left, unless some reason be shown why she should follow him elsewhere.⁴²

§ 3109(2). Wisconsin

The court instructs the jury that a husband is not absolved from his liability to support his wife from the mere fact that she is living separate from him, if she is living apart from him by his procurement, or with his consent, or in accordance with his request or wishes or otherwise without being herself at fault. The obligation and duty to support still rests upon him. And if a wife, being thus apart from her husband, becomes destitute, and her husband, being aware of her destitute condition, willfully remains away from her, leaving her in such condition, this is an abandonment by the

⁴⁰ *Graham v. State*, 134 N. W. 249, 90 Neb. 658.

⁴¹ *Graham v. State*, 134 N. W. 249, 90 Neb. 658.

⁴² *State v. Waller*, 136 P. 215, 90 Kan. 829, 49 L. R. A. (N. S.) 588.

husband within the meaning of the law, if the husband has means or ability to provide a home.⁴³

§ 3110. Effect of fact that wife has obtained necessities from other sources than husband

The jury are instructed that the word "necessitous" means needy, needing the necessities of life, and if you find that the defendant, without just cause, did neglect to provide for the support of his wife and child, or either of them, and that at the time of any of said neglect within ——— years next prior to ———, they were in necessitous circumstances, as herein defined, then the fact, if it be a fact, found from the evidence that they were furnished the necessities of life by relatives, or that the wife aided in furnishing herself with the necessities of life by her own physical labor away from her home, would not change the liability of the defendant for neglecting to provide for said wife and child, or either of them.⁴⁴

§ 3111. Defense of departure of wife from home

The court instructs the jury that you should carefully consider all the evidence and circumstances surrounding this accused and his wife generally, and decide whether the departure of the wife from the home was due to her sole fault, or due to the fault of the accused. If you believe from the evidence that the wife of the accused left him without just cause, as I have defined just cause for you, then you should find the accused not guilty. If you believe from the evidence beyond a reasonable doubt that this accused has unlawfully neglected or refused to support his wife, then you should find him guilty. You should carefully consider all of the evidence before you, and decide whether the wife left the home of the accused for justifiable reasons, as defined to you, or whether she left without justifiable cause, and for some reason which does not appear here.⁴⁵

G. ALIENATION OF AFFECTIONS

§ 3112. Elements of cause of action

§ 3112(1). Indiana

The jury are instructed that, to entitle the plaintiff to recover, he must prove by a fair preponderance of all the evidence that ——— was his wife and that, while she was his wife, the defendant debauched and seduced her, as averred in the complaint. If the jury find from a fair preponderance of the evidence that the defendant did debauch or seduce the plaintiff's wife, and the plain-

⁴³ *Spencer v. State*, 112 N. W. 462, 132 Wis. 509, 122 Am. St. Rep. 989, 13 Ann. Cas. 969.

⁴⁴ *State v. Waller*, 136 P. 215, 90 Kan. 829, 49 L. R. A. (N. S.) 588.

⁴⁵ *State v. Newman*, 98 A. 346, 91 Conn. 6, 3 A. L. R. 103.

tiff has sustained any damage thereby, and such things were done without the connivance or collusion of the plaintiff, then the plaintiff would be entitled to recover, and the amount of such recovery will be the amount of damages shown by the evidence, if any is shown, to which you may add such reasonable amount for exemplary damages as you think the evidence justifies; but such seduction must have been within _____ years before _____, unless defendant concealed the same from the knowledge of plaintiff by some affirmative act.⁴⁶

§ 3112(2). Kentucky

You are instructed that if the jury believe from the evidence that the defendant _____ and _____, or either of them, wrongfully and maliciously, and for the purpose of alienating the affections of plaintiff's wife from him, made statements to the plaintiff's wife or talked to her or so acted towards her and the plaintiff as to poison her mind against the plaintiff, and cause the plaintiff's wife to abandon him, and that the affections of the plaintiff's wife were thereby alienated from him, and that he thereby lost the comfort of his wife's society, the jury should find for the plaintiff against both the defendants, if they believe from the evidence that both did the things mentioned in this instruction wrongfully and maliciously and with the purpose mentioned in this instruction, or, if they believe from the evidence that only one of the defendants did the things mentioned in this instruction wrongfully and maliciously and with the purpose above indicated, the jury should find for the plaintiff only against that defendant.⁴⁷

You are instructed that, unless the jury believe from the evidence that the defendants, _____ and _____, or one of them, wrongfully and maliciously, and for the purpose of alienating the affections of the plaintiff's wife from him, made statements to her or talked to her or so acted toward her and the plaintiff as to poison her mind against her husband, and cause her to abandon him, and that the affections of the plaintiff's wife were thereby alienated from him, the jury should find for the defendants.⁴⁸

§ 3112(3). Missouri

You are instructed that a wife is entitled to the society, companionship, comfort, protection, and aid of her husband. The law gives her a right of action against any person who willfully and maliciously entices, persuades, induces, or influences her husband to separate from her or remain apart from her. Therefore, if you shall believe from the evidence that the defendants willfully and mali-

⁴⁶ *Wales v. Miner*, 89 Ind. 118.

⁴⁸ *Hostetter v. Green*, 150 S. W.

⁴⁷ *Hostetter v. Green*, 150 S. W. 652, 150 Ky. 551.

652, 150 Ky. 551.

ciously acted in concert or co-operated together with the purpose and intent to cause the separation of the plaintiff's husband from her, and cause him to remain from her, and that they did thereby accomplish such purpose and intent, then your verdict will be in favor of the plaintiff.⁴⁹

You are instructed that the term "willfully," as used in the instructions, means intentionally, not accidentally; and the term "maliciously," as used in the instructions, means wrongful and intentional and without just cause or excuse.⁵⁰

You are instructed that, before you can find the issues for plaintiff against defendant, you must believe and find from the evidence that she intentionally influenced the husband of the plaintiff to withdraw his affections from plaintiff and desert her. It is not enough for plaintiff to show merely that defendant was friendly with the husband of plaintiff, knowing at the time that he and the plaintiff were having discord in their marital relations, nor is it sufficient that you should believe merely that defendant's conduct in her association with plaintiff's husband amounted to impropriety, or was even of a scandalous nature, but before you can find for plaintiff, it must be shown by the evidence that defendant's conduct, in her association with the husband of plaintiff, was improper and wrongful, and, further, that defendant intended by such conduct to cause plaintiff's husband to withdraw his affections from her or desert her, and, in addition to this, it must be shown by the evidence that such conduct on the part of defendant ——— did in fact cause the husband of plaintiff to withdraw his affections from plaintiff or desert her. If plaintiff has failed to prove any one of these alleged facts by the greater weight of the evidence, it will be your duty to find the issues for defendant.⁵¹

The court instructs the jury that should you believe and find from the evidence that the defendant wrongfully and maliciously induced and influenced plaintiff's husband to leave and abandon her, and to live separate and apart from her, and that plaintiff's said husband, being so wrongfully and maliciously induced and influenced by the defendant, did by reason thereof on or about the ——— day of ———, leave and abandon plaintiff, and has since said date lived separate and apart from the plaintiff, by reason of the said wrongful and malicious inducement and influence of the defendant, then your verdict will be for the plaintiff.⁵²

The jury are instructed that a wife is entitled to the society, companionship, comfort, protection, and aid of her husband. The law

⁴⁹ *Wagner v. Wagner* (App.) 215 S. W. 784.

⁵⁰ *Wagner v. Wagner* (App.) 215 S. W. 784.

⁵¹ *Claxton v. Pool*, 167 S. W. 623, 182 Mo. App. 13.

⁵² *Cornelius v. Cornelius*, 135 S. W. 65, 233 Mo. 1.

gives her a right of action against any person who willfully and maliciously entices, persuades, induces, or influences her husband to separate or remain apart from her. Therefore, if you shall believe from the evidence that the defendants willfully and maliciously acted in concert or co-operated together with the purpose and intent to cause the separation of the plaintiff's husband from her, and to cause him to remain apart from her, and that they did thereby accomplish such purpose and intent, then your verdict shall be in favor of the plaintiff, and you should assess her damages at such sum as you may believe from the evidence will reasonably compensate her for the deprivation and loss of her husband's society, comfort, companionship, protection, and aid; but your verdict should not exceed the sum of \$———. ⁵³

You are instructed that, in order to entitle plaintiff to maintain this action, it is not necessary that he should prove by his evidence in the cause that the defendant directly requested plaintiff's wife to leave him, or remain apart from him, or to institute a suit for divorce against him; but if the jury believe from the evidence in the case that the defendant was intentionally guilty of such conduct as was calculated to prejudice plaintiff's wife against him, and to alienate her from him, and to induce her to leave him, to remain apart from him, and that such effect was intended to be produced by the defendant, and was actually produced by his conduct, then the jury should find for plaintiff. ⁵⁴

§ 3113. Necessity of showing pecuniary loss

The court instructs the jury that the basis of the action is the loss of conjugal fellowship, society and aid of the husband. The actionable consequences of the injury of the wrong, whenever committed, is the loss of consortium, and the alienation of affections is a matter of aggravation. And it is not essential, therefore, to the maintenance of the action that there should be any loss of the husband's services, or any pecuniary loss whatever. ⁵⁵

§ 3114. Alienation of affections due to other causes than defendant's acts

§ 3114(1). Delaware

The court instructs the jury that, if you find from the evidence that plaintiff's husband alienated his affections from plaintiff without the influence of the alleged misconduct and interference on the part of the defendant, or that the alienation of his affections

⁵³ Nichols v. Nichols, 48 S. W. 947, 147 Mo. 387.

⁵⁴ Hartpence v. Rodgers, 45 S. W. 650, 143 Mo. 623.

⁵⁵ Lupton v. Underwood (Del.) 85 A. 965, 3 Boyce, 519.

was the result of some other cause, over which the defendant did not exercise an effective influence, your verdict should be for the defendant.⁵⁶

§ 3114(2). *Kentucky*

You are instructed that, if the jury believe from the evidence that the plaintiff himself by his own misconduct brought about the trouble between him and his wife, or that she of her own accord left him, and was not induced so to do by the defendants wrongfully and maliciously as set out in the foregoing instructions, you should find for the defendants.⁵⁷

You are instructed that, although you may believe from the evidence that plaintiff's husband transferred his affections from plaintiff to defendant, yet if you further believe plaintiff's husband alienated his own affections from plaintiff without any intentional misconduct on the part of defendant, or that such alienation was occasioned by some other cause over which defendant had no control, or exercised no intentional direction or influence, then you will find for the defendant.⁵⁸

§ 3114(3). *New York*

The jury are instructed that if you find from the evidence that, at the time of the abandonment, the plaintiff's husband had no affection for her, or that it had been previously alienated by other causes than the acts of defendant, then and in that case the plaintiff is not entitled to recover.⁵⁹

§ 3114(4). *Oregon*

You are instructed that there is no ground for an action of this character where a spouse voluntarily gives his or her affections to another; the latter doing nothing wrongful to win such affections.⁶⁰

You are instructed that, to support an action for alienating a wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment and that the wife maintains improper relations with the defendant is not sufficient to bring in a verdict for damages.⁶¹

⁵⁶ *Lupton v. Underwood*, 85 A. 965, 3 Boyce, 519.

⁵⁷ *Hostetter v. Green*, 150 S. W. 652, 150 Ky. 551.

⁵⁸ *Scott v. O'Brien*, 110 S. W. 260, 129 Ky. 1, 33 Ky. Law Rep. 450, 16 L. R. A. (N. S.) 742, 130 Am. St. Rep. 419.

⁵⁹ *Servis v. Servis*, 65 N. E. 270, 172 N. Y. 438.

⁶⁰ *Pugsley v. Smyth*, 194 P. 686, 98 Or. 448.

⁶¹ *Pugsley v. Smyth*, 194 P. 686, 98 Or. 448.

§ 3115. Liability where other causes than defendant's acts contribute to alienation of affections

§ 3115(1). Delaware

The court instructs the jury that the issue which you are called upon to decide is not whether the plaintiff was justified in leaving her husband but whether the defendant was the cause of the alienation and loss of consortium. It must appear by a preponderance of the evidence that the alienation and loss of consortium were wrongfully, unjustly and effectively caused by the defendant by the means and as charged in the plaintiff's declaration in order to warrant a verdict for the plaintiff. It is not necessary to entitle the plaintiff to a recovery that it should appear that the defendant's conduct was the sole cause thereof. It is sufficient if the defendant's conduct was the controlling cause.⁶²

§ 3115(2). Massachusetts

The jury are instructed that if the conduct of the defendant was the controlling cause which induced the wife to leave her husband, and if the jury are satisfied that but for that cause she would not have left him, the plaintiff can recover, although there might have been other causes contributing to the same result.⁶³

§ 3115(3). Nebraska

Rath v. Rath, 89 N. W. 612, 2 Neb. (Unof.) 600. To same effect, see Hadley v. Heywood, 121 Mass. 236, in § 3115(2).

§ 3115(4). Wisconsin

The court instructs the jury that it is not necessary, in order to confer a right of action, that the defendant's conduct be the sole cause of the alienation or separation. It is sufficient if the conduct of the defendant was the controlling cause.⁶⁴

§ 3116. Effect of unhappiness of domestic relations prior to alleged wrongful acts of defendant

§ 3116(1). Delaware

The court instructs the jury that, if the defendant's conduct was effective in causing the injury complained of, any unhappiness or even separation between the plaintiff and her husband, not caused by the defendant, would not justify or excuse the defendant for any unlawful interference between the plaintiff and her husband; for even if it should appear that the husband had little or no affection for his wife, another person has no right to interfere to cut off all chance of its springing up in the future. If the alleged conduct of

⁶² Lupton v. Underwood, 85 A. 965, 3 Boyce, 519.

⁶³ Hadley v. Heywood, 121 Mass. 236.

⁶⁴ Baird v. Carle, 147 N. W. 834, 157 Wis. 565.

the defendant was not the controlling cause of the alienation, the plaintiff cannot recover.⁶⁵

§ 3116(2). *Missouri*

The court instructs the jury that in order to maintain this action, it is not necessary that plaintiff prove by the evidence that she had at any time the love and affection of her husband. That under the law a stranger has no right to voluntarily and unasked interfere with and disturb the concord and unity of the domestic relation or to interfere and cut off any chance or possibility of a future affection springing up between two spouses. That the plaintiff had the right to seek the comfort, companionship, protection, and aid of her husband without the interference of any outside person; and, although the jury may believe from the evidence in this cause that the home life of plaintiff and her husband was unpleasant, nevertheless this would not justify defendant in voluntarily intermeddling with plaintiff's domestic affairs, if she did so intermeddle, and if the jury believe from the evidence that plaintiff's husband still would have lived and remained with her if it had not been for the wrongful acts, conduct, and influence of defendant, if any, and that he was induced to separate and remain apart from plaintiff by the intentional wrongful acts, conduct, and influence of defendant, and that said acts, conduct, and influence were naturally calculated to cause such separation, then your verdict will be for plaintiff and against defendant.⁶⁶

§ 3116(3). *Wisconsin*

The court instructs the jury that evidence tending to show indifference or cruelty of the husband to his wife prior to the alienation and of the unhappiness of their domestic relations only goes to the mitigation of damages, and not to a justification of the willful acts, if you find there is a malicious act of the defendant in causing the separation, if you find he did cause it.⁶⁷

§ 3117. *Effect of willingness of spouse of plaintiff to be a party to wrongful acts of defendant*

You are instructed that it makes no difference in this case as to plaintiff's right of action, whether Mrs. ——— was willing to accept presents, or receive attentions, or have sexual intercourse with the defendant or not. If you find the defendant guilty under either count in this declaration and the instructions I have given you, her willingness to contribute to such wrongs would not relieve defendant from liability. However, this testimony is for your

⁶⁵ *Lupton v. Underwood*, 85 A. 965, 3 Boyce, 519.

⁶⁶ *Claxton v. Pool*, 167 S. W. 623, 182 Mo. App. 13.

⁶⁷ *Baird v. Carle*, 147 N. W. 834, 157 Wis. 565.

consideration in determining the amount of damages, if you come to that question.⁶⁸

§ 3118. Liability of parents of spouse of plaintiff

§ 3118(1). Kentucky

The jury are further instructed that the defendants, being the parents of the plaintiff's wife, had the right to receive their daughter into their home and to harbor her there; also, the right to counsel and advise her regarding her relations with the plaintiff, in good faith on reasonable grounds, and in the honest desire to promote her welfare and happiness, and they are not responsible for doing any of these things, unless they acted, not in good faith as above defined, but wrongfully and maliciously, with a view to separate her from her husband. Reasonable grounds are such as a person of ordinary prudence would act on.⁶⁹

§ 3118(2). Missouri

The jury are instructed that the law does not justify or excuse parents in willfully and maliciously interfering in the domestic affairs of their married children. Therefore, although you may believe from the evidence that the defendants are the parents of plaintiff's husband, still if you shall further believe from the evidence that they are guilty of procuring or bringing about the separation of plaintiff's husband from her, and causing him to remain apart from her, as in the foregoing instruction stated, your verdict should be in favor of the plaintiff.⁷⁰

§ 3119. Liability of defendant for acts making it unpleasant for plaintiff to live at home provided by husband

The court instructs you that it is the duty of a husband to provide a home for his wife, such as she can live in; and if you believe from the evidence in this case that the husband of plaintiff provided no other house for his wife (this plaintiff) than that of his parents, and that his parents (these defendants) made life intolerable and unbearable for her at their said home, she had a right to refuse to live at his parents' house so made intolerable and unbearable for her by them, if they did so, and by so doing she did not forfeit her right to support and maintenance by her husband; but the mere fact that she found it intolerable to live in defendants' home, and felt it necessary to live elsewhere, and in doing so left her husband, would not make defendants liable to damages, but they would only be liable upon their causing the husband not

⁶⁸ *Knickerbocker v. Worthing*, 101 N. W. 540, 138 Mich. 224.

⁶⁹ *Hostetter v. Green*, 150 S. W. 652, 150 Ky. 551.

⁷⁰ *Nichols v. Nichols*, 48 S. W. 947, 147 Mo. 387.

to live with plaintiff as her husband and as instructed in instruction number ———.⁷¹

§ 3120. Presumptions

§ 3120(1). Delaware

The court instructs the jury that, in the consideration of this case, you may assume that the plaintiff's husband, who lived and cohabited with his wife from their marriage to the time of their separation, had, during that time, an affection for his wife, unless you find testimony rebutting the presumption.⁷²

§ 3120(2). Kansas

You are instructed that, in the absence of evidence, the motives of a person in the doing of any proper or lawful act are presumed to be good; and, when the motive with which an act is done is the subject of inquiry, in determining what such motive was the jury have the right to consider the nature and character of the act, the manner in which, and the circumstances under which, it was done, and all the evidence in the case touching upon the question of motive.⁷³

§ 3121. Matters considered in determining issues

You are instructed that the gist and substance of the claims of the plaintiff are that, by means of the wrongful acts and conduct of the defendant alleged in the petition, the defendant knowingly and intentionally alienated the affections of plaintiff's wife from him and caused her to separate from him. In determining whether these claims are true, you should consider all the evidence in the case throwing any light upon the question, including the conduct of the defendant with reference to the wife of the plaintiff prior to, at the time of, and subsequent to the leaving of the home of the plaintiff by his wife as disclosed by the evidence; and, if you find by the evidence, by a preponderance thereof, that such claims are true, then your verdict should be for the plaintiff, and, if you fail to so find, then your verdict should be for the defendant.⁷⁴

§ 3122. Same—Statements of spouse to plaintiff and subsequent relations

You are instructed that evidence has been admitted tending to show that the wife of the plaintiff made statements to him respecting her relation with the defendant, and showing the relations between the plaintiff and his wife since the time of such com-

⁷¹ *Wagner v. Wagner* (Mo. App.) 215 S. W. 784.

⁷² *Lupton v. Underwood*, 85 Atl. 865, 3 *Boyce*, 519.

⁷³ *Warnock v. Moore*, 137 P. 959, 91 Kan. 262.

⁷⁴ *Warnock v. Moore*, 137 P. 959, 91 Kan. 262.

munication. You are instructed that you cannot consider the statements of the plaintiff's wife to him, nor their conduct or relation since that time, in determining the question whether or not defendant has had sexual intercourse with said wife; but if you find, from the other evidence in the case, that defendant did have such sexual intercourse, you may consider the relations existing between the plaintiff and his wife since the time it is claimed she made statements to plaintiff, as above suggested, in determining the damages that plaintiff has sustained, if any, by reason of such acts of the defendant; but such damages cannot be increased because of any unreasonable conduct, if any, of the plaintiff.⁷⁵

§ 3123. Proof of malice

You are instructed that malice is defined as a disposition or intent to injure another or others for the gratification of anger, jealousy, hatred, revenge, or the like; active malevolence; a deliberate intention to do evil either with or without personal ill will; a willfully framed design to do another an injury. Malice need not be proven by direct evidence, but may be inferred from all the evidence introduced. If you find that the defendants or either of them did the acts charged in the complaint, and thereby caused the alienation or separation as alleged, and if you find that the said acts were done purposely and without just or probable cause, then you may infer that such acts were done maliciously. But in case you so find whether or not such inference should be drawn from the acts of the defendants is for you to determine from the evidence in this cause.⁷⁶

§ 3124. Sufficiency of evidence of illicit intercourse

§ 3124(1). Maryland

The jury are instructed that in order for the plaintiff to recover damages against the defendant under the first count of the declaration it is not necessary that the plaintiff should prove any one act of illicit intercourse, which is conclusive of guilt, but the jury must consider the opportunity for the commission of the act, the conduct of the parties, and all the circumstances, and then determine from the whole of the testimony whether it should convince unprejudiced and cautious persons of the guilt of the parties, and if upon a consideration of all the evidence in the case the jury are satisfied of the commission of one act of illicit intercourse then their verdict should be for the plaintiff.⁷⁷

⁷⁵ Ball v. Marquis (Iowa) 92 N. W. 691.

⁷⁶ Daywitt v. Daywitt, 114 N. E. 694, 63 Ind. App. 444.

⁷⁷ Hillers v. Taylor, 69 A. 715, 108 Md. 148.

§ 3124(2). *Michigan*

You are instructed that adultery is a crime naturally committed in secrecy, and it is not necessary, in order to convict of adultery, to produce evidence of witnesses who claim to have caught the parties in the act; but it is simply necessary to show facts and circumstances from which, if found to exist, adultery may be naturally inferred as the natural result of such circumstances. Mere opportunity to commit adultery is not sufficient to establish the offense. There must be evidence of such facts and circumstances, times and places, and association together, as would naturally lead a man of ordinary care and prudence to the conclusion that such parties were having illicit sexual intercourse. And if you find that the conduct and actions of this defendant and Mrs. — were such as to convince you that adultery was committed, you have a right to so find, even though there is no witness who testifies to seeing them engaged in the unlawful act. But if the evidence of such facts and circumstances do not naturally lead to that conclusion when viewed in the light of men of ordinary care and prudence, then you should not find this defendant guilty of adultery. And you are to determine this question from all of the evidence bearing upon it, giving it due and careful consideration, that you may justly determine the truth or falsity of this claim.⁷⁸

§ 3124(3). *Oregon*

I charge you that in this case it is not necessary that illicit intercourse between the defendant and the plaintiff's wife be directly proven. If that were so, it could seldom be proved. Positive evidence of the commission of adultery is rarely possible, and resort may be had to circumstantial evidence from which the overt act charged may be inferred, if you find from the evidence in the case that the overt act is inferable from the circumstances proven in the case.⁷⁹

§ 3124(4). *South Dakota*

You are instructed that the plaintiff's complaint charges the alienation of his wife's affections by means of adultery having been committed with her by the defendant. Now, before the plaintiff can recover under this count, he must satisfy you that the defendant committed adultery with the plaintiff's wife substantially at the time and place and under the circumstances alleged by the plaintiff in his complaint. Mere opportunity to commit adultery is not sufficient to establish this offense. There must be evidence of such fact and circumstances, time and place, and association to-

⁷⁸ *Knickerbocker v. Worthing*, 101 N. W. 540, 138 Mich. 224.

⁷⁹ *Saxton v. Barber*, 139 P. 334, 71 Or. 230.

gether as would naturally lead a man of ordinary care and prudence to the conclusion that such parties did have illicit sexual intercourse.⁸⁰

§ 3125. Sufficiency of proof of adulterous disposition

You are instructed that it is not necessary that an adulterous disposition on the part of the defendant be proven by direct or positive testimony to that particular point; but this may be inferred from the conduct of the parties and from the associations and relations which existed between the parties, if you find from the evidence that such association and relations establish such adulterous disposition, or, in other words, proof of an adulterous mind on the part of either or both of the parties may be established by circumstantial evidence.⁸¹

§ 3126. Effect of failure to prove adultery

The jury is hereby instructed that there is no evidence in this case from which the jury may legally infer that the defendant was guilty of having criminal or unlawful sexual intercourse with the plaintiff's wife at the time and place as alleged in the plaintiff's declaration, or like act at any other time or place, and the plaintiff's declaration counting alone upon criminal conversation with the plaintiff's wife as the sole cause of action, the plaintiff cannot recover in this cause, and your verdict, by direction of the court, will be not guilty or no cause for action.⁸²

§ 3127. Damages

§ 3127(1). Delaware

The court instructs the jury that, if you find from the evidence that the defendant wrongfully and unjustly, by any, or all of the acts complained of, had a controlling influence in alienating the affections of the plaintiff's husband, your verdict should be for the plaintiff; and the measure of damages would be such as you believe would reasonably compensate the plaintiff for the injury to her feelings; for the loss of her husband's comfort and society; and for the loss of his support.⁸³

§ 3127(2). Indiana

The jury are instructed that, should you find for the plaintiff, the measure of damages will be the amount of actual damages sustained by reason of the plaintiff's being deprived of the society, services, comfort, and company of his wife, if he was so deprived of any of them, and the distress and anxiety of mind occasioned thereby, in such amount as you may think from all the evidence the plaintiff is

⁸⁰ *Maiden v. Boyd*, 155 N. W. 187, 36 S. D. 451.

⁸¹ *Saxton v. Barber*, 139 P. 334, 71 Or. 230.

⁸² *Nelson v. Sandel*, 171 N. W. 349, 205 Mich. 73.

⁸³ *Lupton v. Underwood*, 85 A. 965, 3 Boyce, 519.

entitled to compensate him for such matters, to which you may add such amount of exemplary or punitive damages as you think right.⁸⁴

§ 3127(3). *Kentucky*

You are instructed that, if the jury find for the plaintiffs, you should fix the damages at such a sum as you may believe from the evidence will fairly and reasonably compensate the plaintiff for the loss of his, wife's society, assistance, affection, and companionship, and for any mental suffering the jury may believe from the evidence the plaintiff endured thereby, not to exceed the sum claimed by the plaintiff in the petition.⁸⁵

You are instructed that, if you believe from the evidence that the defendant by her acts, wiles, or blandishments, intentionally alienated or took away from plaintiff her husband's affections, you will find for plaintiff, and award her such damages as you believe will fairly compensate her for the injury, if any, resulting to her feelings, for the loss of her husband's comfort and society, if there was such loss, and for the loss of her husband's support, if there was such loss, except to the extent that he has contributed, or may by law be compelled to contribute to her support not exceeding the sum of \$——, the amount asked for. Unless you so believe, you will find for the defendant.⁸⁶

§ 3127(4). *Missouri*

The jury are instructed that, if the jury find for plaintiff, they will assess his damages at any sum they may deem just, not exceeding \$——; and, in estimating his damages, they may take into consideration the injury sustained by him in the loss of the comfort, society, and service of his wife, and the wrong and injury done to his own feelings, character, and condition; and they may allow such sum by way of smart money as they may consider the defendant, from the evidence in the case, by his conduct, deserves, not exceeding in all \$——.⁸⁷

§ 3128. *Mitigation of damages*

The court instructs the jury that any unhappiness between the plaintiff and her husband, while living together, not being induced by the defendant, would not, in itself, constitute a bar to the plaintiff's action, but would go in mitigation or reduction of damages.

⁸⁴ *Wales v. Miner*, 89 Ind. 118.

⁸⁵ *Hostetter v. Green*, 150 S. W. 652, 150 Ky. 551.

⁸⁶ *Scott v. O'Brien*, 110 S. W. 260, 129 Ky. 1, 33 Ky. Law Rep. 450, 16 L. R. A. (N. S.) 742, 130 Am. St. Rep. 419.

⁸⁷ *Hartpence v. Rodgers*, 45 S. W. 650, 143 Mo. 623. This instruction does not say that, in order to recover exemplary damages, the conduct of defendant must have been wanton or malicious or from an improper motive, but the evidence of defendant's bad motives was undisputed.

In cases of this character, the extent of the actual injury to the plaintiff will of course depend upon the prior relations between the plaintiff and her husband. Evidence in mitigation or reduction of damages will, therefore, be received, which tends to show that the plaintiff has in fact suffered less injury than would otherwise be a probable inference from the act complained of. It is proper therefore, for you to consider, in mitigation of damages, but not in bar of the action, evidence, if any, which shows any unhappy relations between the wife and husband, not caused by the defendant, any want of affection for each other, and the fact that they are living apart, together with the circumstances under which the separation occurred. These and like matters are proper for your consideration, in mitigation of damages, to determine whether on account of such relation, the wife lost much or little by reason of the alleged acts and conduct of the defendant, if you find the defendant committed them and that they induced the injury complained of.⁸⁸

§ 3129. Exemplary damages

§ 3129(1). Delaware

The court instructs the jury that, if you find from the evidence that the defendant's conduct was effective in causing the alienation of the affections of plaintiff's husband, and that such conduct was wanton and malicious toward the plaintiff, you may, in such event, in your discretion, award exemplary or punitive damages, in addition to compensatory damages. But in order to warrant the awarding of exemplary damages, you must be clearly satisfied by the evidence that the defendant's conduct was wanton and malicious.⁸⁹

§ 3129(2). Kentucky

You are instructed that, if you believe that the defendant alienated from plaintiff her husband's affections in the manner set forth in instruction No. ———, and further believe that defendant's conduct in causing such alienation was wanton and malicious towards, and with the design to humiliate, plaintiff, then, in addition to compensatory damages, you may, in your discretion, award plaintiff punitive damages, not exceeding in all, however, the sum of \$———. ⁹⁰

§ 3130. Verdict where several defendants

You are instructed that the jury may find for the plaintiff against both defendants, or for the plaintiff against one defendant, and for the other defendant or for both defendants.⁹¹

⁸⁸ Lupton v. Underwood (Del.) 85 A. 965, 3 Boyce, 519.

⁸⁹ Lupton v. Underwood, 85 A. 965, 3 Boyce, 519.

⁹⁰ Scott v. O'Brien, 110 S. W. 200,

129 Ky. 1, 33 Ky. Law Rep. 450, 16 L. R. A. (N. S.) 742, 130 Am. St. Rep. 419.

⁹¹ Hostetter v. Green, 150 S. W. 652, 150 Ky. 551.

CHAPTER CLXVI

IMPROVEMENTS

§ 3131. Rights of occupying claimant—Good faith and color of title of claimant.

See, also, Ejectment.

§ 3131. Rights of occupying claimant—Good faith and color of title of claimant

You are instructed that section _____ of the _____ of this state defines color of title as follows, to wit: "A purchaser in good faith at any judicial or tax sale, made by the proper person or officer, has color of title within the meaning of this chapter, (7) whether such officer or person has sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale, and his rights shall pass to his assignees or representatives."¹

The court instructs the jury that the defendant bases its claim under a color of title under a tax sale and judgment quieting title in said _____, and that it made these improvements while in good faith believing said sale valid. You are instructed that one of the matters to be determined by you is the good faith of the officers and agents of the defendant company, and the burden is upon said company to establish by a preponderance of the evidence that its officers and agents at the time they made the improvements, honestly believed that their company had a valid title to the lots, and if it shall fail to establish that at the time of making the improvements they so acted in good faith, or if you shall believe that the officers and agents of such company at the time the improvements were being made knew or had such information that a reasonably prudent person acting upon it would have known that they did not own said property and the title had not passed from _____ by said tax sale or judgment, then you should find the issues for the plaintiff.²

You are instructed that in this action the defendant claims that it in good faith erected the improvements on the premises herein referred to. The court has defined to you in its instructions what is meant by good faith, and in determining the good faith of the petitioner you should take into consideration all the facts and circumstances as shown by the evidence received herein which bear on the question of such good faith, and from these facts determine wheth-

¹ Doyle v. West Temple Terrace Co., 152 P. 1180, 47 Utah, 238.

² Doyle v. West Temple Terrace Co., 152 P. 1180, 47 Utah, 238.

er, at the time all the improvements were being made the defendant honestly believed it owned the property. You are further instructed that, if it did not in good faith honestly believe that it owned said real estate while said improvements were being made, then your verdict should be for the plaintiff.³

³ Doyle v. West Temple Terrace Co., 152 P. 1180, 47 Utah, 238.

CHAPTER CLXVII

INCEST

§ 3132. Elements of offense.

3133. Necessity of consent of prosecuting witness to intercourse.

3134. Evidence as to consent of prosecuting witness.

3135. Limiting effect of evidence of other acts of intercourse than that alleged in indictment.

3136. Sufficiency of evidence.

3137. Necessity of corroboration of prosecuting witness.

3138. Same—Capacity of girl to be an accomplice.

3139. Necessity of proving specific act of sexual intercourse to satisfaction of all the jury.

§ 3132. Elements of offense

You are instructed that the indictment is based upon the section of the statute that, "if a father shall rudely or licentiously cohabit with his own daughter, the father shall, upon conviction, be punished by imprisonment in the penitentiary." There cannot be a cohabitation, within the meaning of this law, without carnal knowledge, otherwise called "sexual intercourse." This charge may consist of a single act of carnal knowledge, or a continuous series of such acts—for a day, or less time; or, if continuous, it may be for a week, a month, or year, or a number of years. All the essential elements of the crime are contained in the allegations of the indictment, to which you are referred, but which is not evidence.¹

§ 3133. Necessity of consent of prosecuting witness to intercourse

The jury are instructed that, if the defendant forced the prosecuting witness to have sexual intercourse with him against her will, he should be acquitted.²

§ 3134. Evidence as to consent of prosecuting witness

The jury are instructed that, in determining whether prosecutrix consented to unlawful intercourse with her father, it is proper to consider the testimony regarding her age and power by reason of her age to discriminate right from wrong, her condition in life, and the fact that the accused was her father, together with all the facts and circumstances bearing upon the question of voluntary consent.³

§ 3135. Limiting effect of evidence of other acts of intercourse than that alleged in indictment

You are further instructed that if there is any evidence before you with reference to any of the acts of intercourse between the

¹ Owens v. State, 49 N. W. 226, 32 Neb. 167.

² State v. Hert, 134 N. W. 950, 155 Iowa, 21.

³ State v. Eding, 42 S. W. 935, 141 Mo. 281.

defendant and ———, other than the act alleged to have been committed on or about ———, then you are instructed that the defendant is not on trial for such other acts, if any there were, and cannot be convicted for such other acts, if any there were; but any testimony with reference to such other acts can be considered by you, if you do consider it at all, only for the purpose for which it was admitted, and that is for whatever light, if any, it may shed upon the transaction for which the defendant is on trial—that is, the alleged act of intercourse alleged to have occurred behind the chimney on or about ———.⁴

§ 3136. Sufficiency of evidence

You are instructed that it is competent to convict on circumstantial evidence, if strong enough to satisfy the jury beyond a reasonable doubt. The conviction or acquittal must be solely on the evidence, and not at all outside of the evidence. But the evidence, and the facts and circumstances proven, the jury must consider in the light and common knowledge and experience of mankind. No conviction can be had of any fact offered only as circumstantial evidence; as, for instance, evidence of defendant's being in bed with his daughter. No conviction can be had for that act simply, but it, with others proven, may be considered as circumstantial evidence of carnal knowledge, and the carnal knowledge must be proven to convict.⁵

§ 3137. Necessity of corroboration of prosecuting witness

You are instructed that the witness ———, formerly ———, is what is known in law as an accomplice; and with reference to the testimony of accomplices you are instructed that a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of an offense. You are therefore instructed that you cannot find the defendant guilty upon the testimony of the said ———, formerly ———, unless you first believe beyond a reasonable doubt that the testimony of the said ———, formerly ———, is true, and that it shows the guilt of the defendant, and unless you further believe beyond a reasonable doubt that there is other evidence in the case, outside of the testimony of the said ———, tending to connect the defendant with the commission of the offense charged.⁶

You are instructed that, should you find from the evidence in

⁴ *Vickers v. State*, 169 S. W. 669, 75 Tex. Cr. R. 12.

⁵ *Owens v. State*, 49 N. W. 226, 32 Neb. 167.

⁶ *Vickers v. State*, 169 S. W. 669, 75 Tex. Cr. R. 12.

this case that the witness ———, with whom the alleged incestuous intercourse is alleged to have been had, did voluntarily, and with the same intent which actuated defendant, or directly or indirectly, consent to and unite with him in the alleged commission of the offense as alleged, then, in that event, she would be an accomplice, and her testimony would not be sufficient to warrant a conviction, unless she be corroborated by other credible evidence tending to connect defendant with the commission of the alleged offense.⁷

§ 3138. Same—Capacity of girl to be an accomplice

You are instructed that, as it is presumed by the law that any person between the ages of 7 and 14 years is incapable of entertaining a criminal intent and cannot be an accomplice in a crime, if the witness ———, at the time of the acts of intercourse charged in the indictment, as shown by the testimony, if any such occurred, was incapable of entertaining a criminal intent, then she would not be an accomplice in the crime. But if she did have sufficient mental capacity to entertain a criminal intent, that is, to distinguish between right and wrong, and sufficient mental capacity to intend to do the wrongful act, then she could be an accomplice in the crime, even though she was under the age of 14 years.⁸

You are instructed that the presumption as to incompetency of a person between the ages of 7 and 14 years is a presumption of law, which simply means that you will assume in the beginning, before any evidence is introduced, that such person is incapable of entertaining a criminal intent. This presumption, however, is rebuttable. That is, it may be shown that a person under 14 years of age is capable of entertaining a criminal intent. This presumption may be rebutted by any evidence in the case. And therefore, in determining whether or not the said ——— did have sufficient mental capacity to entertain a criminal intent, you will take into consideration all the circumstances of the transaction as disclosed by the testimony, and the manner of her testifying, and all the testimony which you may think throws light upon that subject. The presumption of incompetency as to ———, and the presumption of innocence of the defendant, are both in force at the same time. If the evidence fails to disclose that ——— did have sufficient mental capacity to entertain a criminal intent, as hereinbefore defined, you will not be justified in assuming that she did have such mental capacity; if you have a reasonable doubt of the guilt of the defendant, he is entitled to an acquittal.⁹

You have already been instructed that ——— could not be an

⁷ *Tate v. State* (Cr. App.) 77 S. W. 793.

⁸ *State v. Stalker*, 151 N. W. 527, 169 Iowa, 396, L. R. A. 1915E, 1222.

⁹ *State v. Stalker*, 151 N. W. 527, 169 Iowa, 396, L. R. A. 1915E, 1222.

accomplice unless she had sufficient mental capacity to entertain a criminal intent. If you find that ——— was not an accomplice under this definition, then you are instructed that it is not necessary that her testimony should be corroborated by other evidence tending to connect the defendant with the commission of the crime, if you find that there was a crime committed. And, further, you are instructed that if an assault is committed upon a woman, and carnal knowledge of such woman is had by force and violence and against her will, then she would not be an accomplice, no matter what her age was, and her testimony would not be required to be corroborated. You are instructed in this case, however, that the testimony is not sufficient to sustain a conviction of this defendant upon the theory that intercourse with ——— was accomplished by fraud or force, and violence. Before such condition could exist, said ——— would be required to resist the act of intercourse to the full extent of her physical power, and, if at any time her resistance was changed to consent before that act was accomplished, she would then no longer be resisting and the crime then would not be accomplished by means of fraud or force and violence. Where the crime of incest is accomplished by force and violence and against the consent of the woman, it constitutes what is known in the law as a rape. Yet the fact that it is rape does not prevent its being incest under the statute which covers this. But, as stated above, the testimony in this case will not support a conviction of rape committed by physical force and violence and against the consent of the woman. Therefore, unless you shall find in this case, beyond a reasonable doubt, that ——— was mentally incompetent, by reason of her youth, to entertain a criminal intent, you should find the defendant not guilty. The intent with which an act is committed is a mental state only, and direct proof of it is not required; nor can it ordinarily be shown by direct proof. Intent is a purpose formed to do or not to do something; and the intent of a person in doing a thing may be inferred from the acts done, the nature and character of the act, and from the manner in which, or the circumstances under which, they were done as disclosed by the evidence.¹⁰

§ 3139. Necessity of proving specific act of sexual intercourse to satisfaction of all the jury

The court instructs the jury that it is not sufficient for part of the jury to believe defendants guilty of one act of sexual intercourse and another part believe in their guilt of another act of sexual intercourse, but you must all believe that they were guilty of one specific act.¹¹

¹⁰ State v. Stalker, 151 N. W. 527, 169 Iowa, 396, L. R. A. 1915E, 1222.

¹¹ State v. Pruitt, 100 S. W. 431, 202 Mo. 49, 10 Ann. Cas. 854.

CHAPTER CLXVIII

INDEMNITY

§ 3140. When liability accrues.

3141. Measure of liability—Agreement by assignee of contract of sale to indemnify assignor against consequences of breach.

3142. Release from liability.

See, also, Guaranty; Principal and Surety.

§ 3140. When liability accrues

The court instructs the jury that by the terms of the contract sued on, which the defendant admits he executed, he agreed with the plaintiffs that in the reconstruction of the building occupied by the ——— Company he would do the work in such way as not to interfere with the business of said company and not to cause it any damage whatever. If, therefore, the jury believes from the evidence that the defendant, in person or by his agents, servants, or subcontractors, in the reconstruction of said building, failed to protect the property of said company from injury resulting from their acts, and that it was thus exposed to rain and became injured by reason of water, grit, sand, dirt, or trash, and if the jury further believes from the evidence the said ——— Company instituted an action in this court against the plaintiffs as the landlord of said company to recover damages from them for such injuries occasioned by the acts aforesaid of the defendant, his agents or servants, or subcontractors, and that the said company did recover of the plaintiffs damages for such injuries to its property occasioned by the acts of the defendant, his agents or servants, in the reconstruction of said building, and if the jury further believe from the evidence that the defendant had reasonable notice of the pendency of said former action, and was requested to defend same, and failed to do so, then the law is for the plaintiffs.¹

The court instructs the jury that unless they believe from the evidence the property of the ——— Company was exposed to, and injured by, water, grit, sand, dust, or trash, and that such injury resulted from the acts of the defendant, his agents or servants, in the reconstruction of said building, the law is for the defendant, and the jury should so find.²

¹ Katterjohn v. Nahm (Ky.) 106 S. W. 1179.

² Katterjohn v. Nahm (Ky.) 106 S. W. 1179.

§ 3141. Measure of liability—Agreement by assignee of contract of sale to indemnify assignor against consequences of breach

The court instructs the jury that if they find for the plaintiff the measure of its damages is the difference between the contract price of the lumber and the market value of such lumber for the period during which such lumber was to have been delivered, and if they believe from the evidence that the ——— Lumber Company and the plaintiff have agreed upon a certain sum as the amount of the liability of the plaintiff to the ——— Lumber Company, because of its failure to receive said lumber according to the contract, and that said amount was fairly and honestly arrived at and agreed on, and was not in excess of the difference between the contract price and market value of said lumber, they should fix the plaintiff's damage at that sum.³

§ 3142. Release from liability.

You are instructed that, if the jury believe from the evidence the plaintiffs and the defendant, after the completion of the building, entered into a settlement and agreement of compromise, by the terms of which the defendant made deductions from his claims against the plaintiffs for extra work and material in the reconstruction of said building, and that in consideration of such deductions the plaintiffs released the defendant from all liability under his contract with them for damages done to the property of said ——— Company by him in the reconstruction of said building, then the law is for the defendant, and the jury should so find.⁴

³ *Oriental Lumber Co. v. Blades Lumber Co.*, 50 S. E. 270, 103 Va. 730.

⁴ *Katterjohn v. Nahm* (Ky.) 106 S. W. 1179.

CHAPTER CLXIX

INDIANS

§ 3143. Validity of conveyance by minor.

§ 3143. Validity of conveyance by minor

You are instructed that in regard to the deed of ———, the cross-petitioner has introduced the rolls of the Dawes Commission to show that at that date she was a minor under the age of 18 years. The court instructs you that as a matter of law in this state, by virtue of an act of Congress, the rolls of the Dawes Commission are conclusive as to the age of allottees of the ——— Nation, and if she was under the age of 18 years as shown by said rolls, on ———, the deed executed on that date would be a nullity and would convey no title from ———, and therefore plaintiff could not claim any interest in the land by virtue of that deed.¹

¹ Davenport v. Mitchell, 155 P. 869, 56 Okl. 175.

CHAPTER CLXX

INDICTMENT AND INFORMATION

§ 3144. Necessity of using diligence to ascertain names before alleging that they are unknown.

3145. Variance between allegations of indictment or information and proof.

3146. Same—Name of prosecuting witness.

3147. Same—Indictment or information containing several counts.

§ 3144. Necessity of using diligence to ascertain names before alleging that they are unknown

You are instructed that it is necessary to a conviction of defendant in this cause that the evidence should show upon the issue in the ——— count in the indictment that the grand jury used diligence to ascertain the name of the party who forged said instrument, and you are instructed that the state has failed to show that any diligence was used by the grand jury to ascertain the forger of said instrument, and you will therefore return a verdict of not guilty upon the ——— count.¹

§ 3145. Variance between allegations of indictment or information and proof

You are instructed that it is incumbent upon the state in the trial of a criminal case to prove to the satisfaction of the jury, beyond a reasonable doubt, all of the material averments in the bill of indictment. If an indictment in a case of murder alleges the weapon to be of a certain character, then the evidence must satisfy the jury beyond a reasonable doubt, that the killing was done with the weapon alleged in the indictment, or a weapon of similar nature. If you believe from the evidence, beyond a reasonable doubt, that the killing was done in the present case with a soda water bottle, and also believe that the other material parts of the indictment have been proved to your satisfaction beyond a reasonable doubt, the state would have carried the burden which rested upon it. And if it should appear to you that the killing was done, not with a soda water bottle, but with another instrument, of similar nature, a blunt instrument, which would inflict a wound of the same character of wound that might have been inflicted with a soda water bottle, if you believe this beyond a reasonable doubt, then that averment in the indictment would be sufficiently proved. If, however, you believe from the evidence in the case and all the circumstances in the case, taking into consideration the defend-

¹ *Martin v. State*, 189 S. W. 262, 80 Tex. Cr. R. 275.

ant's statement, that the killing was not done with a soda water bottle and not done with an instrument of like nature of a soda water bottle, or you have any doubt on your mind as to whether it was done with a similar instrument, or similar weapon, then you should give the defendant the benefit of the doubt and find in his favor on this allegation of the indictment, which would be a material averment in the indictment, or if you have a reasonable doubt as to any of the material allegations in the indictment, give the defendant the benefit of the doubt and find a verdict of not guilty.²

§ 3146. Same—Name of prosecuting witness

You are instructed that the defendant has raised the question that there is a variance between the allegations of the indictment and the proof as to the name of the prosecuting witness. The court instructs the jury that such variance is not material, unless it is of such character as to mislead the defendant, or to hamper him in making his defense, or to expose him to the danger of being put twice in jeopardy for the same offense. Either the true name, or the name by which the prosecuting witness was commonly known, will be sufficient, if alleged in the indictment and supported by the proof. Whether the name in the indictment is sufficiently supported by the proof is for you to determine from the evidence introduced in this case, in the same manner as you should determine any other material allegation of the indictment.³

§ 3147. Same—Indictment or information containing several counts

The court instructs the jury that it is the duty of the prosecution to prove each and every material allegation in each of the two counts of the information, and that if the prosecution fails to prove each and every material allegation in the first count, you must acquit the defendant on the first count, and if the prosecution fails to prove each and every material allegation of the second count of the information, you must acquit the defendant on the second count.⁴

² *Watson v. State*, 94 S. E. 857, 21 Ga. App. 637.

³ *State v. Alva*, 134 P. 209, 18 N. M. 143.

⁴ *People v. Lytle*, 167 P. 552, 34 Cal. App. 360.

CHAPTER CLXXI

INFANTS

§ 3148. Contracts—Ratification after reaching majority.

§ 3148. Contracts—Ratification after reaching majority

The jury are instructed that, if you believe from the evidence that ———, after she became twenty-one years of age and before marriage, with knowledge that she, on account of infancy, was not liable to plaintiff for any purchases she may have made of him, expressly promised that she would pay for any portion of the articles mentioned in the bill of particulars, such a promise would be a ratification of the previous contract to the amount she promised to pay. If she promised to pay all, it would render her liable for all. If she promised to pay a part, or a certain sum, it would render her liable for such part, or for such certain sum; and if she, after such promise, paid any money to plaintiff, it would go as a credit on the amount for which she made herself liable on the new promise.¹

¹ Ogborn v. Hoffman, 52 Ind. 439.

CHAPTER CLXXII

INJUNCTION

§ 3149. Liability on injunction bond.

3150. Same—Attorney's fees.

3150(1). Illinois.

3150(2). Idaho.

§ 3149. Liability on injunction bond

The court instructs the jury to find the issues for the plaintiffs and assess the plaintiffs' damages at such sum, not exceeding \$——, as the jury shall find from the evidence the plaintiffs were compelled to expend, or become liable for, in and about the procuring of the dissolution of the injunction issued against the plaintiffs on the bill of complaint filed against them by the defendant, ——, in reference to which evidence has been introduced in this case.¹

§ 3150. Same—Attorney's fees

§ 3150(1). Illinois

The jury are further instructed by the court, as a matter of law, that the plaintiffs were entitled to employ solicitors for the purpose of procuring the dissolution of the injunction issued against them on the bill of complaint filed by —— referred to in the evidence in this case, and that said plaintiffs were also entitled to pay, or become liable to pay, to said solicitors, for their services in and about the procuring of the dissolution of said injunction, a sum equal to the reasonable and customary charge for similar services by reputable attorneys in —— county, state of ——.²

The court instructs the jury, as a matter of law, that in order to recover in this suit it is not necessary for the plaintiffs to prove any express contract with their solicitors with reference to the amount of fees to be paid; but if the plaintiffs requested their solicitors to take steps necessary to secure the dissolution of the injunction, then the law will imply a promise to pay the usual and customary fees for the service rendered, and make the plaintiffs liable therefor to their solicitors.³

§ 3150(2). Idaho

You are further instructed that the defendants are not liable for the value of attorney's fees for services in the trial of said cause

¹ Kerz v. Wolf, 131 Ill. App. 387.

² Kerz v. Wolf, 131 Ill. App. 387.

³ Kerz v. Wolf, 131 Ill. App. 387.

in the district court, and are not liable for attorney's fees on the appeal to the Supreme Court. The only attorney's fees which can be considered in an assessment of damage in this case are the fees paid by plaintiffs to their attorneys in securing the dissolution of the temporary injunction, if any such were paid.⁴

⁴ Ferrell v. Cœur d'Alene & St. J. Transp. Co., 157 P. 946, 29 Idaho, 118.

CHAPTER CLXXIII

INNKEEPERS

- § 3151. Who are innkeepers.
- 3152. Existence of relation of guest and innkeeper.
- 3153. Duty of innkeeper to receive public.
 - 3153(1). United States.
 - 3153(2). Delaware.
- 3154. Matters justifying refusal to receive traveler as guest.
- 3155. Liability for loss of goods of guest.
 - 3155(1). California.
 - 3155(2). Maryland.
- 3156. Same—Right of guest to rely on statements of hotel clerk.
- 3157. Care required with respect to safety of guests.
 - 3157(1). United States.
 - 3157(2). Oklahoma.
- 3158. Liability for assault on guest by employee.
- 3159. Right of innkeeper to expel guest—Disorderly conduct.
- 3160. Same—Right to eject guest for annoying other guests.
- 3161. Same—Manner of expulsion.
- 3162. Right to eject persons visiting guest.
- 3163. Contributory negligence as defense to action against innkeeper for negligence.
- 3164. Same—Right of guest to rely on exercise of care by innkeeper.
- 3165. Pleading and proof.
- 3166. Sufficiency of evidence in action for wrongful ejection.
- 3167. Damages in action for wrongful ejection.

§ 3151. Who are innkeepers

The jury are instructed that an inn is a public house of entertainment, kept open for the reception and accommodation of travelers.¹

The jury are instructed that if the defendant, at the time referred to in the evidence, kept open for the reception and entertainment of the traveling public the house called the ——— and there furnished travelers with those things ordinarily required by them whilst upon their way, he was an innkeeper, and subject to all their liabilities.²

The jury are instructed that a person who makes it his business to entertain travelers and passengers and provide lodgings and necessities for them is a common innkeeper, whether he requires payment in advance, or at the time of furnishing articles, or afterwards.³

The jury are instructed that, if the defendant held himself out to the public as a person who, at the ——— House, entertained passengers and travelers, and provided them with lodgings and meals, he is responsible as an innkeeper, no matter what private

¹ Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

² Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

³ Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

contracts he may have had with others to assist him in conducting some part or parts of the entertainment prepared for his guests.⁴

§ 3152. Existence of relation of guest and innkeeper

The jury are instructed that, if you believe from the evidence that plaintiff, on the occasion in question on which it is alleged he lost the sum of money mentioned in the evidence at the inn of defendant, had gone there to obtain lodging and breakfast, and that he paid the usual charge for such entertainment, then plaintiff was a guest of the inn, and entitled to the remedies of such a guest as against an innkeeper, although you may further believe from the evidence that plaintiff was a resident of the same town as defendant.⁵

§ 3153. Duty of innkeeper to receive public

§ 3153(1). United States

The jury are instructed that innkeepers owe a certain duty to the traveling public which they are required at all times to perform, and, if they violate the duty or refuse to perform it, they are answerable in damages to any person who suffers injury as a result therefrom.⁶

§ 3153(2). Delaware

You are instructed that a licensed inn or tavern is a public place to which the public has a right to go, and going has a right to remain as long as is consistent with the lawful purposes with which the right is employed. If a person enters and is received in an inn or tavern as a guest, he has a right to remain there a reasonable time, if he behaves himself peaceably and properly and pays the amount charged for his entertainment.⁷

§ 3154. Matters justifying refusal to receive traveler as guest

The jury are instructed that, when a traveler presents himself at an inn, it is the duty of the innkeeper to accommodate him if he be a fit person to be admitted and receive accommodation; it being the innkeeper's duty to receive into his house all strangers and travelers who may call for entertainment, provided he has rooms, and they tender him a reasonable sum for the accommodation demanded. The innkeeper, however, can refuse to admit any one, if he pleases, rendering himself liable in an action for any injury the stranger may sustain. If he refuses to entertain a stranger or a traveler for a good reason, he is not liable for damages, as the law only requires him to entertain fit persons.⁸

⁴ Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

⁵ Walling v. Potter, 35 Conn. 183.

⁶ Nelson v. Boldt (C. C. Pa.) 180 F. 779.

⁷ Vansant v. Kowalewski, 90 A. 421, 5 Boyce, 92.

⁸ Nelson v. Boldt (C. C. Pa.) 180 F. 779.

The jury are instructed that it is also the duty of an innkeeper to protect his guests against the intrusion of boisterous, objectionable characters and persons intoxicated, and such persons may be rejected. Where objection to admitting a guest is based on the fact that the guest is committing a breach of the peace, or is intoxicated, the innkeeper's justification may be determined by the court as a matter of law, but when the question is as to the guest's character or reputation, and his standing as a reputable person, the question is for the jury. If the jury believe that plaintiff was not a law-abiding citizen, but at the time was engaged in a business which was in violation of the laws of the various states of the United States, then the jury would be authorized in finding that he was not such a proper person as was entitled to enforce a legal right to be admitted to a hotel in the state of ———, and defendants would be justified in refusing to give him such accommodations as he demanded at that time, it being no answer that other hotels would accommodate him.⁹

The jury are instructed that, if you find from the evidence that plaintiff was a prize fighter, and had engaged in nearly a hundred hotly contested battles in various states of the Union, and that in some of such states prize fighting was a criminal offense, then it is for you to say whether plaintiff was such a reputable person, within the definition given you in other instructions, that he could demand admittance as a guest to the hotel of defendant.¹⁰

§ 3155. Liability for loss of goods of guest

§ 3155(1). California

The jury are instructed that if the plaintiff, and those whose claims he holds by assignment, were travelers and transient persons, and were received by the defendant at the ——— House as an innkeeper, the plaintiff and his assignors became the guests of the defendant, and the latter became responsible for the safety of all their property committed to defendant's care whilst his guests, and defendant can only exempt himself from liability by showing that the loss was by the act of God or the public enemy, or the neglect and fraud of the owner or owners of the property lost.¹¹

The jury are instructed that if the defendant was an innkeeper, and the plaintiff and his assignors were guests of defendant, and travelers and transient persons, and as such committed their property and funds to the custody of the defendant and his agents, to be placed in a safe, according to the defendant's rules and regula-

⁹ Nelson v. Boldt (C. C. Pa.) 180 F. 779.

¹¹ Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

¹⁰ Nelson v. Boldt (C. C. Pa.) 180 F. 779.

tions posted up in the ——— House, the defendant cannot excuse himself from restoring to the plaintiff such property and funds by showing that the safe was robbed by unknown persons, either within or without the house.¹²

The jury are instructed that the liability of innkeepers is not limited merely to the personal baggage of guests, or merely funds sufficient for traveling expenses to their destination, but it extends to all articles of the guest which the innkeeper receives in his custody at his inn.¹³

§ 3155(2). *Maryland*

The jury are instructed that if the jury find, from the evidence in the cause, that the plaintiff was a guest of the defendant, as alleged in the declaration in this cause, that the trunk of the plaintiff was brought by him into the hotel of the defendant while the plaintiff was a guest in said hotel, that the said trunk contained the bank notes testified to by the plaintiff, and that said trunk and its contents were lost while so in said hotel, the plaintiff cannot recover for said bank notes in this action, unless they shall also find that the said bank notes were designed by the plaintiff for his use, while on his journey or while a guest in said hotel, or unless they shall find that they were lost by the fraud or negligence of the defendant.¹⁴

You are instructed that, if the jury find the facts stated in the above prayer, and also find that the plaintiff had on his person at the time of his arrival at the hotel of defendant \$——— or \$——— in money of this country, and that the money in the trunk was in Canada money, they may find that the money of this country was intended by him for use on his journey, and was sufficient for that purpose; and, if they do so find, then the plaintiff cannot recover for the money in the trunk, unless they find it was lost by the fraud or negligence of the defendant.¹⁵

The jury are instructed that, if the jury find that the plaintiff left ——— and came to ———, and brought the caddy or box of tea in controversy with him, and that said caddy or box had not been opened when he arrived at ———, and that he intended renting a house and going to housekeeping in ———, they may find that said tea was not intended for use while on his journey or while he was a guest in the hotel of the defendant (if they find he was such guest), and, if they do so find, then the plaintiff cannot recover for said tea in this action, unless they shall also find that it was lost by the fraud or negligence of the defendant.¹⁶

¹² *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

¹³ *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

¹⁴ *Treiber v. Burrows*, 27 Md. 130.

¹⁵ *Treiber v. Burrows*, 27 Md. 130.

¹⁶ *Treiber v. Burrows*, 27 Md. 130.

§ 3156. Same—Right of guest to rely on statements of hotel clerk

The jury are instructed that the guests in a hotel have the right, in the exercise of intelligence and due care, to rely to some extent and to a large extent, under ordinary circumstances, upon the statements made to them by the clerks and employees in the hotel attending to certain parts of the business, so far as the statements relate to the matters under their control. They are there for that purpose among others. And when it comes to a question of fire, and what the conditions are, the guest has a right to rely upon what they say to some extent, not fully, not as experts, but still what they say to the guests within the bounds of reason and common sense, the guests are protected in paying attention to, if under all the circumstances of the case the jury believe they were justified in paying attention to what was said to them. It does not, however, exonerate the guest from the exercise of his intelligence. But it is for the jury to say whether the plaintiff was negligent, considering all the circumstances, in paying attention to and relying upon the statements of this nature.¹⁷

§ 3157. Care required with respect to safety of guests**§ 3157(1). United States**

The jury are instructed that a keeper of a hotel is not an insurer of the safety of his guests. The limit of his duty is to exercise reasonable care for the safety and comfort of his guests, and whenever he discharges that duty, if a guest gets injured without negligence on his part, then he cannot recover for the injury.¹⁸

§ 3157(2). Oklahoma

You are instructed that a hotel keeper for hire is not an insurer of the safety of his guests, but must use reasonable care and diligence for their safety, and must provide everything necessary for that purpose, including reasonably safe barriers around air shafts or areaways, and sufficient lights for the guests to see and observe any dangerous places, and must exercise to that end a reasonable degree of skill. It is for you to say under the evidence whether or not the balustrade maintained around the areaway referred to was reasonably sufficient to protect the same and to keep guests from falling through the areaway under the conditions which you may find existed there, and also it is for you to find from the evidence whether or not the hallway containing the opening or areaway was sufficiently lighted at the time of the accident, and whether or not the night clerk, or defendant's agents in charge, used reasonable skill and care in escorting the plaintiff to his room,

¹⁷ *Jefferson Hotel Co. v. Warren* (C. C. A. N. Y.) 128 F. 565, 63 C. C. A. 193.

¹⁸ *Trulock v. Willey* (C. C. A. Ark.) 187 F. 956, 112 C. C. A. 1.

and from all these considerations determine whether or not the defendants were guilty of any negligence. You must also take into consideration the circumstances under which the plaintiff came to the hotel, his physical condition, the manner in which he proceeded to his room, and determine therefrom whether or not he was guilty of any negligence which contributed to the injury complained of, and, if you find from the evidence that the plaintiff was guilty of such negligence, then the plaintiff cannot recover.¹⁹

§ 3158. Liability for assault on guest by employee

I charge you, gentlemen of the jury, that it is no defense to this action that ——— did not know, if you believe from the evidence in this case that he did not know, that plaintiff was a guest of and had a room in the ——— Hotel.²⁰

§ 3159. Right of innkeeper to expel guest—Disorderly conduct

You are instructed that, if a guest enters the barroom of an inn or tavern for the purpose of drink or refreshment, being in a physical condition to receive the same and conducting himself in an orderly and peaceable manner, he has a right to enter the barroom and remain long enough to satisfy the lawful purpose for which he entered. He may, by his conduct convert neither place into a place different in character from that for which it was intended by its license. He cannot make of the barroom a loafing place or a place for the display of his temper, appetites or passions. Therefore, when a person enters a barroom wrongfully, that is, with force and disorder in the first instance, or returns thereto in a disorderly manner after having but shortly before been requested to leave or been lawfully expelled, he may be put out in a proper manner, or, having entered peaceably and rightfully by virtue of the license extended to him as one of the public, if he thereafter becomes profane or disorderly, and if, upon request he refuses to leave, he forfeits his right to remain for any purpose and becomes a trespasser, and like any trespasser may be put out by resort to so much force as is necessary. When a person for such reasons is in such a manner ejected from a tavern, and injury results to him, the law considers the injury to be the result of his own misconduct rather than the result of the conduct of him who ejects him in a lawful manner, and for such an injury the law accords to him no right of recovery.²¹

¹⁹ *Seay v. Plunkett*, 145 P. 496, 44 Okl. 794.

²⁰ *Morris Hotel Co. v. Henley*, 40 So. 52, 145 Ala. 678.

²¹ *Vansant v. Kowalewski* (Del.) 90 A. 421, 5 Boyce, 92.

§ 3160. Same—Right to eject guest for annoying other guests

You are instructed that if ——— was troublesome to the defendants and annoying to their guests, and if the annoying acts were willful, the defendants might rightfully put him out of their house, if they used no unnecessary force or violence. If, however, they were the result of sickness, although they might, under certain circumstances, remove him, such removal must be in a manner suited to his condition.²³

§ 3161. Same—Manner of expulsion

You are instructed that, in order to warrant the forcible removal of a person from a barroom by the proprietor or his servant, there must first be some lawful reason or excuse to prompt and justify the removal. Being present by invitation or permission extended to the public by reason of the character of the place for which a license is granted, a person must have done something or threatened to do something by which the invitation or permission is withdrawn before, by his unlawful presence, he becomes a trespasser. If he becomes disorderly, or threatens a breach of the peace, he is in law a trespasser and the proprietor or his servant may lawfully put him out. But in removing a disorderly person from a tavern, being a public place, it is the duty of the proprietor or his servant first to order the person to go out, and if he refuses, he may then remove him, but in doing so he may use only such force as is necessary for the purpose.²³

§ 3162. Right to eject persons visiting guest

The jury are instructed that if Miss ——— and ——— requested this plaintiff to leave the room in question on that night, and she refused to leave the room, ——— was justified, as matter of law, in removing her, provided he used no more force than necessary.²⁴

§ 3163. Contributory negligence as defense to action against innkeeper for negligence

You are instructed that, if drunkenness was the proximate cause of the death of the deceased, if he got drunk under such circumstances as any reasonable and prudent man could foresee that he was putting himself in such a condition that this result might probably happen, then the plaintiff cannot recover.²⁵

²² *McHugh v. Schlosser*, 28 A. 291, 150 Pa. 480, 23 L. R. A. 574, 39 Am. St. Rep. 699.

²³ *Vansant v. Kowalewski* (Del.) 90 A. 421, 5 Boyce, 92.

²⁴ *McKeon v. Taylor* (Sup.) 132 N. Y. Supp. 445.

²⁵ *Scholl v. Belcher*, 127 P. 968, 63 Or. 310.

§ 3164. Same—Right of guest to rely on exercise of care by inn-keeper

The jury are instructed that a guest of a hotel need not look for pitfalls or dangerous places. He has a right to presume that the keeper of the hotel has exercised reasonable care to make the place safe. It is not like when a person goes to some place which is very dangerous, such as crossing a railroad track, then he must stop, look, and listen, to see whether or not a train is coming, and, if he fails to do so and is injured, he cannot recover, but, when a person goes to a hotel where he is a guest, he is not required to look for pitfalls or dangerous places. He has a right to presume that the place where he is going is safe, but the law does require him to exercise reasonable diligence and reasonable care, such as ordinarily prudent persons under like circumstances would exercise.²⁶

§ 3165. Pleading and proof

You are instructed that in the case before you the plaintiff cannot recover unless the testimony satisfies you that the injuries alleged were caused by an assault or ejection made by the defendant himself. Under the pleadings plaintiff charges the assault or trespass as made by the defendant, and not by his agent or servant, so he is held to proof of the wrong by the defendant only.²⁷

§ 3166. Sufficiency of evidence in action for wrongful ejection

You are instructed that in this case, as in all civil cases, the plaintiff must establish his claim by a preponderance of the testimony which means the greater weight of the testimony and unless he has done that he cannot recover, and by preponderance is meant, not the greater number of witnesses but the value and weight of the testimony.²⁸

§ 3167. Damages in action for wrongful ejection

You are instructed that, if the jury shall find for the plaintiff, you may find for him such adequate sum as will reasonably compensate him for the alleged injuries and outlays shown by the evidence to have been received or expended by him, having regard to the suffering and loss that he may hereafter sustain by reason of said injuries as well as to that already sustained by him, and including therein, if proven, his pain and suffering of mind and body, loss of bodily and mental powers, inability to perform ordinary labor, and incapacity to earn money in the past or in the future, and

²⁶ Trulock v. Willey (C. C. A. Ark.) 187 F. 956, 112 C. C. A. 1.

²⁷ Vansant v. Kowalewski (Del.) 90 A. 421, 5 Boyce, 92.

²⁸ Vansant v. Kowalewski (Del.) 90 A. 421, 5 Boyce, 92.

adequate compensation for medical expenses and loss of time which are the immediate and necessary consequences of the injuries sustained by him.²⁹

You are instructed that the plaintiff claims not only compensatory damages, which means compensation or recompense for the injury sustained, but he also claims exemplary or punitive damages. In actions of this kind both kinds of damages may be awarded if in the judgment of the jury the testimony warrants them in so doing. But we would say to you that before awarding to the plaintiff exemplary or punitive damages you must be satisfied from the testimony that the injury complained of was not only committed by the defendant, and was wrongful and unlawful, but that it was also malicious, or willful and wanton in its character.³⁰

²⁹ Vansant v. Kowalewski (Del.) 90 A. 421, 5 Boyce, 92.

³⁰ Vansant v. Kowalewski (Del.) 90 A. 421, 5 Boyce, 92.

CHAPTER CLXXIV.**INSANITY**

§ 3168. Presumptions and burden of proof.

§ 3168. Presumptions and burden of proof

You are instructed that, reason being the common gift of God to man, every man is presumed to be sane, and insanity can only be proved by clear and unexceptionable evidence.¹

¹ *Dominick v. Randolph*, 27 So. 481, 124 Ala. 557.

CHAPTER CLXXV

INSOLVENCY

§ 3169. Validity of preferences of creditors—Intent of insolvent.

3170. Same—Intent of creditor preferred.

3171. Question of intent as one of fact.

§ 3169. Validity of preferences of creditors—Intent of insolvent

You are instructed that if you believe from the evidence that ——— did not transfer the property with the view or intention to given preference to defendants, it makes no difference what were the views or motives of the defendants in receiving the property, or what they suspected or believed about the solvency of ———; and you should find for the defendants.¹

§ 3170. Same—Intent of creditor preferred .

You are further instructed, in this case, no actual fraud is charged against these defendants, but the complaint simply charges that the assignment in question was made to defendants by ———, and was accepted by these defendants with a view to give a preference to defendants, with a view to prevent the property so transferred from coming to the assignee of said ——— in insolvency, and to prevent the same from being distributed ratably among his creditors, and to defeat the objects of the insolvent act of ———; and that the defendants had reasonable cause to believe, and knew, that said ——— was insolvent, and that the transfer was made for the purpose mentioned. Now, if you believe from the evidence that defendant had not reasonable cause to believe as charged and had no other intent than to collect an honest debt due them by ———, and had no intent of defeating the insolvent law, then you must find for the defendants.²

You are instructed that, even if you believe from the evidence that ——— was insolvent at the time of the transfer, and even if he did make the transfer with intent to prefer the defendants to other creditors, if you believe from the evidence that the transfer was made for a valid debt to defendants, and that there was no intent on the part of the defendants to defeat the operation of the insolvent law, and no reasonable cause on their part to believe as charged, you must find for the defendants.³

§ 3171. Question of intent as one of fact

You are instructed that the question of fraudulent intent is one of fact, and not of law. The jury are exclusive judges of all questions of fact.⁴

¹ Haas v. Whittier, 32 P. 449, 97 Cal. 411.

² Haas v. Whittier, 32 P. 449, 97 Cal. 411.

³ Haas v. Whittier, 32 P. 449, 97 Cal. 411.

⁴ Haas v. Whittier, 32 P. 449, 97 Cal. 411.

CHAPTER CLXXVI

INTEREST

§ 3172. Right to interest—On advances.

§ 3172. Right to interest—On advances

The court instructs you that, if you believe and find that defendant, from time to time, subsequent to the execution of the contract sued on by plaintiff, advanced to one C., prior to his assigning his rights in this cause of action to plaintiff certain money upon the request of said C., and upon his agreement to pay interest thereon, and that said amounts were advanced or loaned to said C. upon his promise to repay the same, with interest, then defendant had the right to charge said C.'s account with interest thereon at the rate of ——— per cent. per annum.¹

¹ Coombes v. Knowlson, 182 S. W. 1040, 193 Mo. App. 554.

CHAPTER CLXXVII

INTERNAL REVENUE

§ 3173. What taxable as adulterated butter—Abnormal amount of water.

§ 3173. What taxable as adulterated butter—Abnormal amount of water

Now you will notice that there has been a great deal of discussion throughout the case as to the meaning of certain terms. Among the terms in question is the word "absorption," and it has been contended that that word must apply only to the water taken into the butter by the chemical process of absorption, as distinguished from incorporation. It has appeared by the testimony of one of the witnesses that less than one-half of 1 per cent. of water can be taken by what is chemically called absorption. That is not the only definition of the word "absorb." A very proper definition as given by the dictionaries, the standard dictionaries, is to "draw in as a constituent part." It is inconceivable that the government would have passed a statute against adulteration where less than one-half of 1 per cent. of water could have been absorbed and treated as absorption in a chemical sense, and you are instructed as the law of this case that it is the intent of this statute to make adulterated butter, which by any process is made to contain an abnormal amount of water, whether that is obtained by what is called chemical absorption, or by incorporation, or any other method of that kind. If, by the process of making that butter, there is left in it more than a normal amount of water, it is adulterated within the meaning of the statute.¹

¹ *Coopersville Co-operative Creamery Co. v. Lemon* (C. C. A. Mich) 163 F. 145, 89 C. C. A. 595.

CHAPTER CLXXVIII

INTOXICATING LIQUORS

A. CRIMINAL LIABILITY IN GENERAL

- § 3174. Stating effect of statute.
- 3175. Liability for manufacturing alcoholic liquor.
- 3176. Liability for having possession of apparatus for manufacturing liquor.
- 3177. Unlawfully engaging in business of selling liquor—Elements of offense.
- 3178. Liability for maintaining liquor nuisance in violation of prohibitory legislation.
- 3179. Prosecution for keeping place where liquor unlawfully sold—Place controlled by another than defendant.
- 3180. Prohibition against keeping, storing, and delivering liquor.
- 3181. Liability for keeping liquor on hand at place of business.
- 3182. *Sar* —What constitutes place of business.
- 3183. Liability for giving away liquor—Rights in home.
- 3184. Liability of druggist for suffering persons to drink liquor at and about place of business.
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3202(2). Massachusetts.

3202(3). Missouri.

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3212(1). California.

3212(2). Delaware.

3212(3). Texas.

3213. Judicial notice of character of common beer.

A. CRIMINAL LIABILITY IN GENERAL

§ 3174. Stating effect of statute

The court instructs the jury that the provisions of the Codes of ———, known as the "local option law," were adopted in ——— county by reason of an election held in said county on ———, and became effective in said county on ———, and that since said last mentioned date it has been and now is unlawful in said county for any person to sell either directly or indirectly, or give away to induce trade at any place of business or furnish, to any person any alcoholic, spirituous, malt, or intoxicating liquors.¹

§ 3175. Liability for manufacturing alcoholic liquor

The jury are instructed that the phrase "to manufacture alcoholic liquors," in the statute on which this prosecution is based, means to convert the raw material out of which alcoholic liquors can be made into alcohol.²

§ 3176. Liability for having possession of apparatus for manufacturing liquor

The court instructs the jury that, if you believe beyond a reasonable doubt that this defendant did have in his possession a cop-

¹ State v. O'Brien, 90 P. 514, 35 Mont. 482, 10 Ann. Cas. 1006.

² Patterson v. State, 215 S. W. 629, 140 Ark. 238.

per still and worm, as charged in the indictment; and that was an apparatus for the distilling and manufacturing of liquor, intoxicating liquor or beverages, why he would be guilty under the law, even though that wasn't a complete outfit for the manufacture of liquor. If he had a still and worm, and that was a part of an apparatus used for the manufacture of liquor, as I have already charged you, and as set out in the indictment, why he would be guilty under the law, even though he didn't have the cap, if he didn't have a cap, as insisted on the part of the defense, which would be necessary, as they contend, for the making of a complete apparatus for the manufacturing of liquor. As I have charged you, if he had a part of an apparatus for the distilling or manufacturing of intoxicating liquors—if he had it as charged in the indictment and as I have already explained, under the rules given you, why he would be guilty under the law, even though he didn't have a complete apparatus necessary for the manufacture of liquor.³

§ 3177. Unlawfully engaging in business of selling liquor—Elements of offense

You are instructed that, in order to constitute a violation of this statute, it must appear that the defendant engaged in or pursued the occupation or business of selling intoxicating liquors in _____ county, state of _____; and it must be shown that he, in said county and state, did, during the month of _____ make at least two sales of intoxicating liquors to _____. If you should find that the defendant did not make at least two sales of intoxicating liquor to _____ in the month of _____, or if you have a reasonable doubt thereof, you will acquit. If you shall find that the defendant made two sales of intoxicating liquor to _____, but if you find that he, the defendant, during none of the year _____, engaged in or pursued the business or occupation of selling intoxicating liquor in said county and state, or if you have a reasonable doubt thereof, you will acquit.⁴

You are further instructed that by the terms "occupation" and "business," as the same are used in this law and in this charge, is meant: The trade, calling, or vocation, in which one engages for the purpose of procuring a living or obtaining wealth. And you are instructed, in this connection, that the law requires that, before the defendant can be convicted, he must be shown by the evidence in this case to have made two or more sales, while so engaged in or pursuing said occupation or business.⁵

³ Strickland v. State (Ga. App.) 102 S. E. 383.

⁴ Brown v. State, 160 S. W. 374, 72 Tex. Cr. R. 33.

⁵ Anderson v. State, 157 S. W. 150, 70 Tex. Cr. R. 250.

The jury are instructed that, in order to constitute engaging in or pursuing the occupation or business of selling intoxicating liquors, it is necessary for the state to prove beyond a reasonable doubt that the defendant unlawfully engaged in and followed the occupation and business of selling intoxicating liquors in ———, at any time between the month of ———, and the ———, and that the defendant unlawfully made at least two different sales of intoxicating liquor between said dates in ———, to the parties named in the indictment; but it is not required that the state should show that said business or occupation was the defendant's principal business or occupation, or that he gave the whole or the greater part of his time to said business. A person may engage in his usual occupation or avocation, and yet secretly and covertly sell intoxicating liquors whenever the opportunity presented itself, and would be guilty, under the law governing this case, of engaging in or pursuing the occupation or business of selling intoxicating liquors.⁶

The jury are instructed that if, therefore, you believe from the evidence beyond a reasonable doubt that between the month of ——— and ———, the sale of intoxicating liquors was prohibited in ———, under the laws of this state, and that the defendant, ———, did at any time between said dates in ———, unlawfully engage in and pursue the occupation and business of selling intoxicating liquors, as alleged in the indictment, and if you believe that the defendant unlawfully in said county and state between said dates and at or about the dates alleged in the indictment did make as many as at least two different sales of intoxicating liquors to the parties named in the indictment, then you will find the defendant guilty as charged; but, unless you so believe, you will acquit him.⁷

You are instructed that it is not necessary under the law that a party should make a profit in his business in order to be guilty of engaging in or pursuing the occupation of selling intoxicating liquors.⁸

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant did, in ———, on or about the time charged in the indictment, and prior to ——— (which is the date of the filing of the indictment herein), and subsequent to ———, unlawfully engage in and pursue the occupation and business of selling intoxicating liquors, as alleged in the indictment, and you further so believe that the defendant unlaw-

⁶ Dickson v. State, 146 S. W. 914,
66 Tex. Cr. R. 270.

⁷ Dickson v. State, 146 S. W. 914,
66 Tex. Cr. R. 270.

⁸ Dickson v. State, 146 S. W. 914,
66 Tex. Cr. R. 270.

fully in said county and state, at the time alleged in the indictment, did make two different sales of intoxicating liquors to one ———, and on or about the time alleged in the indictment one sale to ———, and did make on or about the time alleged in the indictment ——— different sales to ———, and did during the months of ———, ———, and ———, 19—, make several different sales of intoxicating liquors to one ———, then you will find the defendant guilty and assess his punishment at confinement in the state penitentiary for any term of years not less than ——— nor more than ———; but, unless you do so believe, you will acquit the defendant.⁹

You are further instructed that, under the law, in order to constitute or engage in or pursue the occupation or business of selling intoxicating liquors, it is necessary for the state to prove beyond a reasonable doubt that the defendant unlawfully engaged in and followed the occupation and business of selling intoxicating liquors in ——— county at the time alleged in the indictment, and during the months of ———, ———, and ———, 19—, and that said sales, if any, must have been prior to ——— (which is the date of the filing of the indictment herein), and unless you do so believe beyond a reasonable doubt you will acquit the defendant and say by your verdict, "Not guilty."¹⁰

§ 3178. Liability for maintaining liquor nuisance in violation of prohibitory legislation

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant kept and maintained the place mentioned in the information at the time therein stated, or at any time within ——— years prior to the filing of the information, which was on ———, and dispensed beer or kept it as a place where persons were permitted to resort for the purpose of drinking beer as a beverage or kept beer for sale, barter, or delivery, then you should find him guilty as charged in the information.¹¹

You are instructed that it is claimed by the state that, as one of the ingredients of the offense charged, there was a sale to the defendant's hired man of a keg of beer under the circumstances as disclosed by the evidence. In that behalf I charge you that, if you believe from the evidence beyond a reasonable doubt that defendant procured a keg of beer or other intoxicating liquor, so that the title and ownership thereof was in him; and that thereafter, on

⁹ Clark v. State, 136 S. W. 260, 61 Tex. Cr. R. 597.

¹⁰ Clark v. State, 136 S. W. 260, 61 Tex. Cr. R. 597.

¹¹ State v. Ball, 123 N. W. 826, 19 N. D. 782.

the premises mentioned in the information, he transferred the title to the same to his hired man by charging its value to him, or in any other manner constituting a sale thereof, then he would be guilty of selling intoxicating liquor in violation of law.¹²

§ 3179. Prosecution for keeping place where liquor unlawfully sold—Place controlled by another than defendant

The jury are instructed that, if you believe from the evidence in this case that the building wherein the intoxicating liquors were sold, bartered, and given away in violation of law, as alleged in the indictment in this case, was during all said time leased and rented to, and under the control and management of, persons other than the defendant, and said building and fixtures and the business therein conducted were not in the control of the defendant, the mere fact that the defendant had knowledge of the illegal business conducted in said building, or the fact that defendant, while acting for the persons conducting the business, made occasional sales of the intoxicating liquors of said other persons, would not make the defendant guilty of the crime charged in the indictment in this case.¹³

§ 3180. Prohibition against keeping, storing, and delivering liquor

The jury are instructed that a person may, under the law, order beer for another, but cannot keep and store it for him, and, if you find from the evidence that the defendant made orders for beer for either of the witnesses ———, ———, or ———, and after receiving it kept it stored in his cellar or basement for him (such witness), so that he (such witness) might go into the basement from time to time and get a bottle of the beer and drink it, this would be a keeping and storing of beer for such person as defined in these instructions, and it would not make any difference in such case if the defendant did have an interest in the case of beer in which the same was shipped, and used and drank some of the beer himself that was shipped in the same case.¹⁴

The jury are instructed that, in order to convict on any count of the indictment in this case, you must find that defendant kept and stored beer for the person named in the said count of the indictment, that he kept it stored in his cellar or basement, and that he intended when he kept it so stored that such person might go

¹² State v. Thoemke, 92 N. W. 480, 11 N. D. 386.

¹³ Durst v. State (Ind.) 128 N. E. 926.

¹⁴ State v. McMurtry, 143 S. W. 521, 161 Mo. App. 400. This was correct

under the evidence, which showed that defendant was maintaining his basement as a drinking resort for any one in the neighborhood whom he was willing to trust and who wished to use the basement for that purpose.

into such basement either by himself or with defendant and get one or more bottles of such beer and drink it, and that such witness would have the right to take some portion of the beer and appropriate it to his own use. It is not necessary to find that there was a distinct understanding as to how many bottles could be taken by such witness, but if you find that there was an understanding between defendant and the witness that some of the bottles of beer might be appropriated by the witness to his own personal use and benefit, and if the defendant kept it stored for the witness with such understanding, this would be a keeping and storing of such beer for such witness.¹⁵

§ 3181. Liability for keeping liquor on hand at place of business

I charge you, gentlemen of the jury, that if you believe, from a consideration of the evidence adduced upon the trial of this case, that the defendant, at the time alleged in this accusation or any time after ———, to ———, was engaged as a restaurant keeper and soft drink dispenser, and that to the establishment wherein he operated the public was impliedly or expressly invited to come and trade, such a restaurant and soft drink establishment did constitute, in law, a place of business, and it would be a violation of the law of ——— for him to keep on hand, in connection with such restaurant or soft drink dispensary, alcoholic, spirituous, malt or intoxicating liquors for any purpose whatever.¹⁶

§ 3182. Same—What constitutes place of business

I charge you that by "place of business" is meant public place of business; not public in the sense that it belongs to the public; not public in the sense that it is done with any great degree of publicity; but it must be a place to which the public is invited, either expressly or by implication, to come for the purpose of trading or transacting business; and a place of that character to which the public is invited, where business is carried on, is a public place of business, it makes no difference whether the amount of business be great or small. By "public" is meant that the public is invited to it and has access to it for a purpose within the scope of the business that is carried on.¹⁷

You will notice the verbiage of the statute; it says "keeping on hand"; to keep on hand at their place of business. For one to keep liquor in his particular place of business in a building, if he has more than one, would be within that statute; but I charge you that it is not necessary for the liquor to be kept in any particular

¹⁵ State v. McMurtry, 143 S. W. 521, 161 Mo. App. 400.

¹⁶ Bashinski v. State, 62 S. E. 577, 5 Ga. App. 3.

¹⁷ Brooks v. State, 90 S. E. 989, 19 Ga. App. 3.

room, or kept in the place where the main business is kept or carried on, or in a public place; that is to say, it is not necessary for it to be kept openly or publicly. It may be kept secretly; it may be kept in another room on the same floor of the building; it may be kept in another room on a different floor of the same building; but if it is kept in connection with the business, easily accessible to the men or persons operating the business, if it is kept in that way, it does not matter whether it is in the same room or on the same floor; indeed, it would not be necessary for it to be in the same building; if it is kept at the place of business, convenient to it, in connection with it, so as to be available, and in a way indicating that it was intended to be available and used in connection with the business (and I charge you that it would not be necessary for it to be such a place of business to show any sale of any liquor), the keeping of it there is a violation of the law.¹⁸

You are instructed that if, up to the time when it was found, business was still carried on there, although it may have been to a more limited extent, although it may have been done privately, or more privately than theretofore, but was nevertheless carried on, the liquor was kept there, and the business was carried on in the building by the defendant at the same place, selling to some extent and carrying on business to some extent as he did before, it would still be his place of business, however limited, and although not so publicly as before, provided it was still a place which the public was expressly or impliedly invited to visit for the purpose of trade.¹⁹

§ 3183. Liability for giving away liquor—Rights in home

The court instructs the jury that the word "home," as used in the law here to be applied, means the permanent residence, or abiding place of a person (other than a club, hotel, boarding house, etc.) and includes with the actual dwelling house, or place, all outbuildings commonly used and intended for necessary or convenient use in connection with the use of the whole as a home. Whether or not the cider given away by the accused was at time of such giving of a greater strength than is by law allowed, where the giving is not shown to be within the home of the giver, and whether or not the giving occurred within the home of the accused, are questions of fact to be determined by the jury, upon the evidence.²⁰

The court instructs the jury that a person having a home, as de-

¹⁸ Brooks v. State, 90 S. E. 989, 19 Ga. App. 3.

¹⁹ Brooks v. State, 90 S. E. 989, 19 Ga. App. 3.

²⁰ Bare v. Commonwealth, 94 S. E. 168, 122 Va. 783.

fined by law and by the instructions given, may lawfully give away cider, in such home, provided, that such giving is in no wise a shift or device to evade the provisions of the law. And the court further instructs the jury that if they believe from the evidence that the giving of cider by the accused, as charged in the indictment and shown in the evidence, occurred only within the home of the accused, in the sense in which "home" has been defined to them, and that such giving was in no wise a shift or device to evade the provisions of the law, they will find the accused not guilty.²¹

§ 3184. Liability of druggist for suffering persons to drink liquor at and about place of business

The jury are instructed that, if you believe and find from the evidence in this cause that the defendant, in the county of ———, in the state of ———, at any time within one year prior to ———, was a druggist and a dealer in drugs and medicines, and did unlawfully suffer ——— to drink whisky at and about his place of business—that is to say, his drug store—you will find the defendant guilty, as he stands charged in the second count of the indictment, and assess his punishment at a fine not exceeding \$——, or at imprisonment in the county jail not exceeding ——— months.²²

§ 3185. Liability for delivery of liquor in dry territory

The court instructs the jury that what is known as the local option law, prohibiting the sale of intoxicating liquors, was adopted in ——— county on the ——— day of ———, and has been in full force in said county from the said date to the present time; and it has been unlawful in said county, during all of said time, for any person to sell to another any intoxicating liquors. And if you believe and find from the evidence that the defendant in ——— county, on or about the ——— day of ———, did deliver to one ——— one pint of whisky, you will find him guilty, as charged in the second count of the information, and assess his punishment at a fine of not less than \$—— nor more than \$——, or by imprisonment in the county jail for a term of not less than ——— months nor more than ——— months, or by both such fine and imprisonment.²³

The court instructs the jury that if you find from the evidence that the defendant did not sell the pint of whisky to the witness ———, as defined by these instructions, but if you do find that he

²¹ Bare v. Commonwealth, 94 S. E. 168, 122 Va. 783.

²² State v. McAnally, 79 S. W. 990, 105 Mo. App. 333.

²³ State v. Elmore, 189 S. W. 612, 195 Mo. App. 15.

agreed with the witness ——— to procure for him one pint of whisky from some other person, and the said ——— gave to the defendant the sum of \$—— with which to procure the said whisky, and if the defendant gave the said money to some other person and agreed with him that such other person should deposit a pint of whisky in a box at the rear of ——— where the said ——— could get it, and if the defendant notified the said ——— where he could find the said pint of whisky, and if, in pursuance of said notice the said ——— went to the said box and got the said pint of whisky, these facts would constitute a delivery of the whisky by the defendant to the said witness ———.²⁴

The court instructs the jury that if the defendant did not have possession and control of the whisky at the time, but the witness gave the defendant the money and asked defendant to get him some whisky, and if defendant took the money and went and got the whisky from some other person, and brought it back and delivered it to the witness ———, these facts would not constitute a sale of the whisky by the defendant, but would constitute a delivery, as charged in the ——— count of the information.²⁵

§ 3186. Liability for transporting liquor into dry territory—Necessity of knowledge that liquor is intended for sale

The court instructs the jury that, if you shall believe from the evidence in this case beyond a reasonable doubt that the defendant, ——— Express Company, in ——— county, state of ———, and before the finding of the indictment herein and within ——— months of that time, was a common carrier for hire, and that within ——— months of the finding of the indictment shipped or transported ——— into such county, at ———, a county where by law the sale as a beverage of vinous, malt, brewed, spirituous, and intoxicating liquors is prohibited, and shall further believe from the evidence beyond a reasonable doubt that the defendant at ———, in said ——— county, had within ——— months of the finding of the indictment, through its agent, ———, delivered to ——— vinous, brewed, fermented, spirituous, or intoxicating liquors, upon which liquors, or the package containing it, there was a statement that such liquors were for the personal use of the consignee, and shall further believe from the evidence beyond a reasonable doubt that the said statement appearing on the outside of said liquor or the package containing it that the said liquor was for the personal use of the consignee, was known to the defendant to be false, and was in fact false, it will be your duty to find the defendant guilty, and fix its punishment at a fine of not less than \$—— nor more than

²⁴ State v. Elmore, 189 S. W. 612, 195 Mo. App. 15.

²⁵ State v. Fraser, 143 S. W. 545, 161 Mo. App. 333.

§———. The word "known" means such information as would put a person of ordinary prudence on notice that the statement was false.²⁶

The court instructs the jury that, unless you believe from the evidence beyond a reasonable doubt that ——, agent of the defendant at —— station, did have such information as would put a person of ordinary prudence on notice that the statement on the packages, or any of them, was false, and also that it was in fact false, you will find the defendant not guilty.²⁷

§ 3187. Falsely indorsing liquor shipment as being for medical purposes

The court instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt that the defendant, —— Company, in this county, and within one year next before the finding of the indictment herein, did knowingly consign and ship a package containing spirituous, vinous, and malt liquors, to wit, whisky, by freight or railroad transportation in territory where the local option law was in effect at the time, and there appeared on the outside of said package, the statement that said liquors were for medical purposes, and that said statement on the outside of said package was untrue, and that statement was known by said defendant to be false, then the jury will find the defendant guilty and fix its punishment by a fine of not less than \$—— nor more than \$—— in your discretion.²⁸

The court further instructs the jury that, in determining whether the defendant knew that the statement on the outside of said package that "the liquors were for medical purposes" was or not false, you may consider the facts that the orders for said liquors did not state that they were for medical purposes, if they did not so state; and the frequency and quantities of liquors shipped by defendant to ——.²⁹

B. CRIMINAL LIABILITY FOR ILLEGAL SALE

§ 3188. Elements of offense

§ 3188(1). Illinois

The jury are instructed that it is the law in this case that any shift or device to evade the provisions of the statute to not sell

²⁶ Adams Express Co. v. Commonwealth, 192 S. W. 56, 174 Ky. 296.

²⁷ Adams Express Co. v. Commonwealth, 192 S. W. 56, 174 Ky. 296.

²⁸ Commonwealth v. Robinson-Pettet Co., 205 S. W. 774, 181 Ky. 702.

In this case the state did not elect to confine the evidence to a shipment upon the date named in the indictment.

²⁹ Commonwealth v. Robinson-Pettet Co., 205 S. W. 774, 181 Ky. 702.

less than ——— gallons of intoxicating liquor is an unlawful selling, and if you find from the evidence in this case beyond a reasonable doubt that the defendant by himself or by another, either as principal, clerk, or servant, in any manner disposed of, for money or other things of value, any intoxicating liquor in less quantities than ——— gallons, as charged in the information, by any shift or device, then you should find the defendant guilty.³⁰

§ 3188(2). Kansas

You are instructed that the necessary elements constituting the crime charged in the first, second, third, fourth, fifth, sixth, and seventh counts of the information, and which must be proven by the evidence beyond a reasonable doubt to justify a conviction under any of them, are—First, that the defendant unlawfully sold some kind of intoxicating liquors; second, that he sold it within ——— county, state of ———; third, that such sale or sales were made some time within ——— years just prior to ———.³¹

§ 3188(3). Texas

The jury are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant, in ——— county, state of ———, on or about the ——— day of ———, did unlawfully sell intoxicating liquor to ———, as charged, and that the sale of intoxicating liquor had theretofore been, and was then and there, prohibited in said ——— county, under and by the laws of this state, then you will find the defendant guilty, and assess his punishment.³²

§ 3189. What constitutes sale

§ 3189(1). Missouri

The court instructs the jury that if you believe and find from the evidence that the defendant delivered to any of the witnesses who have testified in this case a pint of beer, and such witness had with him, at the time, a ticket with figures thereon, and if the said witness had purchased the said ticket from any other person and paid for the same any sum of money, and if, at the time of receiving the said beer from the said defendant, such witness presented the said ticket to the said defendant, and he (defendant) punched therefrom the figures representing a sum of money as the price of such beer, then such transaction would be a sale of the beer to the same extent as if said witness had paid the said defendant the money for the beer at the time he received it.³³

³⁰ *People v. Mylin*, 139 Ill. App. 500.

³¹ *State v. Goff*, 61 P. 680, 10 Kan. App. 286.

³² *Adams v. State*, 85 S. W. 1079, 48 Tex. Cr. R. 7.

³³ *State v. Zehnder*, 168 S. W. 661, 182 Mo. App. 161.

§ 3189(2). *Nebraska*

The court instructs you, gentlemen of the jury, that if from all the evidence in this case you believe, beyond a reasonable doubt, that certain whisky was shipped to one A., under the name of A., and a bill of lading was forwarded with draft attached, and you also believe from the evidence that the said A. refused to take said whisky, and that he told the defendant that he might have it, and that he gave him an order for it, and you further believe from all the evidence that J. paid the defendant money with which to pay for said whisky, and that such payment was made with the understanding between J. and the defendant that said J. was to have said whisky or a part thereof, and you also believe from all the evidence that with said money the defendant paid for the said whisky, or a part thereof, and that he secured said whisky from the railroad company and delivered the same, or a part thereof, to J., then the court instructs you that such transactions would constitute a sale of said whisky by the defendant to J., and if you should so find, and that beyond a reasonable doubt, you shall return a verdict of guilty.³⁴

§ 3189(3). *North Carolina*

The court instructs the jury that if you find from the evidence, beyond a reasonable doubt, that the witness C. applied to the defendant for liquor, and it was then and there agreed by and between the witness C. and the defendant that the defendant would let C. have whisky, in consideration of an agreement on the part of C. to deliver to the defendant other whisky in return for that which he received, and after this agreement was made the defendant delivered to the witness C. a quantity of whisky, in consideration of the agreement of C. to deliver to the defendant a like quantity when C.'s whisky arrived on the train, such transaction, if not a technical sale, would nevertheless be such as is made unlawful by the statute to which your attention has been directed, and your verdict will be "guilty."³⁵

§ 3189(4). *Texas*

The jury are instructed that, in order to constitute a sale in this case, it is not necessary that the purchaser deliver to the seller the money for the whisky; but it is necessary that both parties assent to the sale and payment, if any is made or is to be made therefor.³⁶

The jury are instructed that by the term "sale" is meant an exchange of property, either real or personal, for a price in money.

³⁴ *Skiles v. State*, 123 N. W. 447, 85 Neb. 401.

³⁵ *State v. Mitchell*, 72 S. E. 632,

156 N. C. 659, 77 L. R. A. (N. S.) 302, Ann. Cas. 1913A, 469.

³⁶ *Dawson v. State*, 117 S. W. 136, 55 Tex. Cr. R. 315.

Three things are necessary to its validity, first, the thing sold, which is the object of the contract; second, the consideration paid or to be paid; and, third, the consent of the contracting parties. You are instructed that it is not a violation of the local option law for a person to give away whisky in a prohibition county.³⁷

The jury are instructed that, if you believe from the evidence that the prosecuting witness got a bottle of whisky from defendant and gave defendant an order on ——— for ——— cents, but you further believe from the evidence that at the time defendant received said order he did not receive the same as payment for said whisky, but only to satisfy said witness, or if there remains in your minds a reasonable doubt as to said fact, you will acquit the defendant, and say by your verdict not guilty.³⁸

The jury are instructed that, in law, a sale is the agreed transfer of property having some value to another for a valuable consideration. A sale may be shown by facts and circumstances as well as by direct proof.³⁹

The jury are instructed that if you believe from the evidence that on or about ———, one ——— went upon the premises of the defendant and procured whisky, and that in procuring the same he did so without the knowledge or consent of the defendant, then you will find the defendant not guilty.⁴⁰

§ 3190. Liability as dependent on intoxicating quality of beverage sold

See, also, post, §§ 3191, 3193, 3195.

The jury are instructed that, before you can convict the defendant herein, you must believe beyond a reasonable doubt that the liquid sold by the defendant, if he sold any liquid to the prosecuting witness, was intoxicating, and, in the event that you have a reasonable doubt as to its being intoxicating, you will acquit the defendant, and so say by your verdict.⁴¹

The jury are instructed that, if you believe from the evidence that the hop ale mentioned in evidence and sold by defendant was a nonintoxicant, or if you have a reasonable doubt of its being an intoxicant, you should acquit the defendant.⁴²

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that defendant did, at the time and place alleged in the indictment, sell to ——— two bottles of liq-

³⁷ Byrd v. State, 114 S. W. 135, 54 Tex. Cr. R. 170.

³⁸ Kilgore v. State, 108 S. W. 662, 52 Tex. Cr. R. 447.

³⁹ Adams v. State, 85 S. W. 1079, 48 Tex. Cr. R. 7.

⁴⁰ Williamson v. State (Cr. App.) 40 S. W. 286.

⁴¹ Roberts v. State, 126 S. W. 1129, 59 Tex. Cr. R. 47.

⁴² Rutherford v. State, 88 S. W. 810, 48 Tex. Cr. R. 431.

uor labeled "———," and if you further believe that the same was intoxicating liquor, according to the definition hereinbefore given you, you will find defendant guilty. If the jury believe from the evidence beyond a reasonable doubt that defendant sold two bottles of liquor to ——— at the time and place alleged, and that the same contained alcohol, but should have a reasonable doubt as to it containing alcohol in such proportion that it would produce intoxication when taken in such quantities as may practically be drunk, then you will acquit defendant.⁴³

You are instructed that a liquor is intoxicating, within the meaning of the law, when it is intended for use as a beverage, or is capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it would produce intoxication when taken in such quantities as may practically be drunk; and, unless you believe from the evidence beyond a reasonable doubt that the liquor sold by defendant comes within the above definition, you will find the defendant not guilty.⁴⁴

§ 3191. Sale of nonintoxicating liquor containing alcohol

You are instructed that, if you believe from the testimony in this case beyond a reasonable doubt that this defendant sold any of the liquors mentioned in this indictment the court has just read, and that such liquors were intoxicating, or that any of such liquors contained any alcohol, although it was not intoxicating, you will find the defendant guilty under the statute.⁴⁵

§ 3192. Sale of beer

§ 3192(1). Missouri

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, at any time between the ——— day of ——— and the ——— day of ———, in ——— county, ———, did sell to ——— any beer in less quantities than ——— gallons you should find him guilty and assess his fine at not less than \$——— nor more than \$———. ⁴⁶

§ 3192(2). Nebraska

You are instructed that the word "beer," without restriction or qualification, denotes an intoxicating malt liquor, and is within the meaning of the words "intoxicating liquor" as used throughout the statute.⁴⁷

⁴³ Bailey v. State (Tex. Cr. App.) 66 S. W. 780.

⁴⁴ Malone v. State (Tex. Cr. App.) 51 S. W. 381.

⁴⁵ Selbert v. State, 180 S. W. 990, 121 Ark. 258.

⁴⁶ State v. Besheer, 69 Mo. App. 72.

⁴⁷ Feddern v. State, 113 N. W. 127, 79 Neb. 651.

§ 3193. Prohibition against sale of fermented cider

The jury are instructed that the question for you to determine is, Was this cider in a state of fermentation on ———, when these two men got it? If it was what is commonly called "sweet cider" (that is, cider that had not begun to ferment), there is no offense proved against him. It is no offense to deliver a man a gallon of cider that is not commencing to ferment; but if it has commenced to ferment, and is in any stage of fermentation, then, under the law, it is an offense to sell it or furnish it to another. I do not know that this word "fermentation" needs any definition. It is a term you well understand the meaning of. Sometimes we say cider has "begun to work." It means just about the same thing. The terms "hard cider" and "sweet cider" have been used by counsel quite a little in their talk to the jury and in the testimony. It is not a question, really, whether it was sweet cider or hard cider. It is a question whether this cider, on ———, this gallon of cider, whether it was fermented or not. Of course, if you mean, by "fermented cider," hard cider, why, then, the question is the same. It is not necessary that the cider should be intoxicating. Cider, after it reaches a certain stage of fermentation, is regarded, and is as a matter of fact, intoxicating; but cider may commence to ferment, and be in a state of fermentation, so that it could be called "fermented cider," and yet it might not be intoxicating. It is not necessary that this cider should have gone to such a degree of fermentation as to make it intoxicating. All that is necessary is that it should be fermented. Was this cider fermented on ———? It is not a question of degree, providing it is fermented.⁴⁸

§ 3194. Belief of defendant that beverage sold not intoxicating

The jury are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant sold intoxicating liquors to ———, but you further believe that at the time of so doing he honestly believed that it was not intoxicating, and would not produce a state of intoxication when drunk in reasonable quantities, such as the human stomach will ordinarily hold, then the defendant would not be guilty, and you will find him not guilty.⁴⁹

The jury are instructed that, if you have a reasonable doubt as to whether the liquor sold was intoxicating, you will give the defendant the benefit of such doubt and acquit him. You are also instructed, notwithstanding you may find that the liquor was intoxicating, that, if you believe at the time defendant sold the same he honestly believed it was not intoxicating, as the law defines that term, he would not be guilty. But in this connection you are in-

⁴⁸ *People v. Kinney*, 83 N. W. 147, 124 Mich. 488.

⁴⁹ *Deadweyer v. State*, 121 S. W. 863, 57 Tex. Cr. R. 63.

structed that you must believe from the evidence that the defendant used proper care to ascertain whether the liquor was intoxicating, if it was, before he would be entitled to be acquitted on the grounds of mistake in honestly believing, if he did, that the liquor was not intoxicating under the above and foregoing instructions.⁵⁰

§ 3195. Necessity of showing use of liquor as beverage

You are instructed that, if you find that any of these liquors sold by defendant were intoxicating, it is immaterial whether they were used and drunk as a beverage. On the other hand, if you find that he sold any of the liquors mentioned in this indictment, and that they were used and drunk as a beverage, it is immaterial whether they were intoxicating or not if they contained alcohol.⁵¹

§ 3196. Defendant acting with another in sale of liquor

You are charged that, if you believe from the evidence beyond a reasonable doubt that the defendant and any other person, acting together, sold intoxicating liquors to — at the time and place alleged in the indictment in this case, and that each and both of said persons were present at the time of such sale, and each knew the unlawful act in making said sale, then the defendant would be guilty, regardless of whether it was the defendant or such other person who actually delivered to said — such intoxicating liquor or received the pay therefor.⁵²

§ 3197. Sale and delivery of liquor through agents

§ 3197(1). Connecticut

You are instructed that the question in this case is whether there was a sale of intoxicating liquors—whisky—by the accused on the day named. The state claims to have proved that there was such a sale; that —, clerk of the accused, was the man in charge of his hotel, and was his agent at that time, stood there in his place and stead, and acted for the accused, and sold in fact a quart of whisky to R. If the jury find beyond a reasonable doubt that — was left in charge of the hotel, as the state claims, and was the agent of defendant, stood there in his place, acting for him at the time of the alleged sale, and did in fact sell intoxicating and spirituous liquors to R., then the offense has been proved. The questions of fact are: Was — agent as claimed? Was the sale made as claimed? Those are the two questions of fact for you to determine.⁵³

⁵⁰ Joyce v. State, 120 S. W. 453, 56 Tex. Cr. R. 333.

⁵¹ Selbert v. State, 180 S. W. 990, 121 Ark. 258.

⁵² Reed v. State, 109 S. W. 368, 53 Tex. Cr. R. 4, 126 Am. St. Rep. 765.

⁵³ State v. Curtiss, 36 A. 1014, 69 Conn. 88.

§ 3197(2). *Massachusetts*

The jury are instructed that, if defendant instructed his clerks not to violate his license, and knew all the while that they were violating it, and intended that they should violate it, the fact that he gave such instructions is, of course, of no importance upon the question of defendant's responsibility. It is for you to determine upon all the evidence, if you find that the law was in fact violated in that hotel by the clerks of defendant, whether the defendant in good faith gave instructions intended to be obeyed and enforced, and whether the sales in question, if made, were without his knowledge.⁵⁴

§ 3197(3). *Missouri*

The court instructs the jury that if you believe and find from the evidence that the defendant A. sold to any of the witnesses a pint of beer, as set forth in the first instruction herein given, and at the time and place stated in such instruction, and if you further believe from the evidence that the defendants K. and F. knew of the fact that the said A. was selling intoxicating liquors and aided, advised, and assisted in the making of such sale to the said witness, as aforesaid, if you find he made one, either by procuring the said whisky for the said A. with the intent that he should sell the same to such witness, or by selling to the said witness a ticket, with figures marked or printed thereon, with the intent and purpose that said witness might present the said ticket to the said A. and get beer thereon, and have the figures on said ticket representing the value of such beer punched therefrom, then said defendants, in such case, would be liable for the making of such sale to the same extent as if they had made the sale themselves.⁵⁵

§ 3197(4). *Texas*

In answer to your inquiry, propounded in writing, signed by your foreman, you are instructed that a delivery of intoxicating liquors may be by the person charged with the sale, or it may be by him acting through some one else, and if the defendant in person sold the intoxicating liquor, as alleged, to ———, and delivered said intoxicating liquor himself, in person, or through some other person, acting with the defendant, or under his instructions, such delivery, if any you find, under the instructions heretofore given, would constitute a delivery, and such sale and delivery, as above explained, if any you find from the evidence, beyond a reasonable doubt, was made by the defendant, or his agent, would authorize you to find

⁵⁴ *Commonwealth v. Coughlin*, 66 N. E. 207, 182 Mass. 558.

⁵⁵ *State v. Zehnder*, 168 S. W. 681, 182 Mo. App. 161.

defendant guilty, provided you find the other essential elements of the sale to be true as alleged.⁵⁶

The jury are instructed that, in order to make a sale, within the meaning of the law, it is not necessary that the defendant should in person deliver the liquor and receive the money, but the state must show by legal evidence beyond a reasonable doubt that the liquor was delivered with the knowledge and consent, and at the instance and direction, of the defendant, and that he or some one for him and for his use received the money therefor; and so in this case, if you believe from the evidence beyond a reasonable doubt that the prosecuting witness, J., requested one K. to let him, the said J., have some whisky, and the said K., with the intention of selling same, handed said J. whisky, and that said J. gave said K. money therefor, and that the defendant, knowing the purpose and intent of the said K., received the money, or any part of the money, for said whisky, then these facts would constitute a sale within the meaning of the law; but if, on the other hand, the defendant was merely changing money for the prosecuting witness and the said K., or if he had no knowledge of any purpose, if any purpose there was, on the part of the said K., to sell intoxicating liquor to prosecuting witness, J., or received no pecuniary benefit therefrom, then he would not be guilty of any offense, and if you so believe the facts to be, or if you have a reasonable doubt as to whether such are the facts, you will acquit the defendant and say by your verdict not guilty.⁵⁷

§ 3198. Interest of defendant in sale

You are instructed that before you can convict the defendant you must find from the evidence, beyond a reasonable doubt, that he either sold or was interested in the sale of alcohol or whisky, as alleged in the indictment. And if you find that the defendant had no interest in the sale and was the mere agent of B., or the witness R., then you will find him not guilty.⁵⁸

§ 3199. Liability of servant of innkeeper

The jury are instructed that, if the defendant was not in the room with the proprietor, and the door was locked between him and the proprietor, and the defendant took orders for intoxicating liquor, and delivered the liquor to the party ordering it, and took pay therefor, it was a sale by the defendant.⁵⁹

⁵⁶ Beck v. State, 141 S. W. 111, 63 Tex. Cr. R. 615.

⁵⁷ King v. State, 109 S. W. 182, 53 Tex. Cr. R. 101.

⁵⁸ Ellis v. State, 202 S. W. 702, 133 Ark. 540.

⁵⁹ Commonwealth v. Sinclair, 138 Mass. 493.

§ 3200. Purchase for another as accommodation

§ 3200(1). Arizona

I charge you that under the law one who accepts money from another for the purpose of buying liquor for him, and does buy the liquor and does deliver the liquor to the party who gave the money to purchase it, is guilty of the offense charged in the information, because in such a case the party who procures and delivers the whisky is concerned in the commission of a crime and is aiding and abetting in its commission, and, under the law of ———, is a principal in any crime so committed, and is equally guilty with the one who actually sold the liquor and took the money.⁶⁰

I charge you that even though you should find from the evidence that said defendant only accepted money from said ——— and ——— to pay for whisky for them at their request, and if you further find beyond a reasonable doubt that said defendant did take money from said ——— and ——— for said purpose, and did procure at their request and did deliver such whisky to them, then I charge you that said defendant is guilty, and you should so find by your verdict.⁶¹

I charge you that if you find, beyond a reasonable doubt, that the defendant accepted money from ——— and ———, or either of them, to procure whisky for them, and did thereafter procure the whisky for them and did deliver to them the whisky, you should find the defendant guilty as charged, regardless of where or how the defendant may have gotten the whisky; and it is wholly immaterial whether the defendant had any interest in or received any financial gain from the transaction.⁶²

§ 3200(2). Arkansas

I charge you further that, if you find the defendant in this case purchased liquor from some third party for W., solely as a matter of accommodation to W., and that this was a bona fide transaction, and not a subterfuge on the part of the defendant to evade the liquor laws, and you further find that the defendant did not furnish the liquor in controversy himself, and did not sell it, or was not interested in the sale of it, then in this event you should acquit the defendant.⁶³

You are instructed that if the defendant at the request of the prosecuting witness, and solely as the agent of the prosecuting witness, W., and without having any interest in the sale of the

⁶⁰ *Mo Yaen v. State*, 163 P. 135, 18 Ariz. 491, L. R. A. 1917D, 1014.

⁶¹ *Mo Yaen v. State*, 163 P. 135, 18 Ariz. 491, L. R. A. 1917D, 1014.

⁶² *Mo Yean v. State*, 163 P. 135, 18 Ariz. 491, L. R. A. 1917D, 1014.

⁶³ *Dean v. State*, 197 S. W. 634, 130 Ark. 322.

liquor other than to procure the liquor for the prosecuting witness, went to the party from whom the whisky was purchased and with the money furnished him by W., and without making any profit or having any pecuniary interest or other interest in the sale, purchased whisky which he carried to W., as a matter solely to accommodate W., and not for the purpose of procuring a purchaser for the whisky, or to assist in any way the seller in making the sale, then you should acquit the defendant. The court tells you that an intermediary, as mentioned in these instructions, is one who is employed to negotiate a matter between two parties, and who for that reason is considered as the mandatory of both.⁶⁴

§ 3200(3). Florida

The jury are instructed that, if you believe from all the evidence in this case that the defendant had no interest in the whisky alleged to have been sold, and no interest in the money received for it, at the time of the sale, but merely acted as the agent or friend of the purchaser, then it is your duty to render a verdict of not guilty.⁶⁵

§ 3200(4). Texas

The jury are instructed that, if you believe that the defendant ordered for accommodation the whisky for the witnesses ——— and ——— that is charged by the state to have been sold by the defendant to them, and that in ordering said whisky, if he did, he was acting as the agent of the purchasers, and not as the agent of the seller, then you are charged that such transaction would not constitute a sale by the defendant. You are further charged that if the defendant made other orders of intoxicating liquors for other persons, and in making said orders, if he did, he was acting for accommodation and as the agent of the purchasers, and not the seller, then such transactions, if any, would not constitute sales.⁶⁶

You are instructed that, if you believe from the evidence that the defendant acted as the agent of and for the witness ——— in locating and in purchasing said quart of whisky, and that he was not interested in the sale thereof as a seller, or if you have a reasonable doubt as to whether the defendant sold said quart of whisky to the witness ———, or acted as his agent in the purchase of said quart of whisky, you will acquit the defendant and so say by your verdict.⁶⁷

The jury are instructed that, if you believe from the evidence that S. approached defendant in ——— county, and gave him a dollar,

⁶⁴ *Kemp v. State*, 196 S. W. 918, 130 Ark. 175.

⁶⁵ *Hiers v. State*, 41 So. 881, 52 Fla. 25.

⁶⁶ *Dickson v. State*, 146 S. W. 914, 66 Tex. Cr. R. 270.

⁶⁷ *Dawson v. State*, 117 S. W. 136, 55 Tex. Cr. R. 315.

and requested defendant to send him (S.) a bottle of whisky from ———, and that defendant gave said dollar to C., and you further believe that at the time he delivered the dollar to C. he (C.) was in the employ of H., and sent one quart of whisky to said S. from H.'s stock of liquors, and at the time you believe defendant had no interest in H.'s business, you will acquit the defendant.⁶⁸

The jury are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant, at the time he received ——— cents from W., if he did receive ——— cents from the said W., was under an implied agreement that he, defendant, would furnish said W. with whisky, and, in pursuance of said agreement, he did place whisky where the said W. could get it, then he would be guilty, and you will so find and assess his punishment as heretofore instructed; unless you find, on the contrary, from the evidence, that defendant purchased said whisky from ———, and that in doing so he was acting as the agent of said W. in the purchase of said whisky, for the accommodation of the said W., and had no pecuniary interest in said sale, in which case you will find the defendant not guilty, and so say by your verdict.⁶⁹

§ 3201. Liability for selling liquor to minor

§ 3201(1). Arkansas

The court instructs the jury that, if you find from the evidence that the defendant and ———, a minor, entered into an agreement between themselves by which they agreed to order one half gallon of whisky from ———, and each put in their part of the necessary money to buy the same, and that by agreement the whisky was ordered in the name of the defendant, for said defendant and minor, and that, when said whisky was received by said defendant, he and the said minor got together and divided said whisky, each taking that part of the same for which he had advanced the purchase money, you will find the defendant not guilty.⁷⁰

§ 3201(2). Michigan

The jury are instructed that the proof by the people in this case of the sale of liquor makes a *prima facie* case against defendant; that is to say, that if the question of intent is not rebutted or overcome by the testimony introduced on behalf of the defendant, then your verdict should be guilty. But, as I have already stated, if you find from the evidence that said defendant had good reason to believe and did believe that the said ——— was of the age of 21 years, then it is your duty to acquit. A minor who is approach-

⁶⁸ Brown v. State (Cr. App.) 76 S. W. 475.

⁶⁹ Grimes v. State, 72 S. W. 589, 44 Tex. Cr. R. 503.

⁷⁰ State v. Herron, 139 S. W. 314, 99 Ark. 563.

ing his majority might have the appearance of being 21 years old. and if, on being inquired of, he should assert that he was of full age, a dealer might in good faith sell him liquor without any intention of violating the law. If this be your conclusion in this case, then your verdict should be "Not guilty."⁷¹

§ 3202. Sales by druggists

§ 3202(1). Iowa

The jury are instructed that, if the liquor sold to ——— was so compounded with other substances as to lose its distinctive character as an intoxicant, and no longer desirable for use as a stimulating beverage, and was in fact a medicine, then defendant was not guilty of violating the law in making the sale.⁷²

§ 3202(2). Massachusetts

The jury are instructed that the defendant, as a druggist and apothecary, had a right to have in his possession intoxicating liquors in any quantity to be used solely for the purpose of mixing and combining with other ingredients as a medicine, and that the only question for the jury to decide is whether the liquors found in defendant's possession were so kept by him solely for the purpose of combining with other ingredients as a medicine, or were kept to be sold in violation of law; that, if they should find that they were so kept solely for combining with other ingredients as a medicine, the jury should return a verdict of not guilty, but that, if they should find that they were kept for sale, they should bring in a verdict of guilty.⁷³

§ 3202(3). Missouri

You are instructed that if you believe and find from the evidence in this cause that the defendant, in the county of ———, in the state of ———, at any time within one year prior to ———, did unlawfully sell to ——— one pint or any other quantity of whisky, and shall further find that said defendant at the time of said sale was a druggist and proprietor of a drug store and a pharmacist, and made such sale of whisky to ——— without having first obtained a written prescription from some regular registered and practicing physician, stating the name of the person for whom the same was prescribed, and that said whisky was prescribed as a necessary remedy, you will find the defendant guilty as he stands charged in the first count of the indictment, and, so finding, will assess his punishment at a fine not less than ——— nor more than ——— dollars.⁷⁴

⁷¹ People v. Bronner, 108 N. W. 672, 145 Mich. 399.

⁷² State v. Gregory, 82 N. W. 335, 110 Iowa, 624.

⁷³ Commonwealth v. Boutwell, 38 N. E. 441, 162 Mass. 230.

⁷⁴ State v. McAnally, 79 S. W. 990, 105 Mo. App. 333. This instruction was not objected to.

The jury are instructed that, if they believe from the evidence that defendant was the proprietor of a drug store and a registered pharmacist of ——— county, and sold the prosecuting witness whisky in a less quantity than ——— gallons without first having a prescription from some regular and practicing physician, stating that said liquor was a necessary remedy, they should find the defendant guilty.⁷⁵

§ 3203. Same—Sale under prescription of physician

The jury are instructed that if you find from the evidence that a person asked the defendant to sell him a pint or a quart or any other quantity of corn or rye whisky, or some other intoxicating liquor, and the defendant told that person that he would not sell same to him unless he brought a prescription of a physician for it; and if you further find that said person soon thereafter came back to the defendant with a physician's prescription for said corn or rye whisky, or other intoxicating liquors, with other ingredients to be put in it; and if you further find that defendant took such prescription and filled it by taking corn or rye whisky, or other intoxicating liquors, and putting said other ingredients called for by said prescription in the same, and then sold and delivered to said person, for valuable consideration, the said corn or rye whisky, or other intoxicating liquor, with said other ingredients in the same; and if you further find from the evidence that the ingredients put into the corn or rye whisky, or other intoxicating liquors, did not destroy the same as an intoxicating drink—then I charge you that defendant is guilty of violating the ——— law in this county, and you should find him guilty. But if said other ingredients did destroy the effects of said intoxicating liquors as an intoxicant, then he would not be guilty.⁷⁶

§ 3204. Same—Effect of prescription issued by druggist in capacity of physician

The jury are instructed that, although a prescription signed by the pharmacist who sells liquor is a complete defense if such person was a regular, practicing physician, yet, in order to be available as such defense, it must be issued before the sale of the liquor, and that if the prescription introduced in evidence was signed without the knowledge of ———, and without any request therefor, or was written by the defendant after the sale of the liquor, then it was no defense to the charge.⁷⁷

⁷⁵ State v. Hensley, 67 S. W. 964.
94 Mo. App. 151.

⁷⁷ State v. Hensley, 67 S. W. 964,
94 Mo. App. 151.

⁷⁶ Bradley v. State, 48 S. E. 981,
121 Ga. 201.

The jury are instructed that if the defendant was a duly registered pharmacist, owning and operating a drug store, and also a licensed physician, and, as such regular and practicing physician, issued his prescription to the prosecuting witness at the request of said witness, or any person for him, and, as such registered pharmacist, filled the prescription, then the prescription is a complete bar to the prosecution, even though the jury believe and find from the evidence that it was a false pretense, and the liquor was not a necessary remedy.⁷⁸

§ 3205. Sale for sacramental purposes

The jury are instructed that the sale of wines for sacramental purposes within ——— county would not be a violation of the law; and if you believe from the evidence that defendant sold the witness ——— intoxicating liquor, as alleged, but you further believe from the evidence that the liquor so sold was wine sold for sacramental purposes, or if you have a reasonable doubt of this, then you will find defendant not guilty. Upon the question as to whether or not the sale, if any, was made for sacramental purposes, you are instructed that if defendant made said sale in good faith, believing at the time that it was for sacramental purposes, or if you have a reasonable doubt as to this, you will find defendant not guilty, even though you may believe that said wine was purchased or used for some other purpose.⁷⁹

C. PLEADING AND EVIDENCE IN CRIMINAL PROSECUTION

§ 3206. Proof of sales to other persons than those named in indictment

The jury are instructed that the burden is on the state to prove that the liquor sold by defendant to the state's witness ——— was intoxicating liquor, and he cannot be convicted, unless the evidence shows that fact; and defendant cannot be convicted in this case for sales made by him to other persons than the state's witness ———. Neither can the defendant be convicted for sales made by other persons than the defendant. The defendant being on trial for an alleged sale to the state's witness ———, he cannot be convicted in this cause for any other sale.⁸⁰

§ 3207. Presumptions and burden of proof

§ 3207(1). Arkansas

The court instructs the jury that it devolves upon the state in a case of this kind to prove every material allegation in the indict-

⁷⁸ State v. Hensley, 67 S. W. 964,
94 Mo. App. 151.

⁷⁹ White v. State, 79 S. W. 523, 45
Tex. Cr. R. 602.

⁸⁰ Robinson v. State (Tex. Cr. App.)
49 S. W. 386.

ment, and the material allegations in the indictment, briefly stated, are that the defendant sold liquor, some kind of liquor, as mentioned in this indictment or any kind of intoxicating liquor; that that occurred in ——— county, state of ———, within ——— years next before the finding of this indictment.⁸¹

§ 3207(2). Iowa

You are instructed that the state claims that the defendants kept or used the basement or cellar under their restaurant, and kept beer therein for unlawful purposes. On this issue the burden of proof is upon the state, and, in order to convict defendants on account of what was kept or done in said basement or cellar, you must find from the evidence and beyond reasonable doubt that the defendants kept or used the cellar in question, and that intoxicating liquor was kept therein for the purpose of selling unlawfully. If defendants kept or used the cellar in question, and beer was found therein, the law would presume it was kept there unlawfully; but this presumption might be overcome by evidence showing that the defendants did not keep the beer in the cellar unlawfully. If the defendants did not keep or use the cellar in question, and had no control of it, they would not be responsible for what was kept or done in the cellar; but, if they kept or used the cellar, they would have no right to permit any other person to keep beer therein for unlawful purposes.⁸²

§ 3207(3). North Dakota

I charge you that the finding of intoxicating liquors in the possession of the accused in any place, except his dwelling house or its dependencies, or in such dwelling house, if the same is a tavern, store, public eating house, grocery, or other place of public resort, or in unusual quantities in the private dwelling house, or its dependencies, of a person keeping a tavern, store, public eating house, or grocery, or other public resort, shall be received and acted upon as presumptive evidence that such liquor was kept for sale contrary to law. And I charge you that presumptive evidence is competent and sufficient upon which to convict, provided the jury in fact believes beyond a reasonable doubt that the defendant is guilty.⁸³

⁸¹ Johnston v. State, 219 S. W. 25, 142 Ark. 402.

⁸² State v. Stevens, 94 N. W. 241, 119 Iowa, 675.

⁸³ State v. Kelly, 132 N. W. 223, 22 N. D. 5, Ann. Cas. 1913E, 974.

§ 3208. Same—In prosecution for having possession of liquor with intent to sell

§ 3208(1). Oklahoma

You are instructed that, under the laws of the state of ———, the keeping in excess of one quart of any spirituous, vinous, fermented, or malt liquors, or of any liquors or compounds of any kind or description whatsoever, whether medicated or not, which contain as much as one-half of one per centum of alcohol measured by volume, and which are capable of being used as beverages (except preparations compounded by any licensed pharmacist, the sale of which would not subject him to the payment of the special tax required by the laws of the United States), is prima facie evidence of an intention to convey, sell, or otherwise dispose of such liquors.⁸⁴

§ 3208(2). Virginia

The court instructs the jury that, if they believe from the evidence in this case beyond a reasonable doubt that the defendants, or either of them, had in their, or his, or her possession, in their, or his, or her home, as the case may be, in the city of ———, at any time within the time laid in the indictment in this case, more than ——— gallons of distilled liquor, or more than ——— gallons of beer, that this would be prima facie evidence that the said defendants, or the one so in possession of such distilled liquor, or beer, had the same for sale, although the jury may further believe from the evidence that said defendants, or the one so having in his or her possession such distilled liquor or beer, acquired the same prior to ———. The punishment for such an offense is by a fine of not less than \$—— nor more than \$—— and confinement in jail for a period of not less than ——— nor more than ——— months.⁸⁵

§ 3209. Presumption as to whether transaction a sale

I instruct you that the statute provides that in all prosecutions for selling intoxicating liquor, if delivery of such liquor be proved, it shall not be necessary to prove payment, but such delivery shall be prima facie evidence of such sale. Prima facie evidence, I instruct you, is that degree of proof which, unexplained and uncontradicted, is alone sufficient to establish the act charged. If the state has established from the evidence beyond a reasonable doubt that the defendant delivered, or caused to be delivered, intoxicating liquor on the date named in the indictment, or on any day since ———, to ———, as therein alleged, then I instruct you that the burden of

⁸⁴ Caffee v. State, 148 P. 680, 11 Okl. Cr. 485.

⁸⁵ Pine v. Commonwealth, 93 S. E. 652, 121 Va. 812.

showing that transaction was not a sale is upon the defendant. You are to consider such fact of delivery, if any, together with all the evidence produced by both sides, including the explanation of the defendant and any presumptions, and if, in the light of the instructions of the court, after considering the same, you believe that the state has shown from the evidence beyond a reasonable doubt that the defendant committed the acts charged, you will find him guilty as charged; but if you then entertain a reasonable doubt as to his guilt, you will acquit him.⁸⁶

§ 3210. Matters considered on question of guilt or innocence of defendant

The jury are instructed that, if the evidence is consistent with the innocence of the defendant, he cannot be convicted; that evidence that the shop was fitted up with the paraphernalia of the liquor traffic may be considered, but, inasmuch as the sale of malt liquors is permitted, the evidence, so far as it tends to show that only, should be disregarded; and that the evidence that a shop was fitted up for the traffic in liquors is of less significance than formerly, when no sales of malt liquors were permitted.⁸⁷

§ 3211. Sufficiency of evidence—Prosecution for manufacture of alcoholic liquor

You are instructed that the fact, if it is a fact, that the defendant had in her possession malt or other material, out of which alcoholic spirits or liquors could be manufactured, is not enough, standing by itself, to authorize you to convict the defendant; but the proof must go further, and show beyond a reasonable doubt that the defendant did, in fact, manufacture or make a liquor commonly called —— beer, and, if this is not proven beyond a reasonable doubt, your verdict should be one of not guilty. But the fact, if you find it to be a fact, that the defendant had in her possession malt, grain, or other material, out of which alcoholic liquors could be manufactured, is a circumstance you may consider to determine her guilt or innocence of this charge.⁸⁸

§ 3212. Sufficiency of evidence of character of beverage sold

§ 3212(1). California

You are instructed that, if you have any reasonable doubt as to whether the beverage sold was alcoholic within the meaning of the —— Act you will return a verdict of not guilty, and in this connection I charge you that alcoholic liquor as used in the ——

⁸⁶ State v. Hamilton, 157 P. 796, 80 Or. 562.

⁸⁸ Patterson v. State, 215 S. W. 629, 140 Ark. 236.

⁸⁷ Commonwealth v. Cogan, 107 Mass. 212.

Act means liquor which contains one per cent. by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage.⁸⁹

I charge you that if the beverage which defendant sold to _____ contained less than the one per cent. by volume, of alcohol, it was not unlawful to sell the same, and in determining the quantity of alcohol therein you are to give the defendant the benefit of every reasonable doubt, if any you have. You are to consider and weigh carefully all of the evidence in the case, and if you cannot say that you are satisfied beyond all reasonable doubt and to a moral certainty that said beverage contained one per cent. or more, by volume, of alcohol, you will find the defendant not guilty.⁹⁰

§ 3212(2). **Delaware**

Gentlemen of the jury: _____, the accused, is charged in the indictment with selling to one _____ on the _____ of the present year, in this city, a quantity of lager beer greater than one barrel. It is admitted that the defendant had a license to sell lager beer in quantities as great as a barrel but not greater. So that, before you can find him guilty you must be satisfied from the evidence beyond a reasonable doubt that he sold a greater quantity than a barrel. We decline to instruct you to find a verdict of not guilty as requested by accused's counsel, because, as he claims, there is no proof that the beer delivered to _____ was lager beer. We think there is some testimony upon this point, but whether it is sufficient to establish the fact that it was lager beer is for the jury and not for the court to determine.⁹¹

You are instructed that whether the contents of said bottles was lager beer is a material fact in the case, and must be proved to the satisfaction of the jury beyond a reasonable doubt, as every other material fact in the case must be proved, before the jury can find the accused guilty. This fact however, like any other material fact, may be proved by either direct or circumstantial evidence; but, if proved by either character of evidence the proof must satisfy the jury beyond a reasonable doubt.⁹²

§ 3212(3). **Texas**

You are instructed that any liquor intended for use as a beverage, and capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk, is an in-

⁸⁹ People v. Bickerstaff (App.) 190 P. 656.

⁹⁰ People v. Bickerstaff (App.) 190 P. 656.

⁹¹ State v. Verderamo, 96 A. 758, 6 Boyce, 72.

⁹² State v. Verderamo, 96 A. 758, 6 Boyce, 72.

toxicant. And in this case, if you have a reasonable doubt as to whether the liquor charged to have been sold by defendant was intoxicating as above defined, then you will give defendant the benefit of such doubt and acquit him.⁹³

§ 3213. Judicial notice of character of common beer

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the liquor sold to —— by defendant, on the occasion in question, was ordinary beer, a malt liquor, you will find him guilty, and will fix his punishment at a fine not less than \$——, nor more than \$——, or an imprisonment in the county jail not less than —— or more than —— days, or both such fine and imprisonment, in your discretion.⁹⁴

⁹³ Walker v. State, 98 S. W. 843,
50 Tex. Cr. R. 496.

⁹⁴ Flanders v. Commonwealth, 130
S. W. 809, 140 Ky. 33.

CHAPTER CLXXIX

JOINT ADVENTURES

§ 3214. Mutual rights and liabilities—Effect of contract permitting one party to control business to his own satisfaction.

3215. Liability of one party for preventing the carrying out of joint adventure.

3216. Right of one party, on default of other joint adventurer, to dispose of effects of joint enterprise.

§ 3214. Mutual rights and liabilities—Effect of contract permitting one party to control business to his own satisfaction

The jury are instructed that, if you believe from the evidence that defendant assumed control of the rafting and towing of the logs under the clause in the contract of ——— which permitted defendant, if he should deem it necessary, to control the business in every particular to his own satisfaction, then plaintiff assumed all ordinary risks, such as the risks of navigation, winds, and calamities that might come, but plaintiff was not responsible for the negligent acts, if any, of defendant or his agents, and defendant was liable to plaintiff for any damages resulting from the want of ordinary care and prudence by defendant if there was any such want, in the conduct of the business.¹

§ 3215. Liability of one party for preventing the carrying out of joint adventure

You are instructed that, if the jury believe, from the evidence, that R. and the defendant made the contract described in the declaration, that R. performed the contract on his part by platting, surveying and subdividing the block described in the contract, at his own expense; that he advertised and sold a part of the lots with the concurrence of defendant and at R.'s own expense, and was willing and offered to advertise and sell the balance, and could have sold the same in his lifetime, but was prevented by the defendant from making further sale thereof, without any just and reasonable excuse, and the defendant, without such excuse, refused to make bonds for deeds, upon payment and security, as is provided by the agreement, then the jury will find for the plaintiff and assess the damages.²

¹ *Sullivan v. Ross' Estate*, 82 N. W. 1071, 124 Mich. 287,

² *Robinson v. Stow*, 39 Ill. 568.

§ 3216. Right of one party, on default of other joint adventurer, to dispose of effects of joint enterprise

The jury are instructed that, if you believe from the evidence that plaintiff and defendant entered into an agreement to jointly purchase a block of ——— shares of the stock of ——— Company, that pursuant to the said agreement defendant gave his note for \$—— to such company for such stock, and plaintiff gave his note to defendant for \$——, being one-half the price of said stock, and that by such agreement plaintiff was to devote his time to selling said stock, and if you further believe from the evidence that plaintiff refused to pay his note to defendant or to make any effort to sell said stock, and that by reason of such failure of plaintiff, if any, to carry out his part of the agreement, the accomplishment of the joint enterprise became impossible, then defendant was entitled to use his best judgment and efforts to promote the welfare of that joint enterprise, by disposing of the property thereof to the best advantage possible, and paying what was unavoidable to prevent further loss.*

* *Davidor v. Bradford*, 109 N. W. 576, 129 Wis. 524.

CHAPTER CLXXX

JUDGMENT

§ 3217. Payment—Presumption from lapse of time.

§ 3217. Payment—Presumption from lapse of time

We say to you that the judgment in question standing upon the records of the court unsatisfied and — years not having elapsed since it became due, is presumed to be a subsisting and valid judgment, and there is no presumption that it has been paid in the absence of other facts and circumstances from which the jury might infer that it is paid. The burden therefore is upon the defendant, the estate of —, to satisfy you that the said judgment is paid. Unless you are satisfied, from the evidence which you have heard in this case, that the debt has been paid your verdict should be in favor of the plaintiff, because in that event the judgment would stand. Under the law a judgment is presumed to be paid after the lapse of — years from the time the debt became due, and in that case the burden is upon the plaintiff to show that it is not paid. But where — years have not elapsed such presumption does not arise from the lapse of time, and the burden is upon the defendant to show that it is paid.¹

We say to you that, where a long period of time, for example — or — years, has passed since the judgment debt became due, you have a right to consider any and all relevant facts and circumstances shown by the evidence which tend to show that such judgment has been paid. You may take into consideration therefore in arriving at your verdict, evidence in respect to the financial condition of each or either of the parties to the judgment, both plaintiff and defendant; and also the habits of the plaintiff as to promptness in the collection of indebtedness due to him. But we instruct you that such facts and circumstances are to be considered by you only so far as they may tend to satisfy you that the judgment in question was paid, or from which such payment may be reasonably inferred.²

¹ Janvier v. Culbreth (Del.) 63 A. 309, 5 Pennewill, 505.

² Janvier v. Culbreth (Del.) 63 A. 309, 5 Pennewill, 505.

CHAPTER CLXXXI

JUDICIAL SALES

§ 3218. Right and title of purchaser.

3218(1). Delaware.

3218(2). Missouri.

3219. Collateral attack.

§ 3218. Right and title of purchaser

§ 3218(1). Delaware

The jury are instructed that G. appears as one of the defendants in this case. He claims that the cows in question belong to him; that he was the purchaser of the cows at a sale made by virtue of an execution issued on a judgment recovered against P. All the court needs to say regarding this is that G. can have only such title as P. had. The fact that a sale is made by a sheriff or constable does not make title. The officer selling passes only the title held by the party as whose property the goods were sold; therefore G.'s claim of property in the cows depends upon the validity of P.'s claim of property.¹

§ 3218(2). Missouri

The court declares the law to be that the purchaser at all judicial sales takes only the right, title, and interest of the defendants therein, and, if one ———, the payee, had no right, title, or interest in the note in question at the time said note was levied upon and sold under authority of the justice court of ——— township, then the verdict and finding should be for the defendant, C.²

§ 3219. Collateral attack

The court instructs the jury that as it appears from the evidence that ———, the sole plaintiff herein, was made a party to the chancery suit of ——— v. ———, in the circuit court of ———, and that service of process in said suit was duly accepted by his attorney, the decree of sale made in said suit, the sales made thereunder, the decree of confirmation of such sales and the deeds made pursuant thereto cannot be attacked collaterally in this proceeding, and as it further appears from the evidence introduced in the case that no exception or reservation as to title to any part of the lands decreed to be sold was made either in the decree of the court directing such sale or in the deeds made in pursuance of the sales

¹ Smith v. Kemether, 76 A. 482, 1 Boyce, 572.

² Tipton v. Christopher, 116 S. W. 1125, 135 Mo. App. 619.

made thereupon, you are instructed that said deeds, in so far as they purport to convey lands embraced in this suit, present a legal defense to the same, and the plaintiff is not entitled in this action to recover the possession of the minerals thereupon from any defendant claiming title to any portion of the lands in suit under the deeds so made in said chancery suit.³

³ Wood v. Browning (C. C. A. W. Va.) 176 F. 273, 100 C. C. A. 161.

CHAPTER CLXXXII

JUNK DEALERS

§ 3220. Duty to keep record of details concerning purchases—Criminal liability.

§ 3220. Duty to keep record of details concerning purchases—Criminal liability

Gentlemen of the jury: In this case the state charges that the defendant is a junk dealer in this city, and as such junk dealer, did on the — of — of this year, purchase from one — certain pieces of brass, and did not enter in a book furnished for that purpose, the information designated in section —, which is as follows: * * *¹

You are instructed that this section makes it the duty of a junk dealer in this city, to enter in a book supplied by the police department of the city of —, fairly written in English, at the time any property is purchased by him, an accurate account and description of the goods and articles purchased, the amount paid for them, together with a description of the person selling the goods or articles, including the color of his complexion, color of eyes and hair and his stature and general appearance. It is incumbent upon the state to show to your satisfaction beyond a reasonable doubt all the essential elements of the offense charged; that is, that the defendant was, at the time of the alleged offense, a junk dealer in the city of —, that as such, he purchased from — certain pieces of brass, and did not make the entries in such a book as required by section — of the Code. If you are so satisfied by the evidence produced in the case, your verdict should be guilty.²

¹ State v. Checkver (Del.) 96 A. 202, 6 Boyce, 30.

² State v. Checkver (Del.) 96 A. 202, 6 Boyce, 30.

CHAPTER CLXXXIII

KIDNAPPING

§ 3221. Elements of offense.

§ 3221. Elements of offense

The jury are instructed that kidnapping is a crime in this state made so by statute. To constitute the crime of kidnapping there must be forcible seizure and confinement or inveiglement of another by a person acting without lawful authority, with intent to cause such other person to be secretly confined and imprisoned in this state against his will.¹

¹ State v. Hosmer, 142 P. 581, 72 Or. 57.

CHAPTER CLXXXIV

LANDLORD AND TENANT

A. CREATION AND EXISTENCE OF RELATION

- § 3222. Requisites of lease.
- 3223. Same—Conditional signing.
- 3224. Necessity of recording lease.
- 3225. Effect of occupation under sublease.
- 3226. Evidence on question as to whether lease knowingly executed.
- 3227. Estoppel to deny title of landlord.
- 3228. Same—Attornment by tenant to third person.

B. DURATION AND TERMINATION OF TENANCY

- 3229. Holding over.
 - 3229(1). Michigan.
 - 3229(2). Nebraska.
 - 3229(3). Ohio.
- 3230. Sufficiency of tender of rent to keep tenancy alive.
- 3231. Acceptance of another as tenant.
- 3232. Necessity of giving notice to tenant in order to terminate tenancy.
- 3233. Renewal dependent on premises not being sold.

C. ASSIGNMENT AND SUBLETTING

- 3234. Prohibition against assignment of lease—What constitutes violation.
- 3235. Breach of agreement by lessor to consent to subletting—Damages.

D. RIGHTS, DUTIES, AND LIABILITIES IN GENERAL, WITH RESPECT TO LEASED PREMISES

- 3236. Recovery by tenant for false representations as to quality of land.
 - 3236(1). Missouri.
 - 3236(2). Wisconsin.
- 3237. Same—Measure of damages.
- 3238. Terms of tenancy implied on holding over.

E. POSSESSION, ENJOYMENT, AND USE OF PREMISES BY TENANT

- 3239. Liability to tenant for failure to give possession—Damages.
- 3240. Interference with tenant's enjoyment of premises—What constitutes eviction.
- 3241. Liability of lessor to tenant for trespass.
- 3242. Interference with enjoyment of premises by alterations.
- 3243. Damages for wrongful dispossession of tenant or for wrongful interference with his possession.
 - 3243(1). Alabama.
 - 3243(2). Virginia.
- 3244. Same—Exemplary damages.

F. RIGHTS AND LIABILITIES WITH RESPECT TO CONDITION AND REPAIR OF PREMISES

- 3245. Duty of lessor to make repairs and liability for repairs made by tenant.
 - 3245(1). Delaware.
 - 3245(2). Nebraska.
- 3246. Duty with respect to compliance with ordinances concerning protection from fire.

- § 3247. Measure of recovery by tenant for breach of duty or covenant as to condition or repair of premises.
 3247(1). Arkansas.
 3247(2). Kansas.
3248. Damages for breach of contract by lessor to furnish heat.
3249. Liability of tenant for breach of covenant with respect to protecting premises from injury.
 3249(1). Maryland.
 3249(2). Michigan.
3250. Duty of tenant to restore premises in as good condition as when received.
3251. Obligation of tenant under covenant to destroy weeds.
3252. Waste by tenant—Liability for burning straw.

G. INJURIES TO THE REVERSION

3253. Right of action by lessor against third person for injury to premises.

H. INJURIES ARISING FROM DANGEROUS OR DEFECTIVE CONDITION OF PREMISES

3254. Liability of lessor to tenant for injuries from defective condition.
 3254(1). Delaware.
 3254(2). Idaho.
3255. Same—Notice of defects.
3256. Injuries to servant of tenant by falling down elevator shaft.
3257. Presumptions and burden of proof in action for injuries to tenant.
3258. Liability of lessor for injuries to third persons—Invitees.
3259. Same—Liability to persons in street.
3260. Liability of tenant for injuries to person in street.

I. RENT

3261. Liability for rent in general.
3262. Failure to put tenant in possession.
3263. Eviction as defense to action for rent.
 3263(1). Alabama.
 3263(2). Illinois.
 3263(3). South Dakota.
3264. Effect of eviction from part of premises.
3265. Liability of lessor for acts of agent in evicting tenant—Verbal authority.
3266. Preventing tenant from carrying out purposes for which premises leased.
 3266(1). Michigan.
 3266(2). Wisconsin.
3267. Defense of untenable condition of premises.
 3267(1). Arkansas.
 3267(2). Colorado.
3268. Abatement of rent because of destruction of buildings.
3269. Defense of collapse of building because of structural weakness unknown to tenant.
3270. Defense that lessor did not carry out contract to erect building of a certain character.
3271. Liability where tenant at request of lessor occupies other quarters than those leased.
3272. Surrender of premises as defense to action for rent.
3273. Release from liability.
3274. Same—Effect of leasing premises to third person.
 3274(1). Kansas.
 3274(2). Missouri.
3275. Set-off of damages for failure to make repairs.

- § 3276. Set-off of cost of permanent improvements.
- 3277. Tender of payment.
- 3278. Persons liable for rent.
- 3279. Same—Release of original lessee and acceptance of others as tenants.
- 3280. Burden of proof in action for rent.
 - 3280(1). Illinois.
 - 3280(2). Oklahoma.

J. REMEDIES OF LANDLORD FOR ENFORCEMENT OF RENT

- 3281. Right of lessor to sue out attachment for rent not due.

K. LIEN OF LANDLORD

- 3282. Operation and effect as against one selling goods to lessee under contract of conditional sale.
- 3283. Enforcement against third person purchasing products of leased premises.
- 3284. Same—Notice to third person of lien of lessor.
- 3285. Same—Duty of landlord to reduce damages.
- 3286. Same—Waiver of lien.

L. DISTRESS

- 3287. Liability for wrongful distress.

M. RENTING ON SHARES

- 3288. Status of parties under cropping agreement.
- 3289. Method of sharing in products of farm.
- 3290. Liability of tenant to lessor.
- 3291. Right of lessor to recover against third person for injuries to interest of tenant.

A. CREATION AND EXISTENCE OF RELATION

§ 3222. Requisites of lease

The court instructs the jury for the defendant that a lease contract, though signed by all the parties, is ineffectual, and not binding until the same is delivered and accepted as the final agreement between the parties; and if the jury believe from the evidence that the defendant did not deliver or accept delivery of the lease contract sued on the night it was signed, and afterwards demanded that the same be signed and acknowledged by ———, the owner, before he would execute the rent notes and accept delivery of the lease contract, and said lease contract was never signed and acknowledged, the jury should return a verdict for the defendant.¹

The court instructs the jury that, if the lease in controversy was signed by the defendant and signed by plaintiff for himself and for his wife, and the lease delivered and accepted as the final agreement between the parties, this made a valid lease for the year ———, and the plaintiffs were under no obligation to sign any other lease, and the plaintiffs are entitled to recover \$——— with interest from the ——— day of ———, unless the jury believes

¹ *Hutchinson v. Platt*, 81 So. 281, 119 Miss. 606.

from the evidence that there was a valid lease outstanding made prior to this lease by the plaintiffs to ———.³

The court instructs the jury for the plaintiffs that it is not necessary to the validity of a lease that it should be acknowledged or recorded.³

The court instructs the jury for plaintiffs that the fact that no rent notes were delivered to plaintiffs does not affect their right to recover rent for ——— if the lease sued on was agreed upon between the parties.⁴

§ 3223. Same—Conditional signing

You are instructed that, if the lease of ———, was signed and left with the defendant for the purpose of procuring a written guaranty, and signed by S., and then to be forwarded to ———, and that the same was not to become a binding contract between the parties until the same was so guaranteed, then before ——— was bound to regard the contract as completed he was entitled to a valid and binding lease guaranteed by S.; and if not made in a reasonable time, or on notice by the defendant that he could not procure the guaranty of S., and that he might regard the contract at an end unless he would let him have it without security, this would end the contract, unless ——— afterwards agreed to let him have it without security.⁵

§ 3224. Necessity of recording lease

The jury are instructed that under the law the lease offered in evidence should have been recorded, and is void as to ———, unless you believe from the evidence that at the time of his purchase he had knowledge of such facts as would put a reasonably prudent man on inquiry as to its terms.⁶

§ 3225. Effect of occupation under sublease

The court instructs the jury that the defendant acquired no right to or interest in the ground mentioned in the evidence, unless the jury believe from the evidence that plaintiff's attorney, ———, accepted and recognized defendant as tenant under the terms of the ——— year ——— lease. Unless you believe that such was the fact, then the defendant was a tenant at will, and the plaintiff had the right to eject the defendant from the ground upon giving one month's notice.⁷

The court instructs the jury that if they believe from the evi-

³ Hutchinson v. Platt, 81 So. 281, 119 Miss. 606.

³ Hutchinson v. Platt, 81 So. 281, 119 Miss. 606.

⁴ Hutchinson v. Platt, 81 So. 281, 119 Miss. 606.

⁵ Jordan v. Davis, 106 Ill. 336.

⁶ Great Atlantic & Pacific Tea Co. v. Cofer (Va.) 106 S. E. 695.

⁷ Gattton v. Dobbin, 144 S. W. 757, 147 Ky. 624.

dence that plaintiff's attorney, ———, accepted or recognized the defendant as tenant under the terms of the ——— year ——— lease, and that defendant, on ———, paid or offered to pay the rent then due, and had paid all taxes, insurance, water bills, street improvements, and all expenses against the property, then the law is for the defendant and the jury should so find.⁸

The court instructs the jury that, unless the jury believe from the evidence that plaintiff's attorney, ———, accepted and recognized the defendant as tenant under the terms of the ——— year ——— lease, and that on ———, the defendant had paid or had offered to pay the rent then due, and had paid all taxes, insurance, water bills, street improvements, and all expenses against the property, then the law is for the plaintiff, and the jury should so find.⁹

§ 3226. Evidence on question as to whether lease knowingly executed

The court instructs the jury that, if you believe from the evidence that on ———, the defendant and his wife executed to the plaintiff a warranty deed to the lands involved in this action, and that said deed was executed for the sole purpose of securing an indebtedness of \$——, then owing from the defendant to the plaintiff, then such deed, though absolute on its face, would be a mortgage in fact, and under the circumstances the defendant would be entitled to the possession of the real estate mentioned in the lease sued on in this action. If the defendant was entitled to the possession, as hereinbefore explained, then you may consider that fact with all the other evidence relative to that issue in determining whether or not the defendant knowingly executed the lease mentioned in the complaint.¹⁰

§ 3227. Estoppel to deny title of landlord

You are instructed that, where a tenant holds possession under another as his landlord, he is estopped from denying the title of his landlord.¹¹

§ 3228. Same—Attornment by tenant to third person

The jury are instructed that, if the tenant of the plaintiff surrendered his possession of the land to the defendant without the consent of the plaintiff, the same was void, and the legal posses-

⁸ *Gatton v. Dobbin*, 144 S. W. 757, 147 Ky. 624.

⁹ *Gatton v. Dobbin*, 144 S. W. 757, 147 Ky. 624. The court says that receipt of rent is only prima facie acknowledgment of an existing tenancy,

and therefore the instruction was not misleading.

¹⁰ *Heston v. Dougan*, 96 N. E. 614, 52 Ind. App. 40.

¹¹ *Anthony v. Seed*, 40 So. 577, 146 Ala. 193.

sion was not changed by it, and the plaintiff was not divested of its possession by said surrender to the defendant.¹²

B. DURATION AND TERMINATION OF TENANCY

§ 3229. Holding over

§ 3229(1). Michigan

The court instructs the jury that, under the evidence which has been given in this case plaintiff is entitled to recover. The evidence shows that originally the old P. Company entered into possession under a lease from the complainant of the property in question, and, having entered into possession, gave a sublease to the ——— Railroad Company. To that lease, executed by the plaintiff to the P. Company, the A. Company afterwards succeeded. The testimony shows that there were various leases and re-leases of causes of action entered into between the A. Company and complainant with reference to the balance of this property from which this ——— foot strip was originally taken, and that the leases to the A. Company and P. Company and the sublease to the ——— Railroad Company expired by limitation in ———. The question before the court at the present time is, not the title to the property, because the title to the property in the complainant is conceded, but is whether the complainant is entitled to the possession of the premises without giving three months' notice to the ——— Railroad Company. It is provided, by section ———, that when a person shall hold over any lands or tenements after the time for which they were demised or let to him, or to the person under whom he holds, that recovery may be had in the manner pointed out by the act, of the premises, and unless the evidence shows that there was a distinct assent on the part of the complainant to the holding over of the ——— Railroad Company as subtenant of the A. Company complainant would be entitled to the premises. There is no evidence from which an inference can be drawn that there was any assent on the part of plaintiff to the holding over of the ——— Railroad Company.¹³

§ 3229(2). Nebraska

You are instructed that where a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for a like term and upon the same conditions, and you are instructed that the first term mentioned in the lease was one year, and if you find from

¹² Ratcliff v. Belfont Iron-works Co., 10 S. W. 365, 87 Ky. 559, 10 Ky. Law Rep. 643.

¹³ Tuller v. Michigan Cent. R. Co., 160 N. W. 587, 194 Mich. 312.

the evidence that the defendant held over his term, that is, stayed in possession until ———, or the ——— day of ———, either with the express consent of the plaintiff or by her implied consent, then you are instructed that the defendant would be liable for rent at the rate of \$——— per month for the year ending ———.¹⁴

§ 3229(3). Ohio

The jury are instructed that, where a tenant holds over the term of a lease, either by remaining in possession of the premises personally or through his tenants or subtenants, his intentions and desires as to the lease are wholly immaterial. Actions speak louder than words, and the tenant, by his very act of remaining in possession of the premises after his term has expired, gives the lessor the choice of electing to treat him as a tenant for a new term or as a trespasser, and the lessor has this election wholly independent of any desires, wishes, or intentions on the part of the tenant.¹⁵

§ 3230. Sufficiency of tender of rent to keep tenancy alive

You are instructed that one of the questions in this case is as to whether the plaintiff was in lawful possession of the premises described in the complaint at the time of the injury averred. The plaintiff contends that she was in lawful possession by reason of the contract of tenancy, and was such lawful occupant on ———. The defendants assert that the tenancy had expired previous to the injury; that is to say, on ———. It is admitted that the injury, if any, occurred on ———. The court instructs you that, if the plaintiff rented the premises for an indefinite time, with rent payable monthly, on the ——— day of each month, in advance, then it was the duty of the plaintiff on ———, to pay or tender to the defendant W. the rent due on said day. The court further instructs you that, if the plaintiff on said day sought the defendant W. for the purpose of tendering the money for the rent for the month commencing ———, and was ready and willing to pay the same, but by reason of the absence of the defendant W. if the evidence shows such absence, was prevented from paying such rent or tendering the same, and you further find from the evidence that the plaintiff made reasonable effort on the day the rent became due to offer and tender the rent due, at place where it was to be paid, and by acts of defendant W. was prevented from so doing, if she was so prevented, all of said acts and facts to be proved by the plaintiff by preponderance of the evidence, then the court in-

¹⁴ Kuhlman v. Wm. J. Lemp Brewing Co., 126 N. W. 1083, 87 Neb. 72, 29 L. R. A. (N. S.) 174.

¹⁵ Kerruish v. Brewing Co., 17 Ohio Cir. Ct. R. (N. S.) 449.

structs you that the plaintiff was in the rightful possession of the premises.¹⁶

§ 3231. Acceptance of another as tenant

You are instructed that, if you find from the evidence that defendant did lease the premises, and in ———, he sold out his business to ——— and delivered possession of the building to him with agreement that he (———) was to pay the rent thereafter, and said arrangement was made known to plaintiff who made no objections thereto, and that he (plaintiff) tacitly consented thereto, then defendant became relieved from liability for rent accruing after that time.¹⁷

You are instructed that evidence has been offered that in the spring of ——— defendant took back from C. a portion of the goods he had sold C., on a mortgage, and that such goods remained on said premises for a short time until disposed of by defendant. You are instructed that this does not render the defendant liable for rent, if you find that a tenancy on the part of C. had been substituted for a tenancy on the part of defendant.¹⁸

§ 3232. Necessity of giving notice to tenant in order to terminate tenancy

On the question as to whether the plaintiff was in rightful possession of the premises on ———, the court further instructs you that, if the plaintiff rented the premises for an indefinite time, with the rent payable monthly in advance on the ——— day of each month and you further find by preponderance of the evidence the following facts, if facts they are, that on the ——— day of ———, the rent so payable in advance had not been paid [or] properly tendered, and on said day the defendant W. served upon the plaintiff in this case a written notice to deliver up possession of the property in ——— days or pay the rent then due, then the court instructs you that the plaintiff would not be in unlawful possession of said premises until the expiration of ——— days from the time of service of said notice.¹⁹

§ 3233. Renewal dependent on premises not being sold

The court instructs the jury, as a matter of law, that in order to constitute a sale of real estate within the meaning of the clause in the lease introduced in evidence by plaintiff, it is not necessary that a deed should actually be executed and delivered, but any

¹⁶ P. B. Arnold Co. v. Buchanan, 111 N. E. 204, 60 Ind. App. 626.

¹⁷ Brayton v. Boomer, 107 N. W. 1099, 131 Iowa, 28.

¹⁸ Brayton v. Boomer, 107 N. W. 1099, 131 Iowa, 28.

¹⁹ P. B. Arnold Co. v. Buchanan, 111 N. E. 204, 60 Ind. App. 626. This was an action by tenant to recover for personal injuries caused by act of lessor in removing certain boards from the floor of a bedroom.

written agreement by or under which a party may enforce the making and delivery of a deed of conveyance, and in pursuance of which a deed is subsequently executed and delivered, is, in the eyes of the law, a sale, within the meaning of said clause in said lease.²⁰

On the part of the defendant the court instructs the jury that if they believe, from the evidence, that one I. owned the premises in question, and executed a lease therefor to the plaintiff for one year, with the privilege of renewing for one or more years, provided said I. did not sell the premises before ———, and if they further believe, from the evidence, that the premises were sold by said I. before the ———, then they should find for the defendants.²¹

C. ASSIGNMENT AND SUBLETTING

§ 3234. Prohibition against assignment of lease—What constitutes violation

The court instructs the jury that the deed of trust to ———, trustee, shown in evidence, was not in itself a violation of the clause in the lease prohibiting assignment by the lessee. In order that said deed of trust should operate as such an assignment, the jury must believe that the trustee or his assignee actually took possession of the premises described in the lease.²²

The jury are instructed that the deed of trust from the plaintiff to ———, trustee, upon the leasehold interest in the real estate, was not such an assignment thereof as violated the provisions against assignment set out in the contract of lease exhibited in evidence. In order that said deed of trust should act as such an assignment, it was necessary that there should have been not only a sale under the deed of trust, but that the purchaser at the sale should have complied with the terms of the sale; and if the jury believe from the evidence that the said sale was never consummated, and that the purchaser never was in a position to take possession, then there was no such assignment as is inhibited in the contract of lease.²³

§ 3235. Breach of agreement by lessor to consent to subletting—Damages

The court instructs the jury that, if you find for the plaintiff, you will assess its damages in such sum as you may find and believe from the evidence to be the difference between the amount of rent that plaintiff was to pay defendant under the terms of the lease mentioned in the evidence and the amount that plaintiff would have received from the subtenant procured by it, as mentioned in the

²⁰ *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560.

²¹ *Sutherland v. Goodnow*, 108 Ill. 528, 48 Am. Rep. 560.

²² *Franklin Plant Farm v. Nash*, 86 S. E. 836, 118 Va. 98.

²³ *Franklin Plant Farm v. Nash*, 86 S. E. 836, 118 Va. 98.

evidence, under the terms of the subletting, which in no event shall exceed the sum of \$——, the amount sued for.²⁴

D. RIGHTS, DUTIES, AND LIABILITIES IN GENERAL, WITH RESPECT TO LEASED PREMISES

§ 3236. Recovery by tenant for false representations as to quality of land

§ 3236(1). Missouri

The court instructs the jury that, if the jury believe and find from the evidence that, as an inducement for said defendant to enter into said contract of lease with plaintiff, she represented to him that about —— acres of the said land and farm situated on —— creek bottom was good farming land and would always produce good crops, if properly cultivated, and that in entering into said lease the defendant relied on said representation as true, and was thereby induced to and did enter into said contract of lease; and if the jury further believe from the evidence that said representation as to the quality and condition of said land was false, and that said defendant could not plow or cultivate said —— acres of land, because said land was unfit for cultivation, and that said defendant derived no benefit whatever from said land—then the jury should find for the said defendant a reasonable amount for the damage sustained by him by reason of said —— acres of land not being of the quality and kind as represented by plaintiff, not exceeding the sum of \$——.²⁵

§ 3236(2). Wisconsin

The jury are instructed that if you find that the defendant, in making the contract for the lease, made positive statements as to the character of the farm, the number of acres of plow land, the character of the marsh, or the number of acres of good meadow, and made such statements without knowing them to be true, and with the intent to induce the plaintiff to enter into the lease, and such statements were relied upon by the plaintiff, then the plaintiff is entitled to recover.²⁶

§ 3237. Same—Measure of damages

The court instructs the jury that if you should find that, prior to the rental contract in controversy, the plaintiff made material representations that were false as to the character of the land she was to rent to defendant, and that the defendant was deceived thereby,

²⁴ Underwood Typewriter Co. v. Century Realty Co., 146 S. W. 448, 165 Mo. App. 131.

²⁵ Ware v. Dunlap, 141 S. W. 21, 159 Mo. App. 388.

²⁶ Middleton v. Jerdee, 40 N. W. 620, 73 Wis. 39.

and entered into said contract, relying upon said false and fraudulent representations, if any, then you will find for defendant a verdict for such damages as he has sustained because of said false and fraudulent representations if any. In this connection you are instructed that the measure of damages in this case is the difference between the value of the crops which the defendant could, by due diligence, have grown upon the land as it existed, and the value of the crops which he could and would with the same amount of labor and expenditure have grown upon the land, if it had been as represented by the plaintiff, taking into consideration the relative costs in attempting to make and gather the crops.²⁷

§ 3238. Terms of tenancy implied on holding over

You are instructed that, as to the lot purchased by plaintiff from C., if the jury believe, etc., that defendant had, before the purchase by the plaintiff from said C., occupied the same under a parol lease at a rate agreed upon between C. and defendant, and with the express understanding that, if said lot should be sold to plaintiff at any time during the term of the lease, no deduction should be made for the occupation by said company of the right of way across said lot for the remainder of the term, and that defendant held over after the expiration of said term without any new agreement, then the law implies, and the jury will so find, that the same rate of rent shall be paid for said lot by defendants after as before said purchase; and the jury will not take into consideration the alleged condition and want of repair of the dock of said lot, without proof of an express covenant to put or keep the same in repair by plaintiff or its grantor.²⁸

E. POSSESSION, ENJOYMENT, AND USE OF PREMISES BY TENANT

§ 3239. Liability to tenant for failure to give possession—Damages

You are instructed that, if you find for plaintiff, you will award him such damages as you believe from the evidence will fairly represent the value of the use of the house and pasturage of one cow and two horses, and his half of the market value of the crops, which he, by ordinarily good husbandry, could have raised on the leased land, less the cost of raising the whole crops, including his services as part of the cost.²⁹

§ 3240. Interference with tenant's enjoyment of premises—What constitutes eviction

The court instructs the jury that some act of interference by the owner of property with the tenant's enjoyment of the premises may

²⁷ Klyce v. Gundlach (Tex. Civ. App.) 193 S. W. 1092.

²⁸ Price v. Pittsburg, Ft. W. & O. R. Co., 34 Ill. 13.

²⁹ Adams v. Hambrick, 171 S. W. 398, 161 Ky. 797.

be mere acts of trespass, or they may amount to an eviction. The question whether they partake of the latter character depends upon the intention with which they are done, and the character of the act. If they clearly indicate an intention on the landlord's part that the tenant should no longer continue to hold the premises, and he thereby loses the beneficial use of the same, this would constitute an eviction; otherwise they would amount to no more than mere acts of trespass.³⁰

You are instructed that forcible expulsion is not necessary to cause an eviction. Any act done in violation of the rights of the tenant without his consent which deprives him of the beneficial use and enjoyment of a material part of the premises leased will amount to an eviction. If the jury in this case believes from the evidence that the plaintiffs were in lawful possession of the said mine No. ——— within the meaning of the term "lawful possession" as hereinbefore defined, and that the directors and officers of the defendant company took possession of said mine prior to the ——— day of ———, without the consent of the plaintiffs, then the plaintiffs were evicted from said mine by the defendant.³¹

§ 3241. Liability of lessor to tenant for trespass

You are instructed that this is an action of trespass *quare clausum fregit*, which is an action for breaking the close of another and forcibly and unlawfully entering upon another's land. This action is based upon an alleged injury to the possession of the plaintiffs as tenants of the defendant. It is competent for one in possession of lands under a demise to bring an action of this kind against his landlord. If you find, under the evidence, that there was an unlawful entry by the defendant upon the lands of his tenants, the plaintiffs in this case would be entitled to recover nominal damages. In order for the plaintiffs to recover more than nominal damages—that is, in order for them to recover actual damages—it is necessary for them to show by the evidence that they have sustained some actual damage. If you find from the evidence that the defendant did not unlawfully enter upon the plaintiffs' possessions, but that he went thereupon by the permission, license, or tacit consent of the plaintiff, then the defendant's entry was not unlawful, and in that event your verdict should be for the defendant.³²

You are instructed that if, on the other hand, you find that the defendant did unlawfully—without the consent or acquiescence of

³⁰ *Bokoshe Smokeless Coal Co. v. Bray*, 155 P. 226, 55 Okl. 446.

³¹ *Bokoshe Smokeless Coal Co. v. Bray*, 155 P. 226, 55 Okl. 446.

³² *Morris v. Hazel* (Del.) 77 A. 766, 1 *Boyce*, 324.

the plaintiffs—enter upon the lands, but without injury to the possession of the plaintiffs, then your verdict should be for the plaintiffs for nominal damages.³³

You are instructed that if you find that the plaintiffs are entitled to nominal damages, by reason of an unlawful entry, then you should determine whether they are entitled to recover actual damages. If there was such a custom as alleged in the defendant's special plea, and concerning which evidence has been introduced, both for and against, then the plaintiffs would not be entitled to any damages, provided, of course, that the defendant did only the customary trimming. Of course, a landlord could not go up on the lands of his tenant and willfully destroy his own property to the detriment of his tenant. If there was not any such custom, as relied upon by the defendant, then the question arises for your consideration whether the trimming—which the defendant admits he did—was done by the consent or acquiescence of the plaintiffs. If it was, then the plaintiffs cannot recover. If the trimming was not done by their consent or acquiescence, then it is for you to determine what amount, if any, the plaintiffs have been injured by the trimming—whether it was an unusual and unnecessary trimming, or whether it was such a trimming as that the tenants were not injured thereby.³⁴

§ 3242. Interference with enjoyment of premises by alterations

You are instructed that defendant had a right to remodel, alter, and change the building as he saw fit, so long as he did not disturb the plaintiff in the quiet and peaceable possession and use of the premises and privileges leased to him, but he had no right to obstruct, interfere with, or take away from the plaintiff in a substantial degree the beneficial use of the stairway or entrance to the building, or to authorize or to empower any person or corporation to make changes in the stairway and vestibule that necessarily would result in obstruction and interference with and substantial injury to the plaintiff's business.³⁵

You are instructed that, if you find from the evidence that, at the time of the execution of the lease referred to, the entrance and vestibule as then constructed was of value to the plaintiff's business for purposes of entrance and exit for himself and persons doing business with him; and if you further find that the defendant, or some one authorized by him, radically and permanently altered such

³³ *Morris v. Hazel* (Del.) 77 A. 766,
1 Boyce, 324.

³⁴ *Morris v. Hazel* (Del.) 77 A. 766,
1 Boyce, 324.

³⁵ *Frankel v. Steman*, 110 N. E.
747, 92 Ohio St. 197.

entrance and vestibule during the term of such lease, and by such alterations damaged the plaintiff's business as conducted under the lease, then the plaintiff is entitled to recover the amount of damages caused by such alterations to his business during the period of time from the commencement of such alterations to the termination of the lease. If you find by a preponderance of the evidence as already defined to you that the defendant, or those authorized by him, did in fact interfere with, obstruct the plaintiff in his business, and practically take away from him a part of the privileges leased to him, then I charge you that the defendant cannot recover any rent from the time that this condition lasted.³⁶

§ 3243. Damages for wrongful dispossession of tenant or for wrongful interference with his possession

§ 3243(1). Alabama

The court charges the jury; if they find for the plaintiff, they would give the plaintiff such damages as will compensate her for all of the inconvenience, physical pain or suffering, or mental anguish proximately caused by defendant's wrongful act.³⁷

The court charges the jury that if they find for the plaintiff, in estimating her damages they may take into consideration the character of the weather, the condition of the house or room in which she stayed, any exposure to her proximately caused thereby, any suffering which the evidence showed resulted to her therefrom, or for any disease, if the evidence shows that any disease was proximately caused therefrom.³⁸

§ 3243(2). Virginia

The jury are further instructed that, should they believe from the evidence that the defendants committed the acts complained of in the declaration, and that said acts were committed wantonly and maliciously in order to illegally get possession of the premises described in the declaration, then the plaintiff is entitled to recover not only the determinable money loss which the evidence may show it sustained, but such exemplary and punitive damages as, in their opinion, are called for by the circumstances of the case; and the jury are instructed that punitive or exemplary damages are damages which are allowed when one party has injured the other in a wanton, willful, and oppressive manner, in disregard of his rights, as a warning to him and other persons to prevent them from committing like offenses in the future.³⁹

³⁶ Frankel v. Steman, 110 N. E. 747, 92 Ohio St. 197.

³⁷ Snedecor v. Pope, 39 So. 318, 143 Ala. 275.

³⁸ Snedecor v. Pope, 39 So. 318, 143 Ala. 275.

³⁹ Franklin Plant Farm v. Nash, 86 S. E. 836, 118 Va. 98.

§ 3244. Same—Exemplary damages

See, also, ante, § 3243(2).

The court further instructs the jury that if you find from the evidence that the plaintiff had a lease on said premises expiring —, and the defendant disturbed plaintiff in the peaceable and quiet enjoyment of said premises, and that the plaintiff suffered substantial damages therefrom, and that the injuries complained of were attended by a wanton and reckless disregard of the plaintiff's rights and feelings, the jury may, in addition to the actual damages sustained by the plaintiff, award her reasonable exemplary damages.⁴⁰

F. RIGHTS AND LIABILITIES WITH RESPECT TO CONDITION AND REPAIR OF PREMISES**§ 3245. Duty of lessor to make repairs and liability for repairs made by tenant****§ 3245(1). Delaware**

You are instructed that the plaintiff claims that the charges in his bill of particulars are for work and labor and money laid out in putting in repair a property belonging to the defendant, which he, the plaintiff, occupied as tenant under the defendant. The general rule of law is that a landlord is not bound to pay for repairs made by a tenant without his authority. When a man rents a property he takes it as it is, and unless the landlord has agreed to make repairs, or agrees that the repairs shall be made, or, having been made, promises to pay for them, the landlord is not bound to pay for them. It is claimed on the part of the plaintiff that the owner of these premises did agree to pay for the said repairs; that she authorized the plaintiff to make such repairs as might be necessary to put the property in proper condition. If the defendant did authorize the tenant to make the repairs, or if she directed the tenant to have them made, the law would imply a promise on her part to pay for them. But if they were made without her authority, or direction, and without her promise to pay for them, she would not be bound to pay for them; and it would be merely a voluntary expenditure of money by the plaintiff.⁴¹

§ 3245(2). Nebraska

The jury are instructed that ordinarily a landlord is under no obligation to repair premises unless he has contracted so to do, but where a landlord assumes to repair premises he must make such repairs in a reasonably careful and safe way so as to render such

⁴⁰ Gray v. Linton, 88 P. 749, 38 Colo. 175.

⁴¹ Loscolzo v. Eggner, 78 A. 607, 7 Pennewill, 260.

place reasonably safe for the occupants or persons lawfully upon said premises. Especially is this true when said repairs are concealed and hidden from view.⁴²

§ 3246. Duty with respect to compliance with ordinances concerning protection from fire

You are instructed that, if you find and believe from the evidence in this case that it was the duty of the plaintiff, under his contract with the defendant, to comply with the orders of the mayor of the city of ———, and of ———, fire chief of said city, to install three liquid fire extinguishers of not less than three gallons each, the same to be located, one on the stage, one on the balcony, and one at the door of the main entrance in the opera house building in question, and also an asbestos drop curtain at the front of the stage, and remove all doors leading to the balcony, and to cause all entrance and exit doors to open outward, and to construct fire escapes on the north side of said opera house building aforesaid at the corner of ——— avenue and ——— street in the city of ———, the same being on lots ——— of said city, and all as set forth in plaintiff's Exhibits ———, ———, and ———, in evidence in this case, then you will find the issues in favor of the defendant and against the plaintiff; but if you find and believe from the evidence in this case the contrary to these things hereinabove set forth to be true, then and in that case you will find the issues in favor of the plaintiff and against the defendant, and will award the plaintiff such damages as you may find and believe him justly entitled to under all the facts and circumstances in evidence before you upon this trial, not exceeding the amount sued for, that is to say not in excess of the sum of \$———. ⁴³

§ 3247. Measure of recovery by tenant for breach of duty or covenant as to condition or repair of premises

§ 3247(1). Arkansas

The court instructs the jury that, if the jury find from the evidence that the building was not in habitable repair during any of the months for which plaintiffs sue for rent, defendant would be entitled to a credit on the rent sued for, whatever amount you find from the evidence it would cost to put the building in habitable repair.⁴⁴

⁴² *Carlton v. City Savings Bank of Omaha*, 124 N. W. 91, 85 Neb. 659.

⁴³ *Schmucker v. Clifton*, 162 P. 1094, 62 Okl. 249. In this case, by reason of the failure of the lessor to comply with an order of the city authorities to install fire escapes, etc.,

the leased premises were not fitted for occupancy as contracted, and the lessee, not having occupied the premises, sued to recover damages for breach of the rental contract.

⁴⁴ *Young v. Berman*, 131 S. W. 62, 96 Ark. 78, 34 L. R. A. (N. S.) 977.

§ 3247(2). Kansas

You are instructed that the measure of damages in such case will be the amount of profit that the plaintiffs would have made in their said business for the remainder of the term of the lease, less the rents for the premises from the time of the fire to the date when again ready for occupancy. In arriving at said profit you may take into consideration the gross receipts for the period up to the time of the fire, the total expenses to be deducted from such gross receipts, and arrive as nearly as possible at the average net profits of the plaintiffs. You are not bound to take the net profits of the plaintiffs as the absolute measure of their damage, but may take into consideration the probability or improbability of such profit continuing for the remainder of the term.⁴⁵

§ 3248. Damages for breach of contract by lessor to furnish heat

You are instructed that if you find that the defendants failed to properly heat said leased premises, as I have hereinbefore told you it was their duty to do, such failure constituted a breach of their contract or covenant to heat, embodied in the lease; and the general rule is that a party injured by a breach of a contract is entitled to recover all such damages as might be reasonably and naturally expected to, and do in fact, flow from the breach. I instruct you that the measure of damages in this case, if you find for the plaintiff, is such an amount as will compensate her for all damages which you find from the evidence she sustained by reason of the defendants' failure to heat, or sufficiently heat, the leased premises. That amount will consist in the difference, if any, between the rental value of the premises, furnished as they were, properly and sufficiently heated, and the rental value thereof, heated in the manner you find they were heated during the period of time from _____ to _____.⁴⁶

§ 3249. Liability of tenant for breach of covenant with respect to protecting premises from injury**§ 3249(1). Maryland**

The jury are instructed that if defendants used the building as persons of ordinary care and prudence would have done, looking to its character, size, apparent construction, and strength, and that it fell down in consequence of some defect in its structure, or on account of a want of proper thickness of the wall, or on account of the ordinary decay of the materials, and that all these matters were unknown to the defendants, and could not have been dis-

⁴⁵ O'Neal v. Bainbridge, 146 P. 1165, 94 Kan. 518, Ann. Cas. 1917B, 283.

⁴⁶ Purcell v. Warburton, 126 P. 80, 70 Wash. 129.

covered by reasonable and ordinary diligence, the verdict should be for the defendants.⁴⁷

§ 3249(2). *Michigan*

The court instructs the jury that, even if the mill were turned over to the plaintiff, yet if, by reason of the carelessness and mismanagement of the defendants, fire had been taken from the mill, and put into the sawdust adjoining, it would constitute a breach of contract; and if the fire remained there without the knowledge of the plaintiff, and afterwards broke out, and destroyed the mill, and it is traceable to the carelessness of the defendants, then they are liable.⁴⁸

§ 3250. *Duty of tenant to restore premises in as good condition as when received*

You are instructed that it appears this machinery is used in the process of operating the quarries, which, of course, involves more or less wear and tear, and the intention of the parties in this contract was that the defendant should keep up this property in good condition. It is provided that it is in all things to do and perform those things which would maintain the quarries in good condition, and which of course would necessitate the restoration of any portion of this apparatus that was absolutely worn out and useless. But they were bound to restore the property not absolutely in the condition they received it, but in as good condition as when received, natural wear and tear excepted. If any of this property was in worse condition because of other causes, that is, from misuse or inattention, than it was when received, that depreciation would fall upon the defendant. If the depreciation was from the natural wear and tear, the ordinary use in a skillful manner of that property in the business of the company, the business of quarrying and marketing stone, for that loss or depreciation the defendant would not be liable to the plaintiff.⁴⁹

§ 3251. *Obligation of tenant under covenant to destroy weeds*

You are instructed that it was the duty of defendant to adopt all reasonable means and to do all things reasonably adapted to destroy such weeds and which were consistent with good husbandry. In determining what was reasonable for such purpose, you have the right to consider the methods usually and customarily employed by farmers generally in that vicinity.⁵⁰

⁴⁷ *Machen v. Hooper*, 21 A. 67, 73 Md. 342.

⁴⁸ *Stevens v. Pantlind*, 54 N. W. 716, 95 Mich. 145.

⁴⁹ *East Sioux Falls Quarry Co. v.*

Wisconsin Granite Co., 164 N. W. 77, 39 S. D. 301. This was a lease of a stone quarry.

⁵⁰ *Kossel v. Potratz*, 152 N. W. 189, 160 Wis. 450.

§ 3252. Waste by tenant—Liability for burning straw

The court instructs the jury that, if you believe and find from the weight of the evidence in this case that the straw in question in this lawsuit belonged at the time of the burning to plaintiffs, then the defendant had no right to intentionally burn the same, and if you further find from the evidence that he, the defendant, did intentionally burn or have the same burned or any part of it, then your verdict will be for the plaintiff in such sum as you may think the straw intentionally burned by defendant or his agents was reasonably worth, not to exceed the amount sued for.⁵¹

G. INJURIES TO THE REVERSION**§ 3253. Right of action by lessor against third person for injury to premises**

The court instructs the jury that if you find from the evidence plaintiff, on and subsequent to the _____ day of _____, was the owner of premises and building No. _____ street in the city of _____, and that on or about the _____ day of _____, defendant, by or through its workman or agents, without the consent or authority of plaintiff, caused to be placed on the west wall of said building a painted sign, your verdict will be in favor of plaintiff against defendant for such amount as you may find under the other instructions and the evidence plaintiff is entitled to recover, if you find from the evidence that the property was substantially damaged by said sign.⁵²

H. INJURIES ARISING FROM DANGEROUS OR DEFECTIVE CONDITION OF PREMISES**§ 3254. Liability of lessor to tenant for injuries from defective condition****§ 3254(1). Delaware**

You are instructed that no claim is made that the defendant landlord undertook at the time of the verbal letting of the dwelling house, occupied by the deceased at the time of the accident, to keep the demised premises in repair. The law is that where the landlord does undertake to make repairs, he is liable for injuries resulting from the negligence of himself or his servants, in making such repairs, and this is true where the landlord is under no obligation to make such repairs, but undertakes to make them voluntarily or gratuitously. So in this case the question is not whether

⁵¹ *Campbell & Davis v. Moll*, 217 S. W. 538, 205 Mo. App. 49.

Cusack Co., 190 S. W. 1011, 196 Mo. App. 596.

⁵² *Kretzer Realty Co. v. Thomas*

the steps were out of repair and unsafe at the time the request to repair was made, but whether the landlord through his representative or agent made the repairs, and if so, were they performed so negligently and unskillfully as that the deceased was subsequently injured in consequence thereof? If the alleged defective repairs proximately caused the injuries resulting in the death of the plaintiff's husband without his fault contributing to his injuries, your verdict should be for the plaintiff. If the deceased by the exercise of ordinary care could have avoided his injuries, or if his injuries resulted because of intoxication and not from the condition of the steps, the plaintiff cannot recover.⁵³

§ 3254(2). Idaho

You are instructed that, in the absence of an express agreement by the landlord to make repairs, the landlord is not liable to the tenant for damages caused by defects in the building existing at the time the lease was entered into.⁵⁴

§ 3255. Same—Notice of defects

You are instructed that, under the facts in this case, the defendant is not liable to the plaintiff for damages caused by defects in the building, unless the defendant had knowledge thereof, or unless the defect was so apparent that he is presumed to have had notice thereof.⁵⁵

§ 3256. Injuries to servant of tenant by falling down elevator shaft

The court instructs the jury that, if the plaintiff entered the corridor or hallway in question, on the invitation of the defendant, it became the duty of the defendant to use reasonable care and diligence, the care of an ordinarily prudent person, under the circumstances, to guard the plaintiff against injuries from any danger that existed in the corridor, or hallway. It became the duty of the plaintiff to use reasonable care and diligence to guard himself from injury, and from any danger that he knew of, or had reasonable ground to expect, and it was the duty of the defendant to use the care of an ordinarily prudent person, under the circumstances, to guard the plaintiff against injuries from any danger that existed in the corridor or hallway, when those dangers were within the knowledge of the defendant, or had existed, for a sufficient length of time to make want of knowledge on the part of the defendant improbable. Just what constitutes care and diligence that an ordi-

⁵³ *Fulmele v. Forrest* (Super.) 80 A. 733, 4 Boyce, 155.

⁵⁴ *Russell v. Little*, 126 P. 529, 22 Idaho, 429, 42 L. R. A. (N. S.) 363, Ann. Cas. 1914B, 415.

⁵⁵ *Russell v. Little*, 126 P. 529, 22 Idaho, 429, 42 L. R. A. (N. S.) 363, Ann. Cas. 1914B, 415.

narily prudent person would exercise depends entirely upon the circumstances of the case. Under certain circumstances, an ordinarily prudent person would exercise a very high degree of care, while, under other circumstances, an ordinarily prudent person would exercise a lesser degree of care, so it is for you to say under all the circumstances in this case, considering the amount of light that there was in this hallway, or corridor, at the time the plaintiff entered it, and all the other circumstances as you find them, just how high a degree of care an ordinarily prudent person would exercise. If you find from the evidence, that the defendant, in the care and operation of the elevator in question, exercised that reasonable care which an ordinarily prudent person would exercise under similar circumstances, then defendant was not guilty of negligence, and your verdict will be for defendant.⁵⁶

§ 3257. Presumptions and burden of proof in action for injuries to tenant

You are instructed that this action is based upon the alleged negligence of the defendant which must be proved, and the burden of proving it rests upon the plaintiff. Negligence is defined to be a failure to observe for the protection of the interest of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. There is no presumption of negligence either on the part of the plaintiff's husband, or of the defendant, from the mere fact that injury resulted to the plaintiff's husband, causing his death. Whether his injuries or death resulted from the negligence of the defendant as alleged, you must determine from all the facts and circumstances of this case as disclosed by the evidence.⁵⁷

§ 3258. Liability of lessor for injuries to third persons—Invitees

The court instructs you that, if you believe from the evidence that on or about the ——— day of ———, the plaintiff was delivering newspapers to certain tenants of defendant in said ——— Building upon subscription therefor by any such tenant, that plaintiff then and thereby became an invitee of defendant as to the use of the halls, stairways, and stairway platform, and that, as such invitee, as a matter of law, the defendant owed plaintiff the duty to keep said stairway platform and railing around the same in a reasonably safe condition for a reasonable use thereof by plaintiff, and if you further believe from the evidence that on or about the date mentioned plaintiff, while so engaged, and while in the exer-

⁵⁶ *Pascleszny v. Boydell Bros. White Lead & Color Co.*, 109 N. W. 417, 46 Mich. 223. This instruction

was as favorable to defendant landlord as he was entitled to.

⁵⁷ *Fulmele v. Forrest* (Del. Super.) 86 A. 733, 4 Boyce, 155.

cise of due care, went out upon the stairway platform in question and took hold of or leaned against the railing around the same in a reasonable use thereof for the purposes for which such railing was intended and for the purpose of steadying himself, and if you further believe from the evidence that when plaintiff so caught hold of or leaned against said railing that the same gave way and caused plaintiff to fall and plaintiff was thereby injured, and that the giving way of such railing was due to any defect in the condition of the same, and that such defect, if any, was known to the defendant or his agent or employé, or by the exercise of ordinary care should have been so known, the defendant would be liable to plaintiff in damages, and your verdict should be for the plaintiff.⁵⁸

§ 3259. Same—Liability to persons in street

You are instructed that, before the jury can render a verdict against defendants, you must find from the evidence that in the construction of the sidewalk and basement doors they were guilty of negligence, and constructed them so that they were unsafe and insecure to travel over and upon them.⁵⁹

You are instructed that, before the jury can find a verdict in favor of plaintiff in this case and against the defendants, you must find from the evidence that the said sidewalk and basement doors were defectively constructed and built, or thereafter left in an unsafe and insecure condition for travel over the same by the public by said defendants, or either of them.⁶⁰

You are instructed that, if the jury find from the evidence that in the construction of said sidewalk and doors the defendants C. and H. used good material, well and securely built the same, and that the said doors were well and safely constructed, and properly provided with guards—such as the chains and rod—and that they were in a safe condition when leased to defendant W., and that said defendants C. and H. were not thereafter guilty of any act or negligence concerning the same, then you should find a verdict in favor of the said defendants C. and H.⁶¹

§ 3260. Liability of tenant for injuries to person in street

The court instructs the jury that, if an awning is used to shade the entrance to a storeroom, and that awning is used for no other purpose, and projects over a public street immediately in front of the storeroom, then the tenant of the storehouse conducting business therein must use due care and diligence to see that the awning does not become ruinous and dangerous to the public passing

⁵⁸ *English v. Thomas*, 149 P. 906, 48 Okl. 247, L. R. A. 1916F, 1110.

⁵⁹ *Rider v. Clark*, 64 P. 564, 132 Cal. 382.

⁶⁰ *Rider v. Clark*, 64 P. 564, 132 Cal. 382.

⁶¹ *Rider v. Clark*, 64 P. 564, 132 Cal. 382.

along the street, while the awning is projecting over the street, and used for the benefit of the store, or for the benefit of the tenant, provided the same is done with the knowledge and acquiescence of the tenants.⁶²

I. RENT

§ 3261. Liability for rent in general

You are instructed that if the jury believe, from the evidence, that the plaintiff and defendants executed the lease in controversy, and that the defendants received possession of the premises therein described, then the defendants are liable to pay the plaintiff the amount of the rent accrued thereon up to the commencement of this suit, deducting such payments as are proved by the evidence to have been made thereon, unless the jury believe from the evidence that the said lease has been canceled, surrendered, or modified by further valid agreement between the parties to said lease.⁶³

§ 3262. Failure to put tenant in possession

The court instructs the jury for the plaintiffs that under such a lease as is sued on in this case it was not necessary for or incumbent upon the plaintiffs to put the defendant in possession of the property, but simply to give him the right of possession, and the fact that the defendant never took possession of the property nor cultivated it during the year — is no defense to the suit, if lease sued on was agreed upon.⁶⁴

The court instructs the jury for the plaintiffs that the plaintiffs, under the lease, if such lease was agreed upon, were only obligated to give to defendant the right of possession on the — day of —, and if such lease was agreed upon, although they may believe from the evidence that — was in possession on that date and refused to surrender such possession, that in no way affects plaintiffs' right of recovery.⁶⁵

§ 3263. Eviction as defense to action for rent

§ 3263(1). Alabama

You are instructed that, if there was an eviction from a portion of the land covered by the contract, the defendant had the right to treat it as an eviction from the whole.⁶⁶

You are instructed that, if the jury believe from the evidence that plaintiff rented a portion of the land covered by the contract to

⁶² *Lewy Art Co. v. Agricola*, 53 So. 145, 169 Ala. 60.

⁶³ *Stobie v. Dills*, 62 Ill. 432.

⁶⁴ *Hutchinson v. Platt*, 81 So. 281, 119 Miss. 606.

⁶⁵ *Hutchinson v. Platt*, 81 So. 281, 119 Miss. 606.

⁶⁶ *Anderson v. Winton*, 34 So. 962, 136 Ala. 422.

——, the defendant had the right to refuse to cultivate or pay rent on the balance of the land.⁶⁷

§ 3263(2). Illinois

You are instructed that the principle upon which a tenant is required to pay rent is the beneficial enjoyment of the premises, unmolested in any way by the landlord; and if the jury believe, from the evidence in this suit, that the plaintiff took possession of any part of the premises leased by her to the defendants, against their consent, then in law it is an eviction, and releases the defendants from the payment of any more rent, and you will find for the defendants.⁶⁸

You are instructed that forcible expulsion is not necessary to cause an eviction; any act done in violation of the rights of the tenant, without his consent, will amount to an eviction. If the jury believe, in this case, that the plaintiff, after making this lease, without the consent of the defendants, took possession of a part of said demised premises, then, in law, it is an eviction, and you will find for the defendants.⁶⁹

The court instructs the jury that if the jury believe, from the evidence in this case, that the premises leased by the plaintiff to the defendants, or a part of the same, were inclosed by a fence, and had on the same a brick building, and that the plaintiff took possession of said building and used it as a stable, and took possession of the yard and used it as a cattle yard, without the consent of the defendant, then, in law, it is an eviction, and releases the defendants from the payment of any more rent, and they will find for the defendants.⁷⁰

You are instructed that if the landlord, before the expiration of the lease or tenancy, against the consent of the tenant, evicts or expels the tenant from all or any substantial part of the premises leased, the tenant is discharged from the payment of any rent from the time of such eviction, and is not bound to payment for what he continues to occupy after such eviction. If there is no agreement to the contrary, the tenant is entitled to the possession of the premises without interruption or molestation by the landlord; and if the jury believe, that defendant was tenant from year to year, and entitled to the possession of the premises in question from —— to ——, and that against defendant's consent, and in the absence of any understanding or agreement permitting it, the railroad company wrongfully took possession of part of said lots for their railroad track, and continued to hold and use the same until ——,

⁶⁷ Anderson v. Winton, 34 So. 962, 136 Ala. 422.

⁶⁸ Smith v. Wise, Stigleman & Co., 58 Ill. 141.

⁶⁹ Smith v. Wise, Stigleman & Co., 58 Ill. 141.

⁷⁰ Smith v. Wise, Stigleman & Co., 58 Ill. 141.

and evicted defendant therefrom, then such an eviction by the railroad company works an extinguishment of all rent for said premises from the time of its occurrence, notwithstanding defendant continued to occupy the residue of said lots until ———. But, if it was the understanding that the railroad might put its track across the lots in the event of its electing to do so on completing its purchase, and defendant held under that understanding, then putting down the track after such purchase would not amount to an eviction.⁷¹

You are instructed that physical and forcible expulsion is not necessary to constitute an eviction; but any act on the part of the landlord which deprives the tenant of the beneficial enjoyment of the premises amounts to an eviction, if the act was done in violation of the rights of the tenant.⁷²

§ 3263(3). South Dakota

You are instructed that it is not necessary there should be any act of a permanent character, but any act which has the effect of depriving a tenant of the free enjoyment of the premises, or any part thereof, or any appurtenances pertaining to these premises, must be treated as an eviction; and I charge you that any act of the plaintiffs which has deprived the defendant of the enjoyment of the free right pertaining to and belonging to him as tenant may be treated as an eviction.⁷³

You are instructed that, if you shall find that the plaintiffs assumed exclusive control in front of the place of business, and have prevented enjoyment in the use of the premises leased for the purposes for which it was leased, then such possession and use by the plaintiffs is, for the purposes of this action, a sufficient eviction. Now, understand me about this matter: If you shall find from the testimony introduced in this action the plaintiffs used the street in front of this place of business to the exclusion of any rights which this defendant had in the street, and if by that act the defendant has been wronged by being deprived of the free use and enjoyment of these premises, that amounts to an eviction.⁷⁴

§ 3264. Effect of eviction from part of premises

See, also, ante, § 3263(1, 2).

You are instructed that it is an eviction to take from the tenant some part of the demised premises of which he was in possession; if the jury in this case believe, from the evidence, that the plain-

⁷¹ Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13.

⁷² Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13.

⁷³ Edmison v. Lowry, 52 N. W. 583,

3 S. D. 77, 17 L. R. A. 275, 44 Am. St. Rep. 774.

⁷⁴ Edmison v. Lowry, 52 N. W. 583, 3 S. D. 77, 17 L. R. A. 275, 44 Am. St. Rep. 774.

tiff without the consent of the defendants, took possession of any material part of the demised premises, then the defendants are released from the payment of all rent, and the jury will find for the defendants.⁷⁵

The court instructs the jury that if the jury believe, from the evidence in this suit, that the plaintiff, after leasing the premises to the defendants, leased a part of said premises to one ——— who has taken possession of the same, and built a railroad over the same, then, in law, this is an eviction, and releases the defendants from the payment of all rent, and the jury will find for defendants.⁷⁶

The court instructs the jury that, although the jury may believe, from the evidence, that the defendants have never been disturbed in, or evicted from, the main building on the leased premises, and that they have had the use and enjoyment of the same, still, if they further believe, from the evidence, that the plaintiff has taken possession of any material part of said demised premises, without the consent of the defendants, then the law is it is an eviction, and the defendants are not bound to pay any rent for the part of the said premises they used and occupied, and the jury will find for the defendants.⁷⁷

**§ 3265. Liability of lessor for acts of agent in evicting tenant—
Verbal authority**

You are instructed that if the jury believe, from the evidence, that Mrs. ——— gave to her husband verbal authority, sufficient for him to take possession of the property in controversy for her, and that he did take possession, under the authority so given, of any part of said leased premises, then the jury will find for the defendants, as by law the power and authority given to the husband need not be under seal. Verbal authority is sufficient.⁷⁸

**§ 3266. Preventing tenant from carrying out purposes for which
premises leased**

§ 3266(1). Michigan

The court instructs the jury that the plaintiff claims that under the terms of the lease the defendant was holden and bound for a period of ——— years. Instead of staying during that period and paying rent, that without any legal justification or excuse the defendant left the premises at the expiration of some ——— months. The plaintiff claims that it did what it was obliged to do—it sought to get another tenant—and that it used expedition in that matter, but did not succeed in getting another tenant until the expiration of a month and a half, and therefore it claims the right to recover

⁷⁵ Smith v. Wise, 58 Ill. 141.

⁷⁶ Smith v. Wise, 58 Ill. 141.

⁷⁷ Smith v. Wise, 58 Ill. 141.

⁷⁸ Smith v. Wise, 58 Ill. 141.

here the rental for a month and a half. That is how their claim in that regard amounts to \$——. So much for the plaintiff's claim. With regard to that claim the defendant says this: "You agreed in your lease to give me the premises fitted up and suitable for my business, and it was agreed and understood between us that I was to carry on a certain business, and you knew that my business would call for the use of certain sewing machines, and for the use of the premises in a certain way, and you contracted to give me the premises to be used in that manner, and this obligation on your part you failed to fulfill, and therefore you evicted me, and you cannot complain because I left." The defendant claims that he had the right, under his lease, to set up his sewing machines and run them in any part of the premises he desired under the terms of this lease. Because they made a noise, the plaintiff said, "You cannot run your machines here;" and took them out of the principal room and put the same in a small room, which, the defendant claims, prevented him carrying on the volume of business that he expected to carry on in those premises. In answer to that claim of the defendant the plaintiff claims that the defendant was perfectly satisfied, and that when the suggestion was made that the sewing machines were making too much noise for the comfort and convenience of the people who occupied the premises below these rooms, the defendant acquiesced and used his sewing machines in the small room, called the smaller room here, and nothing was heard in the nature of a complaint from the defendant. There is a statement of facts that is contradicted. You, as judges of the facts, will have to find out from a search of the evidence in the case just which theory is established. I charge and instruct you with regard to the defendant's claim this: That where one leases premises to be used for certain particular purposes, if he is prevented from carrying out that purpose by his landlord, that becomes an eviction in part, if not in whole, and that where there is a partial eviction, the tenant has the right to remain and pay the rent but he cannot be holden under the lease. On the other hand, if the tenant acquiesces in what is done, he cannot afterward, after the lapse of a long time, after he has slept on his rights and given the other party to the lease the idea that he was perfectly satisfied, he cannot then step forward and terminate the lease. The rights of the parties are sometimes fixed by a series of conduct as well as by word by one and agreed to by the other, and the claim of the plaintiff is this: That as the defendant occupied those rooms without any notice to it of dissatisfaction, during all that time there was no legal eviction, either in whole or in part, from the premises. That is a question of fact, and will rest entirely with you to be determined.⁷⁹

⁷⁹ *Bamlet Realty Co. v. Doff*, 150 N. W. 307, 183 Mich. 694.

§ 3266(2). Wisconsin

The jury are instructed that, if they find from the evidence that the vibration or shaking of the building in which defendant's studio was situated, which was caused by the conduct of the automobile company, was such that the defendant was thereby prevented from properly carrying on her work as a glass painter, and her paintings thereby became liable to be damaged or destroyed, and said premises thereby made unfit for the purpose of an art studio, so that she had to abandon the same, then the defendant, as lessee, was evicted from the premises.⁸⁰

§ 3267. Defense of untenable condition of premises**§ 3267(1). Arkansas**

You are instructed that, before the defendants would be authorized to abandon the house and refuse to pay the rent, it must appear from the evidence that the premises became untenable as a boarding house by reason of plaintiff's failure to comply with his agreement to repair. If the jury find from the evidence that plaintiff agreed to make certain repairs and failed and refused to make them, after defendants requested that repairs be made as agreed to by plaintiff, and that by reason of his failure to make same the property became untenable as a boarding house, your verdict should be for the defendants. By untenable as a boarding house the court tells you is meant unsuitable and not adapted to the purpose of keeping boarders.⁸¹

§ 3267(2). Colorado

The court instructs the jury that if they believe from the preponderance of the evidence that an unusual flood had injured the building and its walls to such an extent as to render it unsafe for the purposes for which it was leased, of which fact plaintiff had notice, and thereupon failed, within a reasonable time, to put it in tenable condition, their verdict should be for defendants, unless the defendants made the repairs necessary for that purpose and presented the bill therefor to plaintiff who paid the same, in which event the verdict should be for plaintiff.⁸²

§ 3268. Abatement of rent because of destruction of buildings

The court instructs the jury that, if they believe from all the evidence that any of the buildings or structures upon the leased premises were destroyed without fault or negligence of the defendant by the ice or ice gorge in defendant's plea set out, and were not, before the bringing of this suit, replaced in whole or in

⁸⁰ Wade v. Herndl, 107 N. W. 4, 127 Wis. 544, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591.

⁸¹ Berman v. Shelby, 125 S. W. 124, 93 Ark. 472.

⁸² Post v. Lang, 147 P. 441, 27 Colo. App. 225.

part, and that in consequence thereof the value of the premises to the defendant for its purposes was diminished, they are instructed that the defendant should be allowed a reasonable abatement therefor, and the plaintiff is only entitled to recover the agreed rent of \$—— per month, less a reasonable estimate for defendant's damages occasioned by such destruction of buildings or structures.⁸³

The jury are instructed that they should find for the plaintiff any unpaid amount of the sum of —— dollars, stipulated in the lease as a monthly rent, and may allow interest on any such monthly installment from the time said monthly rent was due, unless they shall believe from all the evidence that the value to the defendant of the premises for its purpose was diminished without any fault or negligence of the defendant by reason of destruction of any building or structure on the premises by the ice or ice gorge set out in the defendant's special plea, in which event the jury should allow the defendant such abatement of the stipulated rent as they may believe from all the evidence to be a reasonable reduction of the rent on account of such destruction; but if the jury shall believe from the evidence that the injuries to the leased premises caused by said ice gorge spoken of herein were caused by the fault or negligence of the defendant, or that the premises were not rendered less valuable to the defendant thereby, they should make no reduction in the said rent on that account.⁸⁴

§ 3269. Defense of collapse of building because of structural weakness unknown to tenant

The court instructs the jury that they must, under the terms of the lease, find for the plaintiff, unless they believe that the defendant has proved by the greater weight of the evidence that the collapse of the building was not caused by its fault or negligence. The jury are instructed that, in considering any defense offered in this case for the purpose of showing that the house collapsed without fault or negligence on the part of the defendant, the burden is on the defendant to prove such defense by the greater weight of the evidence.⁸⁵

The court instructs the jury that the defendant had a right to rely on the statement made to defendant by plaintiff as to the character and strength of the building in the absence of any actual knowledge on the part of the defendant that the building was subject to any structural defects, provided the jury shall believe from

⁸³ *Richmond Ice Co. v. Crystal Ice Co.*, 49 S. E. 650, 103 Va. 465.

⁸⁴ *Richmond Ice Co. v. Crystal Ice Co.*, 49 S. E. 650, 103 Va. 465.

⁸⁵ *Vaughan v. Mayo Milling Co.*, 102 S. E. 597, 127 Va. 148.

the evidence that such words were used by said plaintiff as a warranty of the strength of the building and so relied on by the lessee, and were not used as mere words of commendation and praise, and if the jury believe from the evidence that there was such a warranty, and that the warranty was not true, then the jury cannot allow any damages to the plaintiff, but must find for the defendant against the plaintiff, and assess its damages at the amount claimed in the plea of set-off, less the sum of \$——.⁸⁶

§ 3270. Defense that lessor did not carry out contract to erect building of a certain character

You are instructed that the contract between the plaintiff and defendants introduced in evidence did not require the plaintiff to build a building in all respects like the building at —— street, but provided that the finishing must be similar, and that all that is required under the contract is that there shall be a suitable compliance with the terms of said contract.⁸⁷

You are instructed that if, after a fair and impartial consideration of all of the testimony in this case, you believe that the building was not built in a similar manner, and you further find that the defendants knew of the general character of said building and moved into said building without protest as to the character of materials and the construction thereof, and continued to pay rent after they claimed to have discovered the defects, and after they had notified the plaintiff to comply with his contract, then they would be precluded from asserting that the building was not built according to the contract, and that the defects would be no defense to the plaintiff's recovery in this action.⁸⁸

You are further instructed that if, after a fair and impartial consideration of all of the testimony in this case, you believe that the defendants have established by a preponderance of the testimony that the building was not constructed in compliance with the contract in the light of the instruction heretofore given you, and was not constructed to be suitable for use as a ——, and that after the defendants had discovered the same, and notified the plaintiff thereof and had given him a reasonable time to comply with his contract, he refused within a reasonable time to comply with the same, and that by reason thereof you find that the building became unsafe for them to occupy and that on account of such unsafe and dangerous condition they removed from the building, it would be your duty to find for the defendants.⁸⁹

⁸⁶ *Vaughan v. Mayo Milling Co.*, 102 S. E. 597, 127 Va. 148.

⁸⁷ *Nelson v. Elchoff*, 158 P. 370, 59 Okl. 210, L. R. A. 1916F, 1063.

⁸⁸ *Nelson v. Elchoff*, 158 P. 370, 59 Okl. 210, L. R. A. 1916F, 1063.

⁸⁹ *Nelson v. Elchoff*, 158 P. 370, 59 Okl. 210, L. R. A. 1916F, 1063.

§ 3271. Liability where tenant at request of lessor occupies other quarters than those leased

You are instructed that the plaintiff claims that the defendant occupied a smaller room. That room was not spoken of in the lease or in the other contract that existed at the time between the parties. It is claimed that that room was actually occupied by the defendant, and that claim is not denied, and for a period of some ——— months. Now, with regard to that claim, the plaintiff claims that nothing ever was actually said except that it was understood that the defendant wanted that room, and the plaintiff claims that wanting the room and actually using it at a loss or detriment to the plaintiff constituted a contract between them, and carried with it an agreement on the part of the defendant to pay such a sum for rental as the room was reasonably worth. You have heard the testimony with regard to that, and you will have to consider that claim after a full consideration of the testimony. The defendant, with regard to that claim, says this: That he was prevented from using the room that he had actually hired, and prevented from using it by the plaintiff because of the noise made by the sewing machines that I have already referred to, and he says that the putting of him—that is, the defendant—into that room was an act on the part of the plaintiff for the plaintiff's own benefit, and not for the benefit of the defendant at all, and therefore he claims that the claim of the plaintiff is unjust, and that there was no contract relations that ever existed, either by contemplation of law or agreement of the parties, for the leasing of that room. That becomes, of necessity, a disputed question of fact, and you will have to determine that. If you find that the plaintiff's claim in that regard is established by the proofs, then the plaintiff is entitled to a fair and reasonable compensation for the use of that room for the period of ——— months. The full claim that he makes is for \$———. If you find that the defendant has established his theory with regard to that item, then the defendant, with regard to that item, is entitled to a verdict of no cause of action.⁹⁰

§ 3272. Surrender of premises as defense to action for rent

In respect to the alleged surrender of the premises in controversy to the plaintiff, the jury are instructed that no such surrender could take effect, unless the plaintiff, by himself, or by his authorized agent, accepted such surrender; and although the jury may believe, from the evidence, that the defendants vacated the premises in controversy, and gave notice thereof to the plaintiff,

⁹⁰ *Bamlet Realty Co. v. Doff*, 150 N. W. 307, 183 Mich. 694.

yet this would not exonerate them from the payment of rent, unless assented to by the plaintiff.⁹¹

§ 3273. Release from liability

You are instructed that it is further claimed by the plaintiff that this occupancy by the defendant was continued; that nothing was ever said by the plaintiff that gave the defendant the right to leave at any time. The defendant with regard to that claim of the plaintiff, says this: That at some time during the occupancy the defendant objected to the manner in which things were being conducted, and that the president of plaintiff stated that if the defendant was not satisfied, he could get out, and that he accepted that as a release from his obligation under the lease, and actually did get out with as great expedition as the circumstances would permit. Now, if anything of that kind was said, the evidence shows that it was said in the spring, either in ——— or ———, but the time is not definitely fixed by any of the witnesses, and you will have to determine whether it is reasonable to believe that the defendant got out by reason of that statement, if the statement was made, although the statement is denied, whether he got out at the end of ——— by reason of that, or whether some other thing in the mind of the defendant at that time caused him to move. Where a landlord says to a tenant, "You may leave," if you wish to take advantage of that permission, you must leave, not immediately, but with as great expedition as circumstances will permit. So if you consider that claim, you will have to consider the circumstances that existed at the time or subsequent to the time it is claimed that the release was given, or the permission was given to move out. The defendant claims he was delayed by reason of the peculiarity of the business and the difficulty in obtaining suitable quarters in which to move. Those circumstances have been narrated, and you will have to study the evidence to determine what the truth of these claims is. So much with regard to the claim of the plaintiff with regard to the \$—— item.⁹²

§ 3274. Same—Effect of leasing premises to third person

§ 3274(1). Kansas

See, also, post, § 3279.

The jury is instructed that when the defendant quit the said premises, it was then the duty of the plaintiff, to lessen his loss by renting said rooms to some other person, and the renting of the rooms to another would not be such an act as would release the defendant from the payment of rent; but it would be necessary,

⁹¹ Stoble v. Dills, 62 Ill. 432.

⁹² Bamlet Realty Co. v. Doff, 150 N. W. 307, 183 Mich. 694.

in addition to the leasing of said premises by the plaintiff to another party, that you believe from all the evidence and circumstances that the plaintiff consented to the termination of said lease with the defendant, and consented that the defendant should not be held for any further rent.⁹³

§ 3274(2). Missouri

You are instructed that, if the jury believe and find from the evidence in this case that the defendant rented the property from plaintiff as alleged, and that such renting was not in writing, but verbal, then such tenancy was a tenancy from month to month, and if defendant did not afterward occupy said property as the plaintiff's tenant, and same was occupied by ——— independent of and unconnected with the defendant, and plaintiff collected rent from said ——— several months and receipted to him therefor in his own name, then plaintiff cannot recover and the verdict must be for the defendant.⁹⁴

§ 3275. Set-off of damages for failure to make repairs

The court instructs the jury that the jury will find for the plaintiff \$—— for each of the months sued for with —— per cent. interest on each month's payment from the —— day of the month it was due to the present time. And, if you find from the evidence that the building was not in habitable repair during any of these months, you will find for the defendant for the amount you find from the evidence it would cost to put it in habitable repair, and from the two sums so found you will strike a balance, and return the verdict accordingly.⁹⁵

§ 3276. Set-off of cost of permanent improvements

If the jury believe from the evidence that by the terms of lease in this case the plaintiff was to be allowed out of the rent to become due the costs to him of permanent improvements in adapting the building in controversy to his uses, then he had a right to claim the payment of said costs out of said rents. And if they believe from the said evidence that by said contract said plaintiff was to be paid said costs before paying any rent, and was not so paid, then he had the right to claim the same thereafter at any time he might see proper, and if they believe from said evidence that by said contract it was not provided when said costs were to be taken out of the rents, then the plaintiff had the right to elect to take said costs out of said rent whenever he saw proper so to do.⁹⁶

⁹³ *Hoke v. Williamson*, 158 P. 1115, 98 Kan. 580.

⁹⁴ *Squire v. Ferd. Helm Brewing Co.*, 90 Mo. App. 462.

⁹⁵ *Young v. Berman*, 131 S. W. 62, 96 Ark. 78, 34 L. R. A. (N. S.) 977.

⁹⁶ *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

The court instructs the jury that if they believe from the evidence that S. rented the property in question to E. for one year from the ——— day of ———, at the price of \$——— per month, and that S. agreed to allow E. for such permanent improvements, to be paid to him at the end of the year and not to be taken out of the rent prior to that time, if said E. should not longer rent the property, and if they further believe from the evidence that when the distress warrant was sued out, to wit, the ——— day of ———, the amount of \$——— was due and unpaid for rent of said property, and the amount for said improvements was not then due, or a sufficient amount to offset said \$——— of rents, then they must find for defendant, notwithstanding that the value of the improvements may have been greater than the said sum of \$———. ⁹⁷

§ 3277. Tender of payment

You are instructed that, if the jury believe from the evidence that defendant tendered to ——— the entire amount owing from him under the contract of rent, and has kept said tender good by depositing in court, you must find for the defendant on his plea of tender. ⁹⁸

§ 3278. Persons liable for rent

You are instructed, gentlemen of the jury, if you believe from the evidence in this case that the plaintiff herein and defendant entered into a certain written contract to lease the property described in the plaintiff's petition, and that the said defendant used and occupied said premises under the terms of said lease, or permitted others to use the same, without consent or agreement of this plaintiff to look to such parties for the rents of said premises, and if you further believe that this plaintiff has not accepted, under the instructions hereinafter given you, such parties other than defendant as his tenants and agreed to look to them for his rents, then your verdict should be for the plaintiff for such sum as you may find under the evidence to be due and owing under the terms of said contract offered in evidence. ⁹⁹

§ 3279. Same—Release of original lessee and acceptance of others as tenants

In this connection you are further instructed that it is not necessary in order for the plaintiff to have accepted said J. and C. as his tenants to have positively agreed to accept said J. and C. as tenants

⁹⁷ *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

⁹⁸ *Anderson v. Winton*, 34 So. 962, 136 Ala. 422.

⁹⁹ *McFarland v. T. W. Lanier & Bro.*, 150 P. 1097, 50 Okl. 336.

and to look to them for his rents. But, if said plaintiff, by any course of conduct, words, or acts, caused the said defendant to believe, and he had reasonable grounds to believe, that it was the intention and purpose of the plaintiff to accept the said J. and C. and to release him, the said defendant, from liability under such lease contract, then such acts upon the part of the plaintiff would constitute an agreement to accept the said J. and C. and to release the said defendant. And you are instructed, if you believe from the evidence in this case that with knowledge on the part of this plaintiff, if plaintiff had such knowledge, the defendant had sold and assigned his rights, title, and interest to the ——— Hotel to said J. and C., and that the plaintiff, either by express agreement or by acts, circumstances and course of conduct, as herein instructed you, accepted said J. and C. as his tenants, then your verdict should be for the defendant.¹

You are further instructed, gentlemen of the jury, that under the law the lease in question, being for a longer period of time than one year, assignment of such lease would be void unless in writing, and you are instructed any attempted assignment of such lease to the said J. and C. by said defendant would be null, void, and of no effect, and not binding on this plaintiff, unless you should further find from the evidence that this plaintiff by express agreement, or by acts and circumstances, as heretofore instructed you, accepted the said J. and C. as tenants.²

§ 3280. Burden of proof in action for rent

§ 3280(1). Illinois

The jury are instructed that the terms of the leasing of the plaintiff's farm to defendant are material in this suit, and that the plaintiff must prove to the satisfaction of the jury by a preponderance of the evidence that the terms of said lease were such as plaintiff claims them to be, and if the jury shall find that the evidence preponderates in the slightest degree in favor of the defendant, or is equally balanced, then the law is for the defendant, and plaintiff cannot recover. In this connection you are instructed that, as to the offset made by defendant to the claim set up by plaintiff, the burden of proof is on said defendant, and that he must establish the existence and validity of such offset by a preponderance of the evidence.³

§ 3280(2). Oklahoma

In this case, gentlemen of the jury, the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the

¹ *McFarland v. T. W. Lanier & Bro.*, 150 P. 1097, 50 Okl. 336.

² *McFarland v. T. W. Lanier & Bro.*, 150 P. 1097, 50 Okl. 336.

³ *East v. Crow*, 70 Ill. 91.

material allegations in his petition alleged necessary to constitute his right of recovery herein.⁴

J. REMEDIES OF LANDLORD FOR ENFORCEMENT OF RENT

§ 3281. Right of lessor to sue out attachment for rent not due

The court instructs the jury that the lessor of property has the right to sue out an attachment for rent not due, but to become due within a year, when the lessee intends to remove, or is removing, or has within ——— days removed, his effects from the leased premises, where there is not, or he believes that, unless an attachment issues, there will not be left, on the leased premises, property, liable to distress, sufficient to satisfy the rent to so become due and payable.⁵

The court instructs the jury that, if they believe from the evidence that there was a deed of trust on the property attached, given by the plaintiff after it was carried on the leased premises, and such trustee intended to remove said property from the premises, by sale or otherwise, not leaving on the leased premises sufficient property to satisfy one year's rent, and without securing to the lessor one year's rent, then such intention of the trustee was of itself sufficient cause for suing out the attachment.⁶

K. LIEN OF LANDLORD

§ 3282. Operation and effect as against one selling goods to lessee under contract of conditional sale

The court instructs the jury that it is urged, as a third ground, by the defendant, that in any event there has been a breach in the terms of the lease of the property in question; and indisputably under this evidence there has been a breach. The lessees failed at least in the payment of the rental of the theater; and it is alleged they failed in other respects as well. Examining the lease of the property in this case, which is Exhibit ———, and its assignment, Exhibit ———, it is found, in paragraph ——— of the lease, that lessor and lessees agree that, should any default in the terms of the lease be made on the part of the lessee, the lessor of the property would have a right to assert a lien against the improvements put by the lessees on this property; and, according to paragraphs ——— and ——— of this lease, part of the very property which the lessees were to install in the theater were these very chairs. And paragraph ——— of the lease provided that, in installing these

⁴ *McFarland v. T. W. Lanier & Bro.*, 150 P. 1097, 50 Okl. 336.

⁵ *Offterdinger v. Ford*, 24 S. E. 246, 92 Va. 636.

⁶ *Offterdinger v. Ford*, 24 S. E. 246, 92 Va. 636.

chairs, the lessees were to pay for them in cash or its equivalent. Now, the lessees failed in observing that condition of their lease; they did not pay for these chairs in cash or its equivalent; but, without any knowledge on the part of the lessor, they violated that agreement of theirs, and they bought these chairs conditionally. They furthermore committed a breach of their lease by not paying the rent. So that, under paragraph — the lessors, when the default on the part of the lessees occurred, had a right to assert a lien for the amounts due to the lessors, and to claim that lien on those very chairs. That is what the defendant company is doing in this case. The defendant claims that, because of the terms of the lease which had been violated by the lessees, they have a right now to assert a lien against these chairs. That clearly is their right under the very terms of the agreement, unless something has arisen to amount to a waiver of the right or a breach of good faith on the part of the lessors. Has there been any breach of good faith on the part of the lessors? Manifestly not. The lessors did not know that these chairs were purchased upon conditional terms of sale. The lessors had the right to presume that the lessees were obeying their contract, and, in buying and installing these chairs, were paying cash or its equivalent for them. The terms of the agreement for the sale of the chairs, Exhibit —, were private and secret, so far as the lessors were concerned, and they had no knowledge of them. What, on the contrary, was the position of the sellers of these chairs, the vendor, —? First, they had actual knowledge, through their agent, who came to —, of the rights which the lessees, who were the purchasers of the chairs, had in and to the premises. They had actual knowledge of that, gained from —, president of the defendant company. Furthermore, since the lease and its assignment, Exhibits — and —, were recorded in the office of the register of deeds, in this county, the seller of the chairs, the —, had constructive notice of the terms under which the lessees held this property. So here, gentlemen, with actual notice, and with constructive notice, as well, although this last is not material, in view of the actual notice, the — sold to the lessees of this theater these chairs upon conditions and under circumstances which disclosed to the seller the terms under which the lessees were in possession of that property. That being so, and the seller, in addition to that, having specific and actual knowledge of the precise use to which these chairs were to be put, namely, their installation in this very theater, owned by the defendant company, and the defendant company, having in no way waived its rights under the lease, but having acted in good faith throughout, it is now in the position to rely on the terms of the lease and to

assert a lien against these chairs for the moneys due, arising out of the breach and default of the lessees.⁷

§ 3283. Enforcement against third person purchasing products of leased premises

The court charges the jury that if they believe from the evidence, that the tenant S., shipped his cotton to defendants, and that they sold the cotton and accounted to S. for it by applying part of the proceeds to the payment of S.'s debt to defendants, and by paying S.'s drafts for the balance before plaintiff demanded his rent of defendants, the jury ought to find a verdict for defendants, unless they further believe that defendants knew that part of the cotton was raised upon rented land, or had notice of facts that would reasonably put a merchant upon inquiry as to such rental, and which, if followed up by diligent inquiry, would have resulted in knowledge on the part of defendants of such renting, and the burden of proving such knowledge or notice would, under the circumstances stated above, be upon the plaintiff.⁸

The court charges the jury that a person is chargeable with knowledge of the landlord's lien, who knows that the property purchased is the product of rented lands.⁹

The court instructs the jury that, if the jury believe from the evidence that J. rented the land called the ——— from the plaintiff in the year ——— and raised cotton thereon and removed the same therefrom without paying the rent thereof for the said year, and without the consent of the plaintiff, and shipped the same to defendants, and they sold the same and failed and refused to pay said rent to the plaintiff, and the defendants, before they sold said cotton, had knowledge of any fact sufficient to put them on inquiry, which if prosecuted with reasonable diligence would have disclosed to them the fact that said cotton was raised on the land rented by said J. from the plaintiff in said year, they must find for the plaintiff and it is immaterial from what source, or by what method, or at what time the information was obtained.¹⁰

§ 3284. Same—Notice to third person of lien of lessor

The court further instructs the jury that the notice of the lien of the plaintiff upon the crops of his tenants need not necessarily be in writing; and if the jury believe, from the evidence, that the defendants knew that H. rented from the plaintiff the land whereon the grain in controversy was raised, and neglected and failed to in-

⁷ Luce v. Scott Realty Co., 167 N. W. 869, 201 Mich. 587.

⁸ Foxworth v. Brown, 24 So. 1, 120 Ala. 59.

⁹ Foxworth v. Brown, 21 So. 413, 114 Ala. 299.

¹⁰ Foxworth v. Brown, 21 So. 413, 114 Ala. 299.

quire into the facts regarding the plaintiff's lien thereon, to the extent that reasonably prudent men should, under the circumstances, do, then the jury should find for the plaintiff.¹¹

§ 3285. Same—Duty of landlord to reduce damages

The court instructs the jury that, if they believe from the evidence in this case that the plaintiff was, at any time after the rent here sued for became due to them from the tenant, N., indebted to the said N. in any sum, and that they paid him any amount that they were so owing him instead of applying it to the rent due them by the said N., and if the jury further believe from the evidence that the purchase of the cotton raised on the leased premises by the defendants was for a good and valuable consideration, and that they did not, in consideration of such purchase, assume or promise to pay the rent due by the said N. to the plaintiff, the plaintiff thereby released the defendants from their liability for said rent to the extent of such payment so made by them to the said N., and the jury should deduct from the amount of the rent sued for such sum as the evidence shows was so paid by the plaintiff to the said N. and return their verdict only for such balance, if any, as is now due to the plaintiff on said rent after the deduction of such payments so made by them to the said N.¹²

The court instructs the jury that, if they believe from the evidence that the plaintiff was at any time indebted to the tenant, N., in a sum equal to or exceeding the amount due to them by the said N. for rent, and that the plaintiff paid the said sum to the said N. instead of retaining it in satisfaction of the rent due them by the said N., the defendants were thereby released from their liability on account of the purchase of the cotton raised on the leased premises, if said purchase was in good faith and for a valuable consideration, and if the defendants, in consideration of the purchase, did not assume and agree to pay the said rents, and if the jury so believe, they should find for the defendants.¹³

§ 3286. Same—Waiver of lien

You are instructed that, if the jury believe from the evidence that the plaintiff consented to ——— shipping and selling the cotton raised upon the rented place before paying the rent, then they ought to find a verdict for the defendants, and such consent may be expressed or implied from the dealings between the parties.¹⁴

¹¹ *Prettyman v. Unland*, 77 Ill. 206.

¹² *Scott & Garrett v. Green River Lumber Co.*, 77 So. 309, 116 Miss. 524.

¹³ *Scott & Garrett v. Green River Lumber Co.*, 77 So. 309, 116 Miss. 524.

¹⁴ *Foxworth v. Brown*, 24 So. 1, 120 Ala. 59.

L. DISTRESS

§ 3287. Liability for wrongful distress

The court instructs the jury that the defendants cannot be held liable in the action, unless the plaintiff shows that they directed or approved the issuing of the distress warrant of ———, and the seizure and detention of the plaintiff's property thereunder, or became aware of the seizure and failed to repudiate it, and if they believe from the evidence that the plaintiff has not shown that any one of the defendants did thus direct and approve the issuing of the distress warrant and the seizure and detention of the property of the plaintiff thereunder, or that after knowledge of the seizure failed to repudiate it, then the jury must find such defendants not guilty.¹⁵

M. RENTING ON SHARES

§ 3288. Status of parties under cropping agreement

You are instructed that an agreement whereby the use of land is granted to another for cropping purposes during the cropping season only, and which confers a right to plant, cultivate, and harvest a crop during said cropping season, and by which the parties retain joint possession and control of said land during said cropping season, is not a lease but a cropping agreement; and if you find, from a preponderance of the evidence, that such was the arrangement as to certain lands herein, and that plaintiff was to receive as compensation for the use of such land during the cropping season a share of the crop raised, then you are instructed that plaintiff and said party so cropping said land were joint owners of the crops upon said lands according to their respective interests as fixed by said agreement.¹⁶

§ 3289. Method of sharing in products of farm

You are instructed that, if you find that it was understood between the parties that this milk should not be divided upon the farm from day to day, as it was milked, but should be divided by selling it, and the proceeds of it divided, then that should control. If it was so understood that it should be divided in this way between the parties, and that no compensation should be allowed to W. for it, because it was understood between them that his obligation to do the work included this arrangement, then he should not be allowed for it; but if it was not so understood, and this was an arrangement made afterwards, whereby W., at the request of R.,

¹⁵ Fishburne v. Engledove, 91 Va. 548, 22 S. E. 354.

¹⁶ Wheeler v. Sanitary Dist. of Chicago, 110 N. E. 805, 270 Ill. 461.

agreed to deliver the milk for him, then he should be allowed what it would be reasonably worth to do that.¹⁷

§ 3290. Liability of tenant to lessor

We may say to you that in determining whether there is anything due and owing from the tenant to the landlord in this case, there are two things to be considered: (1) What did the tenant in fact raise or grow on the farm? (2) Did he pay or deliver to his landlord one-half of all that he did raise or grow, according to the terms of his agreement? There can be no recovery in this action for any failure on the part of the tenant to cultivate and manage the farm in a good and proper manner. If you believe from the evidence that there was, at the time of the distress, any rent in arrear, from any crop, due and owing to the landlord from her tenant, your verdict should be in favor of the defendant in the replevin for such amount as you are satisfied was the fair value in money of the share of any crop or crops not paid or delivered. If you believe the tenant had paid his landlord all the rent to which she was entitled, your verdict should be in favor of the plaintiff in the replevin.¹⁸

You are instructed that, in regard to the crop of oats in dispute, the tenant contends that a part of them were damaged by rain falling upon them from a window, the glass in which had been broken out, and that such oats were consequently of inferior quality, and of little if any value. We say to you upon this point that it is the duty of a tenant on shares to deliver the landlord's share of the crops in a reasonable time after their maturity, no matter whether they are in good or inferior condition. And it is also his duty to properly harvest his crops, and until the delivery of the landlord's share to keep such share in a safe place, and in good condition, so far as he can do so by the exercise of due and reasonable diligence and care.¹⁹

§ 3291. Right of lessor to recover against third person for injuries to interest of tenant

You are instructed that, if you believe from the evidence in this case that the plaintiff's agreement with her croppers was that she should furnish the land and the mules and one-half of the fertilizer, and the croppers should furnish the labor and one-half of the fertilizer, and that the crop was to be divided between the plaintiff and the croppers, one-half to the plaintiff and one-half to the crop-

¹⁷ *Williams v. Rogers*, 68 N. W. 240, 110 Mich. 418.

¹⁸ *McLain v. Willey* (Del.) 78 A. 493, 2 Boyce, 186.

¹⁹ *McLain v. Willey* (Del.) 78 A. 493, 2 Boyce, 186.

pers, you cannot award the plaintiff any sum as damages for one-half interest of the croppers, if you should decide that the plaintiff is entitled to recover.²⁰

You are instructed that, if you believe the evidence in this case, that there was a contract between the plaintiff and the croppers that the plaintiff should furnish the land, the mules, and one-half the fertilizer, and that the croppers should furnish the labor and one-half the fertilizer, and that the crop should be divided in halves between the plaintiff and her croppers, then the relation of tenants in common existed between the plaintiff and her croppers, and should you, after a consideration of all the testimony, decide that the plaintiff is entitled to recover, you cannot award the plaintiff any sum as damages to the interest of the croppers, should you decide that their property was damaged by fumes from the defendant's fertilizer plant.²¹

²⁰ International Agr. Corporation
v. Burton, 69 So. 417, 194 Ala. 108.

²¹ International Agr. Corporation
v. Burton, 69 So. 417, 194 Ala. 108.

CHAPTER CLXXXV

LARCENY

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 - 3324(1). Alabama.
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- 3325. Consideration of evidence as to intoxication of defendant.
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 3327(1). United States.
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 3332. Corroboration of accomplice.
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 3334. Conviction of lesser offense of taking without felonious intent.
 3335. Drunkenness of accused as affecting question of punishment.

See, also, Burglary; Receiving Stolen Goods; Robbery.

§ 3292. Elements of offense

§ 3292(1). Delaware

You are instructed that the defendant is charged in this case with the larceny of a mare and colt alleged to be the property of the prosecuting witness. Larceny, or stealing, is the felonious taking and carrying away by one person of the personal property of another, with the intention on the part of the taker of appropriating said property to his own use without the owner's consent.¹

Gentlemen of the jury: In this case the defendant is charged with the larceny of two diamond rings, the property of ———. Larceny is the felonious or wrongful taking of the personal property of another without the consent of the owner and with the intention on the part of the taker to convert the property to his own use.²

You are instructed that larceny consists of three main essential elements, namely, the taking and carrying away personal property which is the severance thereof from the possession of the owner against his will; the taking of property of some value from a person with a legal right to the possession thereof; the intent to steal, which embraces the intent to permanently deprive the owner of the possession of the property stolen, and the intent of the taker of the property to derive some gain or profit thereby.³

You are instructed that theft or larceny is the felonious taking and carrying away of the personal property of another with intent to convert it to the use of the taker without the consent of the owner.⁴

¹ State v. Collins (Gen. Sess.) 108 A. 78, 7 Boyce, 438.

² State v. Von Buren, 102 A. 981, 7 Boyce, 79.

³ State v. White, 97 A. 231, 6 Boyce, 86.

⁴ State v. Stewart, 67 A. 786, 6 Pennewill, 435.

§ 3292(2). Iowa

The court instructs the jury that, to convict, the jury must find, beyond a reasonable doubt, that defendant did take the money of ——— unlawfully and feloniously, with the intent then and there to convert the same to his own use, and permanently deprive the said ——— of said money without the consent and against the will of the said ———.⁵

You are instructed that larceny is the felonious taking of the property of another without the knowledge or consent of that other, and with the intent of the party taking, at the time of the taking, to permanently deprive the owner thereof, and, with the further intent at said times to wholly and permanently appropriate it to the use of the party taking.⁶

§ 3292(3). Kentucky

The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that in ———, and before the finding of the indictment herein, the defendant, by himself or with another, did unlawfully steal, take, and carry away one horse, the personal property of Mrs. ———, with the felonious intent then and there to convert the same to his own use and to permanently deprive the said Mrs. ——— of her property therein, without the consent of the said Mrs. ———, you will find the defendant guilty of horse stealing and fix his punishment at confinement in the penitentiary for not less than ——— nor more than ——— years.⁷

The court instructs the jury that, if you believe and find from the evidence in this case beyond a reasonable doubt that the defendant, in ——— county on the ——— day of ———, and before the finding of the indictment herein, did unlawfully and feloniously take, steal, and carry away goods and lawful money of the United States to the amount and value of more than \$——, the personal property of ———, with the felonious and fraudulent intent then and there to convert the same to his own use and to permanently deprive the said ——— of their property therein, without the consent of said ———, then the jury will find the defendant guilty of grand larceny as charged in the indictment and fix his punishment at confinement in the state penitentiary for a minimum term of not less than ——— years and for a maximum term of not more than ——— years, within said limits.⁸

§ 3292(4). Missouri

Gentlemen of the jury, by the indictment herein, which was filed in this court on the ——— day of ———, the defendant is charged

⁵ State v. Fisher, 77 N. W. 456, 106 Iowa, 658.

⁶ State v. Minor, 77 N. W. 330, 106 Iowa, 642.

⁷ Ford v. Commonwealth, 193 S. W. 1026, 175 Ky. 126.

⁸ Harris v. Commonwealth, 174 S. W. 476, 163 Ky. 781.

with the offense of grand larceny, and he pleads not guilty. It is the duty of the court to instruct you on all questions of law arising in this case, and it is your duty to receive such instructions as the law of the case, and to find the defendant guilty or not guilty according to the law as declared by the court and the evidence as you have received it under the direction of the court. First. If upon consideration of all the testimony in the case in the light of the court's instructions you find and believe from the evidence that at the city of ——— and state of ———, on or about the ——— day of ———, or at any time within ——— years next before the filing of the indictment herein, the defendant unlawfully and feloniously did take, steal, and carry away one automobile from the possession of ——— with the felonious intent to fraudulently convert the same to his own use, and permanently deprive the owner thereof without his consent, and that the same was the property of the said ———, and of the value of \$——— or more, you will find the defendant guilty of grand larceny as charged in the indictment and assess his punishment at imprisonment in the penitentiary not less than ——— years nor more than ——— years; and, unless you so believe and find from the evidence, you will acquit the defendant. Larceny, as that term is used in these instructions, is the unlawful and fraudulent taking, stealing, and carrying away of any goods or personal property of another person of some intrinsic value, against the will of the owner thereof, and with the intent at the time unlawfully, fraudulently, and feloniously to convert such property to some use of the person or persons stealing, taking, and carrying away the same, and to deprive the owner of such property permanently without his consent.*

You are instructed that, although you may not believe and find from the evidence that the defendant broke into and entered the building in question, yet if you find and believe from the evidence that the defendant, on the night of the ——— day of ———, at and in the county of ——— and state of ———, did willfully and feloniously take, steal, and carry away any of the goods, wares, and merchandise charged in the indictment, with the intent to convert the same to his own use, and to deprive the owners of the use thereof, and if said goods, wares, and merchandise you may find to have been so taken by defendant, if you find they were so taken by him, were of the value of ——— dollars or more, and were at the time and place aforesaid the property of the ——— Mercantile Company, a corporation organized under the laws of ———; you will find him guilty of larceny, and assess his punishment at im-

* State v. Weiss, 219 S. W. 363.

prisonment in the state penitentiary for a term of not less than _____ nor more than _____ years.¹⁰

§ 3292(5). *Nebraska*

You are instructed that larceny is the wrongful and unlawful taking and carrying or leading away of a thing, without claim of right, made in good faith, and without the owner's consent, with the intention of permanently converting it to a use other than that of the owner.¹¹

§ 3292(6). *Oklahoma*

You are instructed that if you find and believe, beyond a reasonable doubt, that the defendants did, at the time and place stated in the information, willfully, unlawfully, and feloniously, by stealth, steal, take, and carry away, without the consent and against the will of the true owner, the property described in the information, and you further find beyond a reasonable doubt that the property was of value exceeding \$——, and that the same was the personal property of ——, and you further find beyond a reasonable doubt that the defendants took the same, as charged in the information, with the unlawful and felonious intent of them, the said defendants, to deprive the true owner of the value thereof, and to appropriate the same to their own use and benefit, and you so find, you will return your verdict, finding the defendants guilty as charged in the information.¹²

You are instructed that larceny is the felonious stealing, taking, carrying, riding, or driving away the property of another. It is the felonious taking; that is, a wrongful, corrupt taking.¹³

You are further instructed that before you can find the defendants, or either of them, guilty, the state must prove to your satisfaction, beyond a reasonable doubt, the following propositions: First, that the property charged in the indictment, or some part of the same, was taken; second, that it was taken either by fraud or stealth, or by both fraud and stealth; third, that it was the property of —— and ——, or one of them; fourth, that it was taken with the felonious intent to deprive the owners thereof; fifth, that the defendants were the persons who took the property.¹⁴

§ 3292(7). *South Carolina*

You are instructed that the offense charged is under a statute, or partially under a statute, which makes the stealing of live stock

¹⁰ State v. Sprague, 50 S. W. 901, 149 Mo. 409.

¹¹ Philamalee v. State, 78 N. W. 625, 58 Neb. 320.

¹² Inklebarger v. State, 127 P. 707, 8 Okl. Cr. 316.

¹³ Hendrix v. United States, 101 P.

.125, 2 Okl. Cr. App. 240. This instruction was based on a statute.

¹⁴ Flohr v. Territory, 78 P. 565, 14 Okl. 477. In other instructions the court advised the jury of the distinction between grand and petit larceny.

a crime, and grand larceny is where the value of the property stolen is above the value of twenty dollars. It is incumbent upon the state to prove that the prisoner at the bar took and carried away the sheep described in the indictment, and that his purpose in taking and carrying away those sheep was fraudulent, and that he intended to steal.¹⁵

§ 3292(8). Texas

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, in the county of ——— and the state of ———, on or about the date alleged in the indictment, did fraudulently take and steal the cow alleged to be the property of ———, and you believe from the evidence that said cow was the property of ——— on the date she was alleged to have been taken, and that at the time she was taken, if you so find, she was in the possession of the said ———, and that the defendant fraudulently took said cow, if you find he did do so, with the intent at that time to deprive the owner of the value of the same, and with the intent to appropriate said cow to the defendant's own use and benefit, and that said cow was taken without the consent of said owner, then in that event you will find the defendant guilty as charged in the indictment and assess his punishment at confinement in the state penitentiary for a term of not less than ——— years and not more than ——— years.¹⁶

You are instructed that, if you believe from the evidence beyond a reasonable doubt that about the time and place as alleged in the indictment the defendant did fraudulently take corporeal personal property, to wit, that alleged in the indictment, or any part thereof, of the value of ——— dollars, or more belonging to ———, from the possession of the said ———, without her consent and with the intent to deprive the said ——— of the value of said property, and to appropriate the same and the value thereof to his own use and benefit, then you will find him guilty, and assess his punishment at confinement in the state penitentiary for a term of not less than ——— nor more than ——— years.¹⁷

§ 3293. "Fraud" and "stealth"

The jury are instructed that "fraud," within the meaning of the statute on larceny, is the getting possession of property by means of falsehood, deception, or artifice. The meaning of the word "stealth," as applied to larceny, is the taking of property secretly and without the knowledge or consent of the owner.¹⁸

¹⁵ State v. Garvin, 26 S. E. 570, 48 S. O. 258.

¹⁶ Richards v. State, 127 S. W. 823, 59 Tex. Cr. R. 203.

¹⁷ McCoy v. State, 120 S. W. 858, 56 Tex. Cr. R. 551.

¹⁸ Flohr v. Territory, 78 P. 565, 14 Okl. 477.

§ 3294. Distinction between larceny and embezzlement

You are instructed that, if you find from the evidence that the wife of defendant, ———, placed in the custody of defendant a check for \$———, to be cashed by him, and the money invested in her name or for her use, and that defendant afterwards cashed said check and converted the said money to his own use, you will find the defendant not guilty of larceny, because that would not be larceny, but embezzlement.¹⁹

§ 3295. Commission of larceny as well as burglary

The court instructs the jury that if you believe and find from the evidence that the defendant, at and in the county of ———, and state of ———, on the night of ———, did willfully and unlawfully break into and enter a certain storehouse, and if the said storehouse was at the time and place aforesaid in the possession of the ——— Mercantile Company, a corporation organized under the laws of the state of ———, and if the said defendant broke into and entered the said store building, at the time and place aforesaid, with the intent then and there to take, steal, and carry away, and convert to his own use, and deprive the owners of the use thereof, of any valuable goods, wares, and merchandise situate, kept, and deposited in the said building, then you will find him guilty of burglary, and assess his punishment at imprisonment in the penitentiary for a term not less than three years. And if you further believe and find from the evidence that this defendant, at the time and place aforesaid, did willfully and feloniously steal, take, and carry away from within said building, with intent to convert to his own use, and deprive the owners of the use thereof, any goods, wares, and merchandise of any value whatever, and if such goods, wares, and merchandise were then and there the property of the ——— Mercantile Company, a corporation as aforesaid, you will also find him guilty of larceny, and assess his punishment for such larceny at imprisonment in the penitentiary for not less than ——— nor more than ——— years.²⁰

§ 3296. What are subjects of larceny

The jury are instructed that you must be satisfied of the genuineness of the treasury notes mentioned in the evidence and alleged to have been stolen by defendant before you can find a verdict of guilty.²¹

¹⁹ Hunt v. State, 79 S. W. 769, 72 Ark. 241, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33.

²⁰ State v. Sprague, 50 S. W. 901, 149 Mo. 409.

²¹ Collins v. People, 39 Ill. 233.

§ 3297. Same—Trees

You are instructed that it is also necessary for me to define to you what the meaning of the words "goods and chattels" is. Chattels in the ordinary sense of the word is any property that is movable; not so connected with the ground as to become a part of the ground or the realty. A growing tree is real estate and is not a chattel, but the minute a growing tree becomes disconnected with the ground, is thrown down, then it becomes a chattel. And while the owner of the property as long as the tree was growing only owned real estate, if without severing her ownership of the real estate the tree is cut down without her consent, or with her consent, it then becomes a chattel, and capable of asportation, and the person who converts real property into personal property and then carries it away, if he does it unlawfully and wrongfully would be guilty of larceny. A tree, when it is cut from the stump, cut into these logs, becomes a chattel, and the party who would steal that, carry it away secretly without the knowledge or consent of the owner, would be guilty of larceny under the statutes of this state.²²

§ 3298. Intention of defendant to steal or to defraud owner of property taken as essential element of crime

§ 3298(1). Alabama

You are instructed that larceny is the felonious taking and carrying away the personal property of another with the intent to convert it to the use of the taker, or to deprive the owner thereof, and unless you believe from all the evidence that this was the intention of the defendant at the time that he took the trousers from the shop of ———, you cannot convict.²³

You are instructed that the intent to steal is the material ingredient of larceny, and I charge you that if defendant took the trousers from the shop of ——— under the belief that they were his own, and after taking them, determined to keep them, for his own use, and deprive the owner of them, he was not guilty of larceny, and you cannot convict him of the offense charged in the indictment.²⁴

§ 3298(2). Connecticut

The court instructs the jury that, to constitute the crime, there must be not only a wrongful taking, but a wrongful taking with the intent of thus depriving the real owner of his property by appropriating it to the use of the taker: that, although the property of another is wrongfully taken, yet, if taken through mistake, theft is not committed; there must be a taking with a criminal intent,

²² State v. Donahue, 144 P. 755, 75 Or. 409, 5 A. L. R. 1121.

²³ Ludlum v. State, 69 So. 255, 13 Ala. App. 278.

²⁴ Ludlum v. State, 69 So. 255, 13 Ala. App. 278.

and, as bearing upon the facts and claims in the case, a felonious taking requires a knowledge in the taker that the thing taken is the property of another, and an intention to deprive the owner thereof by appropriating it to his own use, whether it is property secretly taken, or cattle wrongfully driven from a pasture where the owner has placed them.²⁵

§ 3298(3). Delaware

You are instructed that larceny is the felonious taking and carrying away of the personal property of another, with the intent to convert it to the taker's use and deprive the owner of the use thereof, without the consent of the owner. You will observe, therefore, that the felonious intent is a material element of the crime charged, and must be proved beyond a reasonable doubt.²⁶

§ 3298(4). Georgia

Gentlemen of the jury, if you find from the evidence in this case that this defendant, in company with the other defendant, with a gun shot and wounded the hog in question without any intention of stealing it, and then with a club beat the hog to death and threw it into the water of a river swamp, without any intention of stealing it, and without converting it to their own use, but simply killed it and left it there to rot, that then, and in that event, he would not be guilty of the offense of simple larceny, as charged in this indictment.²⁷

§ 3298(5). Kentucky

You are instructed that, if the jury believe from the evidence beyond a reasonable doubt that the defendant, in this county and within —— months before finding the indictment, did take, steal, and carry away from the possession of —— two chickens of value, the property of said ——, with the intent and purpose to convert same to his own use and deprive the owner of the same, you will find him guilty as charged in the indictment, and fix his punishment at confinement in the jail not less than —— months and not more than —— months.²⁸

§ 3298(6). Missouri

The court instructs the jury that you cannot convict the defendant in this case unless you find and believe from the evidence and beyond a reasonable doubt, that the defendant at the time he took said gloves intended to convert the same to his own use and intended to deprive the owner permanently of the use thereof, and,

²⁵ State v. Main, 52 A. 257, 75 Conn. 55.

²⁶ State v. Dredden, 73 A. 1042, 6 Pennewill, 446.

²⁷ Paulk v. State, 58 S. E. 1108, 2 Ga. App. 660.

²⁸ Allen v. Commonwealth. 137 S. W. 1060, 144 Ky. 222.

unless such intent is shown from the testimony, you will acquit the defendant.²⁹

§ 3298(7). *Oregon*

You are instructed that the intent with which one takes into his possession property alleged to have been stolen is one of the principal ingredients of larceny, and that the intent to convert the property to defendant's own use at the time of the taking without the owner's consent is necessary to constitute larceny. The theory of the state in this case is that this bill of exchange was taken from the post office after it had been deposited there by the holder, ———; and the theory of the defendant is that it was picked up in the street—found by the defendant. I instruct you, gentlemen, that it makes no difference in this case whether or not defendant took the check in question from the post office or picked it up on the street, provided, however, that the evidence should show beyond a reasonable doubt that if he picked it up from the street he knew at the time he got it that it belonged to ———, and, if he did have such knowledge and converted it to his own use, it is a sufficient conversion under the law of stealing.³⁰

§ 3298(8). *South Dakota*

Now, gentlemen, on the other hand, the defendant, as I understand it, claims that he did not know that the sheep were in his bunch and did not know that they were being sheared as his sheep, and that he did not know there were any sheep belonging to ——— in his bunch, until he was informed by ———, and that immediately upon being informed he went with ——— and allowed ——— to pick his sheep out of the bunch. Now, gentlemen, if that is the case, the defendant would not be guilty.³¹

§ 3298(9). *Texas*

The court instructs the jury that, if you believe from the evidence that the defendant when he took the cotton had no fraudulent intention, but took the same with the view and intention of paying for same, or if you have a reasonable doubt as to whether or not he did so take the same, then you will find the defendant not guilty.³²

The court instructs the jury that, if you should believe from the evidence that defendant took the cotton without the knowledge and without the consent of W., and you further believe from the evidence that at the time of taking the cotton the defendant intended to pay for same, and believed that it would be satisfactory to W.,

²⁹ *State v. Stanley*, 100 S. W. 678, 123 Mo. App. 294.

³⁰ *State v. Hinton*, 109 P. 24, 56 Or. 428.

³¹ *State v. Demerly*, 168 N. W. 167, 40 S. D. 513.

³² *Watkins v. State*, 207 S. W. 926, 84 Tex. Cr. R. 412.

or if you have a reasonable doubt as to whether or not the defendant believed it would be satisfactory with W., or whether he intended to pay W. for the cotton, you will acquit him.³³

You are instructed that by "fraudulent taking," as used above, is meant that the person taking knew at the time of the taking, if any, that the property was not his own; that the property was taken, if taken at all, without the consent of the owner; and that the property was taken, if taken, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.³⁴

You are instructed that, if the jury are not satisfied from the testimony that the taking was fraudulent, you will acquit; and, if the testimony should show that the defendant took the property only to keep said — from attending at —, then you will acquit the defendant.³⁵

§ 3299. Intention at time of taking property

§ 3299(1). Arkansas

You are instructed that, if it is contended on the part of the state that the defendant is guilty of larceny, before you can convict the defendant of the crime of larceny the state must prove beyond a reasonable doubt: First, that the money taken, if any was taken, was the property of —, the prosecuting witness, and that it was taken with the felonious intent to steal the same and deprive — of the possession thereof. The intent to steal at the time of the taking is an essential element of the crime of larceny.³⁶

§ 3299(2). Delaware

You are instructed that, if defendant can satisfy you that, although he took the rings without the consent of the owner, he did not take them with the intention of converting them to his own use, then he did not commit larceny, as the intention must be in his mind at the time the property was taken. But if he intended at the time the property was taken to convert it to his own use, it was larceny, notwithstanding he may have later repented of the taking and returned the goods.³⁷

§ 3299(3). Texas

You are charged that, in order to convict the defendant of the crime of theft, you must be satisfied from the evidence beyond a reasonable doubt, that he not only did appropriate the horse to his

³³ *Watkins v. State*, 207 S. W. 926, 84 Tex. Cr. R. 412.

³⁴ *McCoy v. State*, 120 S. W. 858, 56 Tex. Cr. R. 551.

³⁵ *Cain v. State*, 2 S. W. 888, 21 Tex. App. 662.

³⁶ *Wylie v. State*, 215 S. W. 593, 140 Ark. 24.

³⁷ *State v. Von Buren*, 102 A. 981, 7 Boyce, 79.

own use, as alleged in the indictment, but that the intention of the defendant to defraud the owner of the value thereof (if you find that such intent existed) existed at or before such taking. And in this connection I further charge you that, if you should find that the horse alleged to have been stolen was taken by the defendant for his own temporary use and benefit, and that, at the time he took said horse (if he did take same), he intended to return the horse to ———, or if you have a reasonable doubt thereof, then the defendant would not be guilty.³⁸

You are instructed that, if you believe from the evidence that the defendant, when he discovered said animal was crippled, fed and cared for said animal until it had recovered of its injury, and that afterwards he sold the same for the purpose only of repaying himself for the trouble and expense, if any, that he had incurred by his attentions to said animal, and not with the intention of depriving the owner of the value of said animal, and to appropriate it to his (defendant's) use, then you will acquit him, and so say. You are further charged in this connection that, if the defendant had no fraudulent intent at the time of the original taking, but merely took possession of the animal for the purpose of caring for it and curing it, and afterwards formed the fraudulent intent to steal the animal, he would not be guilty of the offense charged against him.³⁹

§ 3299(4). Wisconsin

You are instructed that the intent of the accused at the time of the taking of the property is an important fact, and that, before you can convict defendant of the offense charged, you must be convinced by the evidence, beyond a reasonable doubt, that at the time he took it he took it intending wholly to deprive the owner of this property, and without an intention to return it.⁴⁰

§ 3300. Appropriation of property under claim of title or right § 3300(1). Arkansas

You are instructed that it is not every taking and carrying away that is larceny; it becomes larceny when the taking and carrying away is with the fraudulent intent that is a purpose to steal, and if you find from the evidence that the defendants, or either of them, had engaged in a bet or wager with the prosecuting witness, and that said money of the prosecuting witness was bet upon said trick or chance and won by the defendants, or either of them, and the

³⁸ Hartman v. State, 213 S. W. 936, 85 Tex. Cr. R. 582.

³⁹ Key v. State, 40 S. W. 296, 37 Tex. Cr. R. 511.

⁴⁰ Stoddard v. State, 112 N. W. 453, 132 Wis. 520, 13 Ann. Cas. 1211.

money was taken by the defendants under an honest belief that they had won same in said game of chance, and that said money was their property and they had a right to remove it, this would not constitute the crime of larceny, as, in order to constitute the crime of larceny, there must be a taking and carrying away of the property of another with the fraudulent intent to steal same and dispossess the true owner of the possession thereof.⁴¹

§ 3300(2). Delaware

You are instructed that the state claims that the defendant and the prosecuting witness, P., on a certain Sunday had a conversation about the trade of a mare and colt belonging to P. for a mule owned by the defendant, in which conversation the defendant, offered to trade a mule for the mare and colt; that P. agreed to make the trade if the mule was sound and not over five years old, but that he was to see the mule on the following Monday before agreeing to the trade; that on Monday, the mule, which was neither sound nor young, was left at P.'s home and the mare and colt taken away in P.'s absence. The state, therefore, claims that when the mare and colt were taken by defendant, through his agent, ———, the trade had not been completed and they were still the property of P. and taken without his consent. The defendant contends that there was a definite agreement between him and P. respecting the exchange of the property before the mare and colt were taken, the trade having been fully agreed upon, and that, therefore, the mare and colt were his property, and that he had a right to take them away when he delivered the mule.

So you see, gentlemen, the principal question you are to decide is not what the defendant directed his agent to do when he took the mule to the home of P., but whether the mare and colt were at that time the property of the defendant or of P. If the trade had been fully agreed upon by both parties, and nothing remained to be done but the delivery of the mule by the defendant, then the mare and colt were his property, and he had a right to take them. But, if the trade had not been fully agreed to by P., the defendant did not own the mare and colt, and had no right to take them away. Therefore, if you believe beyond a reasonable doubt that at the time the defendant, by his agent, took the mare and colt they were the property of P., and were known by the defendant to be such, and they were taken feloniously and without P.'s consent, your verdict should be guilty. But, if, on the other hand, you believe that the mare and colt, at the time they were taken, were, by virtue of a trade, the defendant's property, or he honestly believed them to be such, or if you believe they were taken with P.'s

⁴¹ *Wylie v. State*, 215 S. W. 593, 140 Ark. 24.

consent, and not feloniously and with criminal intent, your verdict should be not guilty.⁴²

§ 3300(3). Georgia

The court instructs the jury that if the defendant took the meat and requested ——— to charge it to him, and he believed that he was entitled to take it under these circumstances, you could not convict this defendant.⁴³

§ 3300(4). Michigan

You are instructed that the statute provides that any person obtaining money by card playing or shooting craps, or shooting dice, or any gambling device whatever, if the sum obtained by said playing is less than \$——, the person obtaining said money is subject to a fine of \$——, or to be confined in jail for —— months, or both such fine and imprisonment. I further charge you, gentlemen of the jury, that this same statute which I have mentioned gives the loser of his money, which would be this defendant, if he lost his money in said saloon and by that method of crap shooting and gaming, a right to recover the same in action of assumpsit for money had and received, or in an action of trespass on the case, or by replevin for and on behalf of the plaintiff. Therefore I charge you that if this money was obtained by gambling, as aforesaid, from the defendant, the prosecuting witness, or any one who was present shooting crap games in said saloon, could not acquire any title to said property, because it is in contravention of the law to play such games, and they never come into the legal possession of said money; if you find these facts to be true from the evidence, gentlemen of the jury, you must acquit the defendant, as he is not guilty of the charge as set up in the information.⁴⁴

§ 3300(5). Oklahoma

You are further instructed that if you find from the evidence that on or about ———, the prosecuting witness, H. was indebted to the defendant F. in the sum of —— dollars and accumulated interest thereon, and that at or about that time the said H., as security for the payment of said indebtedness, made and executed to the said F. a bill of sale of the drug stock and the fixtures, and that the key to the drug store wherein such property was contained was turned over to the defendants, or either of them, because of their having such bill of sale as security for their claim, and in order to place them in possession of the property upon

⁴² *State v. Collins* (Gen. Sess.) 108 A. 78, 7 Boyce, 438.

⁴³ *Dozier v. State*, 78 S. E. 203, 12 Ga. App. 722.

⁴⁴ *People v. Henry*, 163 N. W. 534, 202 Mich. 450.

which they had the bill of sale, and in order to give them possession under their lien, then in such a case the defendants could not be found guilty of larceny for the misappropriation of property coming into their hands under such circumstances.⁴⁵

§ 3300(6). Texas

You are instructed that, if you find from the evidence that the defendant and one ——— traded, said ——— trading the horse in question for a mule given him in exchange by defendant, or if you have a reasonable doubt as to whether the trade was made, you will acquit the defendant.⁴⁶

You are instructed that if you believe defendant took the hog or hogs of ———, but you also believe he took the same under a mistaken claim of ownership, in good faith believing the same was his own property, or if from the evidence you have a reasonable doubt as to whether or not he took it or them under such mistake, you will find the defendant not guilty.⁴⁷

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant, acting as a principal with ———, did, in ———, on or about the time charged in the indictment, fraudulently take one hog belonging to ——— from his possession, without his consent, with the intent to deprive the owner of the value of such hog and to appropriate it to the use or benefit of himself, the defendant, or of himself and ———, you will find the defendant guilty as charged in the indictment, and assess his punishment at confinement in the penitentiary not less than ——— nor more than ——— years. If you believe defendant took or participated as a principal in the taking of ———'s hog, but believe he so acted under a mistaken claim of right, in good faith believing the hog to be his own property, or if you have a reasonable doubt as to whether or not he acted under such mistake, you will acquit the defendant.⁴⁸

The jury are instructed that no man can commit theft of his own property, and if you should find that T. owned the animals charged to have been stolen, or if you find that he believed they were his at the time he took them, then it was not theft, although you may believe, under the evidence, that they were not his in fact; and, if you have a reasonable doubt of this you will acquit the defendant.⁴⁹

You are hereby instructed that if you believe from the evidence

⁴⁵ Flohr v. Territory, 78 P. 565, 14 Okl. 477.

⁴⁶ Brooks v. State, 160 S. W. 696, 71 Tex. Cr. R. 599.

⁴⁷ Lockett v. State, 129 S. W. 627, 59 Tex. Cr. R. 531.

⁴⁸ Fields v. State, 124 S. W. 652, 57 Tex. Cr. R. 613.

⁴⁹ Steed v. State, 67 S. W. 328, 43 Tex. Cr. R. 567.

that the defendant really and bona fide believed that the property which he is charged to have stolen was his, or that he had a right to remove the same at the time of such taking, then your verdict will be for the defendant; and it makes no difference whether or not such right did in fact exist.⁵⁰

You are instructed that if, from the evidence, you believe that E. rented the premises, from which the defendant is charged with having stolen said property, to defendant for gardening purposes, and that the said E. agreed to furnish sufficient water for irrigation, and if you further believe that the said E. failed to furnish sufficient water as agreed, then the defendant had the right to rescind the contract and remove whatever building or parts thereof that he would have been entitled to remove at the expiration of the lease, in which event the verdict will be for the defendant.⁵¹

You are instructed that, if you find from the evidence that the defendant bought the horse in good faith from G. honestly believing at the time that the horse belonged to G. and that G. had a right to sell it, then the defendant would be not guilty. But, even if defendant bought the horse from G., such purchase would not authorize defendant to take it unless he, the defendant, acted in good faith, and in the belief that G. owned the horse, and had the right to dispose of it.⁵²

You are instructed that, to constitute theft, there must have been a fraudulent taking of the horse by the defendant—that is, a taking by the defendant with the fraudulent intent on the part of the defendant to deprive the owner of the value of the same, and with the intent to appropriate the same to the use or benefit of the defendant; and if, from the evidence in this case, you find and believe that the defendant took up the horse in controversy as his own, believing at the time that the horse belonged to him (the defendant), you will find him not guilty, or if, from the evidence, you have a reasonable doubt as to whether or not he so took said horse, you will acquit the defendant.⁵³

§ 3300(7). Washington

You are instructed that the laws of the state of ——— provide that in any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim is untenable. Therefore, if you find from the evidence that the defendant withheld or appropriated to his own use the property or money

⁵⁰ *Meersch v. State* (Cr. App.) 57 S. W. 955.

⁵¹ *Meersch v. State* (Cr. App.) 57 S. W. 955.

⁵² *Baxter v. State* (Cr. App.) 43 S. W. 87.

⁵³ *Hunter v. State* (Cr. App.) 37 S. W. 323.

described in the information and that he did so openly and avowedly, under a claim of title preferred in good faith—that is, honestly, believing that he was legally entitled to it as his own—then your verdict should be not guilty.⁵⁴

You are instructed that, if you should find from the evidence that the animal killed by the defendant was the animal described in and identified by the state's evidence, and that it belonged to ———, still you must find the defendant not guilty, if you should further find that the defendant had purchased a calf from the Indian ———, and that he killed the animal described as belonging to ——— by mistake, believing it to be the calf he had purchased from the Indian.⁵⁵

You are instructed that if this defendant took this horse under a claim of right, and you find a fair pretense for so taking said horse, it is your duty to acquit this defendant, though you should find he was mistaken in his claim to said horse.⁵⁶

§ 3301. Same—Right of farm laborer to share in crops

I charge you that, if a laborer steals any part of the crop prior to the division, he can be indicted for larceny, and if the testimony establishes the fact that he did take and carry away a portion of the crop with that intent—if that is established beyond a reasonable doubt—he can be convicted on that charge.⁵⁷

§ 3302. Detaining trespassing animal

You are instructed that, if the defendant willfully took the horse while trespassing upon his premises, either with the intent of concealing and retaining it until the owner should offer a reward, and then of returning it and receiving the reward, or with the intent of purchasing it from the owner at a price less than its value, and of concealing and retaining it until such purchase could be effected, such taking would be larceny.⁵⁸

§ 3303. Theft as bailee

§ 3303(1). Oklahoma

You are further instructed that if you find from the evidence that H. and his wife went to the house of the defendants during the month of ———, taking with them a part of the property described in the indictment, and when they left the premises of the defendants that they left such property in their trunks, and in the care and custody of the defendants, and you further find from the evi-

⁵⁴ State v. Russell, 147 P. 194, 84 Wash. 607.

⁵⁵ State v. Crossen, 137 P. 1030, 77 Wash. 438.

⁵⁶ State v. Eubank, 74 P. 378, 33 Wash. 293.

⁵⁷ State v. Saunders, 30 S. E. 616, 52 S. C. 580.

⁵⁸ Commonwealth v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

dence that, after H. and his wife had left the place of the defendants, the defendants, or either of them, opened the trunk so left in their care and custody, and took the property therefrom with the felonious intent to deprive the owners thereof, then the defendants, or one of them, that took such property under the circumstances above stated, is guilty of larceny, and you should so find.⁵⁹

§ 3303(2). Texas.

You are instructed that, if you have acquitted the defendant under the above instructions, then you will next inquire whether or not the defendant is guilty of theft as a bailee, and as to that offense you are instructed: That a bailment means a delivery of personal property to another person for a special purpose, upon a contract or agreement, either express or implied, that such agreement would be carried out by the party who receives the property, and where such person shall, without the consent of the owner, fraudulently convert, sell, or pawn such personal property to his own use with the intent to deprive the owner of the value of the same, he would be guilty of theft as a bailee, and shall be punished as in theft of like property. Now if you believe from the evidence beyond a reasonable doubt that the defendant, in ———, on or about the date alleged in the indictment, did obtain the possession of the three diamond rings from Mrs. ———, and that she was the owner and had possession of said rings at the time, and that the defendant obtained possession of said rings by borrowing them and by agreeing with Mrs. ——— to have the diamonds in said rings tightened or fastened in the clamps or to the rings, and that defendant fraudulently converted said rings to his own use without her consent, and with the intent to deprive the said owner of the value of the same, then if you so believe you will convict the defendant of theft as a bailee, and assess his punishment at confinement in the state penitentiary for not less than ——— and not more than ——— years. If you believe from the evidence that Mrs. ——— delivered said rings to the defendant for the purpose of allowing the defendant to get money on them for his own use, or if you have a reasonable doubt thereof, then you will find the defendant not guilty. The burden of proof in this case is upon the state throughout, and the defendant is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and, if you have a reasonable doubt of the guilt of the defendant, you will acquit him.⁶⁰

⁵⁹ Flohr v. Territory, 78 P. 565, 14 Okl. 477.

⁶⁰ Creale v. State, 158 S. W. 268, 71 Tex. Cr. R. 9.

§ 3304. Same—Necessity of showing conversion with intent to steal

You are instructed that, to constitute the crime of larceny, a felonious intention—that is, an intention to steal—must always exist. And, under our statute, making the conversion of property to his own use by a bailee larceny, the crime is not made out by merely showing a conversion of the property to his own use by the bailee, but it must further appear that such conversion was with an intent to steal the same. The jury are instructed, that the taking or conversion of personal property which renders a person guilty of simple larceny, or of embezzlement, is a felonious taking or conversion, and before you can convict the defendant in this case you must be satisfied from the evidence, beyond a reasonable doubt, that the property mentioned in the information, or some part of it, was converted to his own use by the defendant, with an intention at the time to steal the same.⁶¹

§ 3305. Obtaining possession of property by fraud, trick or device with intent to deprive owner of it

§ 3305(1). California

The jury are instructed that the case for the people is limited to a taking by fraud, trick, or device, and that the law is that, when by means of fraud, or artifice, or any other kind of contrivance the possession of personal property is fraudulently obtained from another, and the party so obtaining the possession acquires it with the intention feloniously of stealing the property when he gets possession of it, then the crime is larceny; provided, the person from whom the property was taken still remains the owner of the property, and has not parted with the title. One of the questions, therefore, for the jury to consider in this case is whether there was a parting with the title by the witness ———.⁶²

The jury are instructed that, in order to convict the defendant, the jury must believe that the prosecuting witness did not at the time intend to part with her ownership in said ring, but was induced by fraud of the defendant to part with the possession, there being at the time a felonious intention on defendant's part, in taking the ring, to steal the said ring.⁶³

§ 3305(2). Illinois

You are instructed that, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, by false representation and encouragement, induced the prosecuting witness

⁶¹ *Tashima v. People*, 144 P. 200, 58 Colo. 98.

⁶² *People v. Grider*, 110 P. 586, 13 Cal. App. 703.

⁶³ *People v. Grider*, 110 P. 586, 13 Cal. App. 703.

to part with ——— dollars of his money by a trick at cards, or any other device or trick, in manner and form as charged in the indictment, then the defendant is guilty as charged in the indictment, and you should find the defendant guilty.⁶⁴

§ 3305(3). *Indiana*

You are instructed that larceny may exist, although the possession of the alleged stolen goods is obtained with the consent of the owner, if that consent is procured by deception, and with the felonious intent to steal and appropriate the property to the taker's use, and deprive the owner thereof, and of the remedy for their loss.⁶⁵

§ 3305(4). *Missouri*

You are instructed that all persons are equally guilty who act together with a common intent and purpose in the commission of a crime, and the crime so committed by two or more persons jointly is the act of all and each so acting. If you find and believe from the evidence that at the city of ———, state of ———, at any time within ——— years next before the finding of the indictment herein, the defendant, either acting alone or with another, did, by use of a fraud and deception, induce ——— to deliver into the possession of defendant, or that of another person acting with him with a common purpose, ——— dollars, lawful money of the United States, or any sum of such money of the value of ——— dollars or more, with the fraudulent intent on the part of defendant at the time to wrongfully steal, take, and carry away said money from the possession of said ———, and to fraudulently convert the same to his own use, or that of himself and another, or others acting with him with a common intent and purpose, and to permanently deprive the owner thereof without the owner's consent, and that, after so receiving or coming into possession of said money, defendant or another, or others acting with him with a common intent or purpose, did convert the same to his own or their own use with the intent at the time to permanently deprive the owner thereof, and that the same was the property of ———, and of the value of ——— dollars or more, then you will find defendant guilty of grand larceny, and assess his punishment at imprisonment in the penitentiary not less than ——— years nor more than ——— years.⁶⁶

⁶⁴ *Maxwell v. People*, 41 N. E. 995, 158 Ill. 248.

⁶⁵ *Crum v. State*, 47 N. E. 833, 148 Ind. 401.

⁶⁶ *State v. Copeman*, 84 S. W. 942,

186 Mo. 108. There was no evidence that the prosecuting witness parted with the title to his property, or that he intended to do so.

§ 3305(5). New York

The jury are instructed that, in order to convict the defendant, you must find that at the time he received the money he formed an intent to steal it.⁶⁷

§ 3305(6). Texas

You are instructed that the taking must be wrongful, so that if the property came into the possession of the person accused of the theft by lawful means, the subsequent appropriation is not theft; but if the property was obtained under false pretext, and with the intent to deprive the owner of the value thereof and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense is complete. Hence, if you find from the evidence beyond a reasonable doubt that the defendant obtained possession of the said hogs from the said ——— by a false pretext, such as pretending to buy the same and with the intent on the part of the defendant to deprive the owner of the value thereof and to appropriate the hogs to his own use and benefit, and the defendant did so appropriate the same, then the offense of theft is complete; but in order to convict the defendant of the offense charged in the indictment, the jury must believe beyond a reasonable doubt that the defendant had the intent, at the very time he obtained the hogs, if he did obtain them from the said ———, to so deprive the owner of the value thereof and appropriate them to the use and benefit of the defendant, and that he did so appropriate it. On the other hand, you are instructed that if he did not have the intent at the time that he obtained the possession of the hogs to appropriate them to his own use and benefit, or did not use a false pretext at the time to obtain said hogs, or that he did not appropriate the same to his own use and benefit, or if you have a reasonable doubt as to whether this is true, you will acquit the defendant.⁶⁸

§ 3306. Appropriation of lost property by finder to his own use**§ 3306(1). Connecticut**

You are instructed that, if defendant found the pocketbook and bank bills, as claimed by him, and knowing, or having the means of knowing, the owner, concealed them, and converted them to his own use, instead of giving notice thereof to the owner, he was a thief, and ought to be found guilty.⁶⁹

§ 3306(2). Delaware

You are instructed that if the finder knows who is the owner of the lost chattel, or if, from any mark upon it, or from the circum-

⁶⁷ People v. Miller, 62 N. E. 418, 169 N. Y. 339, 88 Am. St. Rep. 546.

⁶⁸ Anderson v. State, 177 S. W. 85, 77 Tex. Cr. R. 31.

⁶⁹ State v. Weston, 9 Conn. 527, 25 Am. Dec. 46.

stances under which it was found, the owner could reasonably have been ascertained, then the fraudulent conversion of it to the finder's use is sufficient evidence to justify the jury in finding the felonious intent constituting a larceny. In the case before you the defendant was not the actual finder of the money, and yet if, at the time he received the money from his son, he knew, or the circumstances then existing were such as to reasonably inform him, that the prosecuting witness was the owner thereof, and notwithstanding such knowledge, or means of knowledge, he feloniously appropriated the money to his own use without the consent of the owner, he would be guilty of larceny.⁷⁰

We say to you that, in order to determine whether the prisoner knew to whom the money belonged, and feloniously intended to appropriate it to his own use at the time he received it, you may consider all that was said or done by the prisoner, or by others in his presence or hearing, and any other circumstances which would indicate what his actual knowledge and intentions were.⁷¹

§ 3306(3). *Indiana*

You are instructed that a person may be guilty of larceny by taking and converting to his use lost goods found by him. If he knows the owner, it is clearly larceny; as where a carpenter finds money secreted in a bureau given him to repair, if he convert it to his own use, it will be larceny. So, if a hackman convert to his own use a parcel, left by a passenger in his coach by mistake, it is larceny if he knew the owner, or if he took him up or put him down at any particular place where he might have inquired for him. So, where there is a mark upon the property, by which the owner may be traced, and the finder, instead of restoring the property, converts it to his own use, such conversion amounts to larceny. So, where a person bought at auction a bureau, and found in it a secret drawer containing money, which he used, it was held that would be larceny, unless he had reasonable grounds for believing that he bought the bureau and its contents. But where the finder does not know the owner, and has nothing to indicate where the owner may be found, his appropriation of the goods will not be larceny, even although he has not advertised the goods; and the mere fact that he had secreted the goods, or denied finding them, will not make it larceny.⁷²

§ 3306(4). *Kentucky*

The jury is instructed that, if it believes from the evidence beyond a reasonable doubt that in ——— county, and before the find-

⁷⁰ *State v. Dredden*, 73 A. 1042, 6 Pennewill, 446.

⁷¹ *State v. Dredden*, 73 A. 1042, 6 Pennewill, 446.

⁷² *Bailey v. State*, 52 Ind. 462, 21 Am. Rep. 182.

ing of the indictment, the witness ——— did then and there lose a bill of the currency of the United States and of the denomination and value of \$——, and the same mentioned in the evidence and of which the said ——— was the owner, and that he lost custody of it involuntarily and without intention to abandon it, and the defendant found the bill, and then and there knew who was the owner of it, or, not knowing who was the owner of it, had reasonable grounds for believing that the owner of it would be discovered and would claim the bill, and did then and there feloniously and against the consent of said ———, and with the intention of appropriating the bill to his own use and benefit, and to permanently deprive the owner of the use and benefit of same, take it into his possession and removed it into another place, it, the jury, will find the defendant guilty as charged in the indictment and fix his punishment at confinement in the penitentiary for a period of not less than —— year nor more than —— years, in its discretion, controlled by the evidence.⁷³

The court instructs the jury that, although the jury may believe from the evidence beyond a reasonable doubt that the defendant found the bill mentioned in the evidence and took same into his possession and removed it to another place, and then and there knew who was the owner of the bill, or had reasonable grounds to believe that the owner of the bill would be discovered and would claim the bill, yet, if it believes from the evidence that the defendant did not intend to convert it to his own use and benefit and to permanently deprive the owner of its use and benefit, but intended at the time to return it to —— or to its owner when discovered, or if the jury believes from the evidence that at the time the defendant took the bill into his possession and removed it, if he did so, that he did not know who the owner of it was, and did not have reasonable grounds for believing that the owner of it would be discovered, it, the jury, should find the defendant not guilty.⁷⁴

The jury is instructed that, if the jury has a reasonable doubt of the defendant having been proven to be guilty, as set out in instruction No. ——, it will find him not guilty.⁷⁵

§ 3306(5). **Minnesota**

You are instructed that, to render the finder of lost property guilty of larceny in appropriating it to his use, it is necessary that he find it under circumstances which give him knowledge or means of inquiry as to the true owner, and that there must exist, on the

⁷³ Commonwealth v. Metcalfe, 212 S. W. 434, 184 Ky. 540.

⁷⁴ Commonwealth v. Metcalfe, 212 S. W. 434, 184 Ky. 540.

⁷⁵ Commonwealth v. Metcalfe, 212 S. W. 434, 184 Ky. 540.

part of the finder, both the belief that the owner can be found and the intent to deprive him of his property at the time of the finding.⁷⁶

§ 3307. Helping another to wrongfully appropriate property

§ 3307(1). Mississippi

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that ——— stole the cattle described in the indictment with the knowledge of the defendant, and that defendant helped ——— drive them out of ——— county into ——— county, and helped to sell them, then he is guilty, and the jury should so find.⁷⁷

§ 3307(2). Texas

The court charges the jury that, to convict defendant, the evidence must show beyond a reasonable doubt that defendant was an original taker with R. of the animal in ——— county, and not an accomplice or accessory or a receiver of stolen property; and, unless the state so shows beyond a reasonable doubt, the jury will find defendant not guilty.⁷⁸

§ 3307(3). Virginia

The jury are instructed that, if you believe from the evidence that the defendant received the automobile mentioned in the indictment from Mrs. ———, the wife of ———, to sell for her under instructions to pay to her the money from the sale, if made, and, if not made, to return to her the automobile, and that, not having made the sale he went to ———, where Mrs. ——— then was, for the purpose of returning the car, you must find defendant not guilty. But if you find from the evidence that defendant received the said car fraudulently, and was knowingly aiding Mrs. ——— in permanently depriving her husband of his property in said car, then you should find defendant guilty, but you are further told that, in order to convict the accused, you must find him guilty beyond a reasonable doubt.⁷⁹

§ 3308. Effect of acts committed after felonious taking by another than defendant

You are instructed that you must believe beyond a reasonable doubt that defendant is guilty of, or in complicity with, the original taking, and any subsequent connection after the taking would not be larceny in him, whether in good or bad faith; and if you believe that this defendant received the horses in question from ———, or

⁷⁶ State v. Hoshaw, 94 N. W. 873, 89 Minn. 307.

⁷⁷ Murray v. State, 36 So. 341.

⁷⁸ Steed v. State, 67 S. W. 328, 43 Tex. Cr. R. 567.

⁷⁹ Ambrose v. Commonwealth (Va.) 106 S. E. 348.

any other party; after the felonious taking, whether in good or in bad faith, he is not guilty of larceny, and you must acquit him.⁸⁰

§ 3309. Effect of assisting thief to dispose of property

The jury is instructed that if you believe that the only part that the defendant took in the alleged larceny was that he, after the said mules were stolen, aided or assisted the person who stole them in selling or disposing of them, or participated in the profits thereof, then he cannot be convicted of grand larceny, and, in such case, you will acquit the defendant.⁸¹

§ 3310. Larceny by husband from wife

The jury are instructed that, if you find from the evidence that the wife of defendant placed in the custody of defendant a check for ——— dollars, to be cashed by him and the money invested in her name or for her use, and that defendant afterwards cashed said check and converted said money to his own use, you will find the defendant not guilty of larceny, because that would not be larceny, but embezzlement. But, on the other hand, if you believe from the testimony, beyond a reasonable doubt, that defendant, by fraudulent artifice practiced upon prosecuting witness, ———, did obtain from her a check for \$———, and drew the money on it, and thereby obtained and carried away her money, as alleged in the indictment, and had, at the time he so practiced said fraudulent artifices, and obtained and carried away said money, the felonious intent to steal the same, you will find him guilty of grand larceny, as charged in the first count of the indictment.⁸²

You are instructed that you are to exercise your judgment and common sense, neither of which you are to leave behind you when you go into the jury room. Under the laws of the state of ———, a married woman may own property absolutely in her own right. A husband, in this state, may steal the property of his wife. It is for you to determine from the testimony in this case, and the law given you, whether the defendant has stolen the money, as alleged in the indictment. If you find from the evidence, beyond a reasonable doubt, that he conceived the idea that he would steal the money, which he knew or believed the prosecuting witness had, and, for the purpose of enabling him to accomplish that object, he married her, and used artifices upon her, and thereby deceived her, inducing her to deliver to him the money, having all the time the intention of stealing it, the marriage would be no protection to him, but would rather be an aggravation of the offense.⁸³

⁸⁰ State v. Hill, 128 P. 444, 63 Or. 451.

⁸¹ People v. Disperati, 105 P. 617, 11 Cal. App. 469.

⁸² Hunt v. State, 79 S. W. 769, 72

Ark. 241, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33.

⁸³ Hunt v. State, 79 S. W. 769, 72 Ark. 241, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33.

§ 3311. Asportation as necessary element of offense

Sufficiency of evidence of asportation, see post, § 3330.

§ 3311(1). Iowa

You are instructed that, before you can find the defendant guilty of any degree of the crime charged in the indictment you must be satisfied beyond a reasonable doubt that he in fact took and carried away the three tubs of butter mentioned in the indictment, or some of them. While it is not necessary in order to constitute a taking and carrying away of the property, that the same should have been taken and retained in the possession of the defendant, yet it must be shown beyond a reasonable doubt that the defendant did in fact take some or all of said butter tubs from their original place and position in the car, and remove the same to some extent, with intent on his part to steal the same or some of them, the lifting, shoving, or pushing the same on the bottom of said car in any manner and to any extent would be such moving.⁸⁴

You are further instructed that if you find that the defendant did in fact remove said tubs of butter, or some of them, from their original place or position in the car, where he found them in the car, and had the same in his possession, and you further find that only a part of said tubs were so removed from their original position and place in said car, then you cannot find the defendant guilty except as to the tub or tubs of butter you so find was or were removed from their original position in said car, and taken into possession of the defendant with the intent to steal the same. The removal of the stamps or address on said tubs, or any of them, and placing the stamp of defendant thereon, being the address of ———, if you find defendant did so change stamped address on said tubs, or any of them, with intent to steal the tubs of butter or any of them, is not in law larceny, and will not alone warrant a conviction.⁸⁵

You are instructed that larceny is the felonious stealing, taking, and carrying away of the personal property of another. If the defendant actually took into his hands the property named in the indictment, and lifted it from the place where the owner had placed it so as to entirely remove it from the place where it was put, he is guilty of larceny. As to the place from which it is claimed said property was stolen, you are instructed that if you do not find beyond a reasonable doubt that said defendant took said property from said ——— at ———, as charged in the indictment, but if you do find beyond a reasonable doubt that defendant took and carried away said property from a place outside of any building, then your

⁸⁴ State v. Rozeboom, 124 N. W. 783, 145 Iowa, 620, 29 L. R. A. (N. S.) 37.

⁸⁵ State v. Rozeboom, 124 N. W. 783, 145 Iowa, 620, 29 L. R. A. (N. S.) 37.

verdict should be guilty of larceny, fixing therein the value of the property stolen.⁸⁶

§ 3311(2). *Missouri*

The jury are instructed that, if you find from the evidence that defendant took the wheat mentioned in the evidence from its place in the granary and filled the same into sacks, and tied the sacks so containing such wheat, this is a sufficient carrying away to constitute larceny within the meaning of the indictment, if such acts be done with the felonious and unlawful purpose of stealing such wheat.⁸⁷

§ 3311(3). *New York*

The jury are instructed that the least removal of property from the place where it is deposited is a sufficient carrying away to constitute the offense of larceny, provided the jury believe from the evidence beyond a reasonable doubt that such removal was of a felonious character.⁸⁸

§ 3311(4). *Vermont*

You are instructed that if you find the steer was killed or dropped to the ground by being struck in the forehead with the head of an ax, and if you further find that the respondents had, from the start, an intention to kill the steer, to procure his meat for their own use and benefit, and that in getting the steer into such a position, or so far under their control, as to enable one of them to strike the blow, they moved it, or caused it to move, from the place where they found it, that would be a sufficient moving to support the charge of larceny of the steer. Anything short of this would fail to constitute such a moving of the steer as the law requires. But it was not necessary to move it off the premises, or out of the inclosure where it was confined, or any considerable or particular distance. In determining whether there was such a removal as I have indicated, you have a right to take into consideration the evidence which tends to show that the steer was running loose, the nature of the animal, and the manner of its killing. If, in your judgment, an inference that the location of the steer was changed from one spot to another while alive, by the acts of the respondents, follows, beyond a reasonable doubt, from the matters I have stated, then you are justified in finding the fact.⁸⁹

⁸⁶ *State v. McDermet*, 115 N. W. 884, 138 Iowa. 86.

⁸⁷ *State v. Hecox*, 83 Mo. 531.

⁸⁸ *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517.

⁸⁹ *State v. Gilbert*, 34 A. 697, 68 Vt. 188.

§ 3312. Necessity of taking property into actual possession of defendant

You are instructed that the jury must believe, beyond a reasonable doubt, that the defendant got the money into his hands, or actual possession, before they can convict him of larceny.⁹⁰

§ 3313. Necessity of taking property from immediate possession of owner

You are instructed that it is not necessary to constitute larceny, that the property should be taken from the immediate possession of the owner, but if you believe from the evidence, beyond a reasonable doubt, that the heifer was on the range, and was taken by the defendant with the felonious intent to steal the same, you will convict him.⁹¹

§ 3314. Value of property stolen**§ 3314(1). Iowa**

The court instructs the jury that evidence has been offered with a view of showing the value of the property claimed to have been stolen. It is your duty, if you find defendant guilty, to ascertain further what the reasonable market value of the property actually stolen by him was on ———, and the value which you find and return must be the value which is shown by the evidence beyond a reasonable doubt.⁹²

§ 3314(2). Texas

You are instructed that if you believe from the evidence beyond a reasonable doubt that defendant is guilty, but have a reasonable doubt whether said bicycle was of the reasonable cash market value of \$——— or over at the time and place of the alleged offense, you will give the defendant the benefit of such reasonable doubt, and not convict him of theft of the value of property of \$——— or over, but convict him of petty theft—that is, of the theft of property under the value of \$———. ⁹³

You are instructed that, where theft of property by the same person, and from the same owner, is committed on different occasions, each occasion constitutes a distinct offense. Therefore, even though you believe that the defendant did take from the possession of ———, property belonging to him, and that the taking constituted theft, yet, unless you believe beyond a reasonable doubt that property to the value of \$——— was taken at one and the same time,

⁹⁰ Thompson v. State, 10 So. 520, 94 Ala. 535, 33 Am. St. Rep. 145.

⁹¹ Spivey v. State, 198 S. W. 101, 133 Ark. 314. An accompanying instruction requiring proof of venue should be given.

⁹² State v. Hatters, 160 N. W. 113, 184 Iowa, 878.

⁹³ Robinson v. State, 140 S. W. 228, 63 Tex. Cr. R. 373.

you must acquit the defendant of theft of property of the value of \$——; and the burden of proof is upon the state to prove that the property so taken at one time was of the value of \$——. Should you find that defendant is not guilty of taking property of the value of \$——, but believe that on an occasion as alleged in the indictment, he did take property from the possession of the said —— of value less than \$——, you will find defendant guilty of theft of property under the value of \$——. Should you find defendant guilty of theft of property, as alleged in the indictment, under the value of \$——, the punishment for such offense is by imprisonment in the county jail for any term not exceeding —— years, and by fine in any amount not exceeding \$——, or by such imprisonment as you may agree upon without fine.⁹⁴

§ 3315. Method of determining value of goods taken

§ 3315(1). Iowa

The court instructs the jury that they must find the fair market value of the property at the time it was taken, and that they can only consider the testimony as to the original cost thereof for the purpose of determining its fair market value when taken.⁹⁵

You are instructed that, if you shall find the defendants guilty of the larceny of the goods described in the indictment, or some part thereof, it will become your duty to determine the market value of the property which you shall find they thus stole. By the words "market value," as here used, is meant the price or prices at which the property could ordinarily be bought and sold, by or between persons who would ordinarily buy and sell such goods for cash, or trade at an equivalent for cash. In determining such value, you are not necessarily confined to the price at which dealers in secondhand clothing would buy or sell the property, but you should ascertain and return the sum which you shall find, upon a consideration of all the facts shown in the evidence and the evidence of all the witnesses, to be the reasonable market value thereof, as above defined.⁹⁶

§ 3315(2). Missouri

The court instructs the jury that in arriving at the value of the property charged to have been stolen you are not to be governed by the value of the property to the owner, but you will be governed by what the evidence shows said property to have been actually worth.⁹⁷

⁹⁴ Johnson v. State, 122 S. W. 877, 57 Tex. Cr. R. 308.

⁹⁵ State v. Lewis, 123 N. W. 168, 144 Iowa, 483.

⁹⁶ State v. Hathaway, 69 N. W. 449, 100 Iowa, 225.

⁹⁷ State v. Maggard, 61 S. W. 184, 160 Mo. 469, 83 Am. St. Rep. 484. There was no evidence in this case that the stolen property had a market value.

§ 3316. Effect of redelivery bond given by defendant in former replevin suit

You are instructed that evidence has been introduced in this case showing that an action of replevin was commenced by one or both of the ——— to recover the possession of the property, or a part of the property, alleged in the indictment to have been stolen, and that in that suit some part of the property was taken by the sheriff under the order of delivery issued therein, and that a redelivery bond was given by the defendants, and that the property taken under the writ of replevin was retained by them. The evidence of this replevin action so introduced was competent for the purpose for which it was offered, as a circumstance throwing light upon the main issue; but the fact that this replevin action was commenced, and the fact that the defendants, or one of them, gave a redelivery bond and retained the property, in no wise relieves him or them of the criminal responsibility of the larceny of the property, if you find from the evidence, beyond a reasonable doubt, that the property was in fact stolen by them, or either of them.⁹⁸

§ 3317. Proof of ownership as alleged in indictment**§ 3317(1). California**

You are instructed that a person who takes in cattle to pasture for compensation, and who has the care and possession of such cattle, has a lien thereon for his compensation for pasturing the same, and is a special owner thereof, and may be deemed to be the owner thereof within the law of larceny, and an information charging the larceny of such cattle may properly allege that he is the owner thereof.⁹⁹

§ 3317(2). Delaware

You are instructed that the indictment in this case charges that the corn alleged to have been stolen was the property of ———, but it is not essential that the state should have proved that he was the sole or actual owner. It is sufficient if it is shown to your satisfaction that ——— had the lawful possession of the corn at the time it was stolen.¹

§ 3317(3). Massachusetts

You are instructed that, if you find from the evidence that the said company was employed to take the money mentioned in the evidence to ——— and that it was incorporated, under the law of ———, as the ——— Company, and attempted to do business here under its organization, and received this money and under-

⁹⁸ *Flohr v. Territory*, 78 P. 565, 14 Okl. 477.

⁹⁹ *People v. Cain*, 93 P. 1037, 7 Cal. App. 163.

¹ *State v. Robinson* (Gen. Sess.) 103 A. 657, 7 Boyce, 106.

took to deliver it through this boy, as its agent, then it might be considered as having special ownership in this property, which would be sufficient under this indictment.²

§ 3317(4). Oklahoma

You are instructed that the indictment in this case charges the property which is alleged to have been stolen as belonging to H. and W. If you find from the evidence, beyond a reasonable doubt, that the offense is described with sufficient certainty in other respects to identify the act of larceny, but find that the property taken all belonged to H. individually, or that some of the property belonged to W. individually, or that some of the property belonged to H. individually and some of it to W. jointly, then the variance between the allegation in the indictment as to the ownership of the property alleged to have been stolen and the ownership as shown by the evidence is not material.³

§ 3317(5). Oregon

The court instructs the jury that evidence has been introduced calculated to show a sale claimed to have been made by one G. of what has been referred to as the ——— cattle, to D. at some time prior to the time of the alleged larceny, and on this feature you are instructed that if you believe from the evidence that a contract of sale of cattle owned by G. was entered into for the sale to D. of her cattle, and that said G. was then the owner thereof, including the steer in question, and that in and by such contract the parties thereto agreed and intended that said G. then sold and permanently relinquished and gave to said D. the right to take possession of said steer as owner thereof on the range or wherever found, and that such sale was made upon an agreed purchase price for said animal, then if you find from the evidence that such were the facts as to the intention and transaction of said parties, the same would constitute constructive delivery of possession of such steer, and said D. would, under such state of facts as far as pertains to this case, become the owner regardless of whether the purchase price of said steer has been paid or not; but, if D.'s right to permanent possession or ownership was dependent upon payment of the price before such right should exist, then there would be a failure of proof of the allegation of ownership in which event it would be your duty to acquit.⁴

² Commonwealth v. Whitman, 121 Mass. 361.

³ Flohr v. Territory, 78 P. 565, 14 Okl. 477.

⁴ State v. Childers, 142 P. 333, 71 Or. 340.

§ 3317(6). Texas

You are instructed that, if you shall believe the hog the defendants are charged with taking was ——'s and not the property of D., as alleged in the indictment, or if the evidence raises in your mind a reasonable doubt as to whether said hog was the property of —— or of ——, you will give the defendants the benefit of the doubt, and will acquit them.⁵

§ 3318. Jurisdiction of offense

You are instructed that, if the animal killed in —— county, which is not within the jurisdiction of this court, was one of ——'s, and was brought into this county, the jury cannot convict defendant for that offense, although they might believe he was connected with the taking thereof; and, if the jury have a reasonable doubt as to whose animal was killed in this county, they must acquit defendant.⁶

You are instructed that, if you believe from the evidence that the animal killed in this county was R.'s, the alleged accomplice of defendant, or he believed it was, you must acquit defendant; or, if you have a reasonable doubt as to this, you must acquit, although you may believe that the one in A. county was not R.'s, and defendant helped R. to take it fraudulently.⁷

§ 3319. Presumptions and burden of proof

You are instructed that in this case the state charges, and has produced evidence to prove, that the defendant on the —— day of —— last took the property in question from —— Company without their consent, intending to convert it to his own use. The defendant does not deny that he took the property without the consent of the owners thereof, but claims that he took it in the way of a joke, intending to return it. If you believe from the evidence beyond a reasonable doubt—as you must because it is admitted—that the defendant took the rings without the consent of the owners, then the law presumes that he took them with the intention of converting them to his own use, and the burden is upon defendant to satisfy you that he took them for another purpose, that is, for a lawful purpose, and not for an unlawful purpose.⁸

§ 3320. Matters considered in passing on question of guilt or innocence

The jury are instructed that, if the evidence satisfies you that said goods were stolen, then, in passing upon the question of the

⁵ Wright v. State, 48 S. W. 191, 40 Tex. Cr. App. 45.

⁶ Steed v. State, 67 S. W. 328, 43 Tex. Cr. App. 567.

⁷ Steed v. State, 67 S. W. 328, 43 Tex. Cr. App. 567.

⁸ State v. Von Buren (Del.) 102 A. 981, 7 Boyce, 79.

defendant's guilt or innocence, you should consider the evidence as to the goods having been found in the possession of the defendant, as well as the evidence as to defendant's opportunity or want of opportunity to commit the larceny, his conduct at or about the time of the larceny, and prior and subsequent thereto, and what, if anything, he may have said respecting the larceny, as well as all the attending circumstances, as shown by the evidence admitted in the case.⁹

§ 3321. Effect of possession of stolen goods as evidence of guilt
Presumption raised by possession of goods taken from burglarized premises, see ante, § 1351.

§ 3321(1). California

You are instructed that the evidence of the recently unexplained possession of stolen property, standing alone, is not sufficient to justify a verdict of guilty, even in a case of larceny. In cases of larceny the mere unexplained possession of stolen property is not alone sufficient to warrant a conviction, but it is a circumstance tending to show guilt, that can be taken into consideration in determining the guilt of the accused person; and such unexplained possession and other evidence tending to show guilt justifies the jury in arriving at a verdict of guilty, if the same, taken as a whole, satisfy the minds of the jury beyond a reasonable doubt and to a moral certainty that the person accused is guilty of the larceny.¹⁰

You are instructed that possession of property recently stolen puts upon the possessor the burden of explaining such possession, and, if this explanation fails to show that the property was honestly obtained, this may be considered by the jury as a circumstance tending to show his guilt.¹¹

You are instructed that the mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction. It is a circumstance, which, taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe from the evidence, that the defendant was found in the possession of the property described in the information, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of stolen property, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts or conduct or declarations of the defendant, or any other cir-

⁹ *McLain v. State*, 24 N. W. 720, 18 Neb. 154.

¹⁰ *People v. Miller* (App.) 188 P. 52.

¹¹ *People v. Matezski*, 105 P. 425, 11 Cal. App. 465.

cumstances tending to show the guilt of the accused. If the jury believe the property was stolen, and was seen in the possession of defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such.¹²

The jury are instructed that the possession of stolen property in a case of larceny is a circumstance tending to prove guilt only where it appears that the defendant acquired the possession by his own act or with his concurrence or knowledge. The possession must be personal and exclusive, or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused.¹³

§ 3321(2). Delaware

You are instructed that, where personal property that has been recently stolen is found in the possession of a person, that person is presumed to be the thief, and guilty of the larceny, unless he makes a satisfactory explanation of such possession, and convinces the jury that it is a lawful one.¹⁴

§ 3321(3). Georgia

The jury are instructed that the possession of stolen property within a short time after it is stolen, if that possession is unaccounted for and unexplained, affords a presumption of guilt; but this presumption is not one of law, and does not require a verdict of guilty, even though shown, and the jury will still acquit, if there be a reasonable doubt of defendant's guilt.¹⁵

You are instructed that, among the other circumstances which the state claims that it has proved in this case, it contends that this defendant was found in the possession of the hide and horns of the animal alleged to have been stolen, and they have introduced in evidence what they contend is the hide and horns of the cow alleged to have been stolen. The court charges you in reference to them that recent possession of a thing stolen may be considered by you along with other evidence in the case; but, before you would be authorized to consider such recent possession as an in-

¹² *People v. Horton*, 93 P. 382, 7 Cal. App. 34.

¹³ *People v. Warren*, 63 P. 86, 130 Cal. 683.

¹⁴ *State v. Robinson* (Gen. Sess.) 103 A. 657, 7 Boyce, 106.

¹⁵ *Latty v. State*, 91 S. E. 942, 19 Ga. App. 621.

culpating circumstance against the defendant, it would be necessary for you to find that the thing alleged to have been stolen was stolen, and that it was so recently in his possession immediately after the theft was alleged to have been committed, and was in his possession with his knowledge and consent.¹⁶

§ 3321(4). Illinois

The jury are instructed that the recent and unexplained possession of stolen property by the defendant, if the evidence so shows, tends to establish his guilt, and is sufficient, of itself, to authorize a conviction unless the inference of guilt thereby raised is overcome by other facts and circumstances in evidence, so as to raise in the minds of the jury a reasonable doubt of such guilt.¹⁷

The court instructs the jury that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt.¹⁸

The jury are instructed, as a matter of law, that possession of stolen property, immediately after the theft, is sufficient to warrant a conviction, unless attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of prisoner's guilt, when an acquittal should follow.¹⁹

§ 3321(5). Iowa

The jury are instructed that, where the possession of recently stolen property is unexplained, the presumption arises that the person in possession thereof is the person who committed the theft, and, in the absence of any explanation, the fact of such possession is sufficient to warrant a conviction, unless the evidence and circumstances disclosing such possession and the nature of it are such as to leave in the mind a reasonable doubt whether such person may not have come honestly into the possession of such property.²⁰

The jury are instructed that such possession is presumptive evidence that the person in whose possession the property is found is the person who stole the property, unless the facts and circumstances given in evidence raise a reasonable doubt as to whether defendant came into such possession otherwise than by said larceny.²¹

¹⁶ *Turner v. State*, 36 S. E. 686, 111 Ga. 217.

¹⁷ *People v. Surace*, 129 N. E. 504, 295 Ill. 604.

¹⁸ *Smith v. People*, 103 Ill. 82

¹⁹ *Sahlinger v. People*, 102 Ill. 241.

²⁰ *State v. Hayward*, 133 N. W. 667, 153 Iowa, 265.

²¹ *State v. Kimes*, 132 N. W. 180, 152 Iowa, 240.

The court instructs the jury that the possession of stolen property soon after the commission of the theft is prima facie evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt. If there is a reasonable doubt, you must acquit.²²

You are instructed that it is a rule of law that when property has been recently stolen, and is shortly thereafter found in the exclusive possession of a party, such fact is prima facie evidence of the guilt of such party so found in possession, of the felonious taking of said property, unless to the jury such possession is satisfactorily explained. If, therefore, you find from the evidence herein that the steer in the indictment described was the property of ———— that is, was stolen from him on or about ————, in this county and state—and if, further, the evidence shows that the defendant was in the possession of said steer, in this county and state, and sold the same to the witness M. within two or three days after the same was stolen, then such proof would warrant you in finding the defendant guilty, unless the testimony has to you satisfactorily explained that possession. But before presumption of defendant's guilt would arise, and before you would, by reason of such possession, be warranted in finding defendant guilty, you must be satisfied that the same steer that defendant sold was, when sold, the property of ————, and had been, within a short time prior thereto, stolen from said ————. ²³

§ 3321(6). Kansas

You are instructed that the possession of stolen property recently after it has been stolen is prima facie evidence of guilt, and throws upon the possessor the burden of explaining his possession of the said stolen property, and if unexplained, or if his explanation is not satisfactory, it is sufficient of itself to warrant a conviction.²⁴

§ 3321(7). Michigan

The court instructs the jury that, if you find that that property at any time was in defendant's possession, if you find that the property was in the trunk, and if you find that the trunk was in his possession, and if you find that he took that trunk down and put

²² State v. McDermet, 115 N. W. 884, 138 Iowa, 86. This instruction is proper in connection with other instructions on the effect of explanation of possession.

²³ State v. Kelly, 11 N. W. 635, 57 Iowa, 644.

²⁴ State v. White, 92 P. 829, 76 Kan. 654, 14 L. R. A. (N. S.) 556. The

court refused to condemn this instruction, although stating that, technically, unexplained possession of stolen property does not make a prima facie case of guilt, but is merely an evidential fact, to be submitted to the jury with the other evidence in the case.

it in the basement, then this property was in his possession. Was it stolen property, and if it was stolen property, how long was that after it was stolen, if it was stolen at all from the ———? Was it soon after or long after? I think the only testimony upon the question is that it was there in the store in ——— and was found to be missing later. Because it is the rule, and I will state it to you not from memory, that if one is found in possession of stolen goods shortly after they are taken, a presumption arises that the party in whose possession those goods are found is the thief, if the goods were stolen; and it is always considered as a circumstance bearing upon the probability of respondent's guilt in taking them. It is a circumstance which may, if unexplained, raise a presumption of guilt. It is a presumption, however, that may be overcome by other evidence. It is not a conclusive presumption. Possession of stolen property within a short time after it is alleged to have been stolen raises a presumption of guilt; but it is not a conclusive presumption, but one which may be overcome by other facts and circumstances in the case, and which you may believe to be true. And the further away from the time the goods were stolen that they are found in the possession of a man the weaker is the presumption as to his guilt. Now, I say, if you find that these goods were in the possession of this respondent here, has he explained away that presumption satisfactorily to you? If you find that these goods were in his possession shortly after they were stolen, if you find they were stolen, then I say the presumption that would arise as to his guilt, if any, is not conclusive, and can be overcome; but it is the duty of the respondent to overcome that. But in the end, considering all of the testimony, the burden is upon the people to satisfy you of the respondent's guilt beyond a reasonable doubt.²⁵

§ 3321(8). *Mississippi*

The court instructs the jury that possession of property recently stolen is a circumstance of guilt, in absence of some reasonable explanation of such possession.²⁶

§ 3321(9). *Missouri*

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the automobile mentioned in the indictment was stolen from ———, and that soon thereafter said automobile was in the exclusive possession of defendant, then and in that event the defendant is presumed to be the thief, and the burden is on him to rebut or overcome such presumption to your satisfaction, but not beyond a reasonable doubt; and, unless such presumption is overcome to your reasonable satisfaction by evi-

²⁵ *People v. May*, 165 N. W. 832, 199 Mich. 574.

²⁶ *Murray v. State*, 36 So. 541.

dence in the case explaining such possession (if you find and believe from the evidence that he had the possession) in a manner consistent with his innocence, you should find the defendant guilty of the offense of grand larceny.²⁷

The court instructs the jury that, if the jury find from the evidence beyond a reasonable doubt that the goslings of the prosecuting witness, described in instruction No. ———, were stolen, taken, and carried away from the premises upon which the dwelling house of said prosecuting witness and her husband was situated, in ——— county, ———, on or about the ——— day of ———, in the nighttime, and that on or about the ——— day of ——— thereafter said goslings were found in the exclusive possession of defendant, or of defendant and his wife, on defendant's premises, then and in that event the person or persons in whose possession said goslings were so found are presumed to have stolen them, and the burden is on the defendant to rebut or overcome such presumption to your satisfaction, but not beyond a reasonable doubt. And unless such presumption is overcome to your reasonable satisfaction by evidence explaining such possession in a manner consistent with defendant's innocence, you should find the defendant guilty.²⁸

§ 3321(10). *Nebraska*

The jury are instructed that the possession of stolen property, recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a fact exclusively for the jury.²⁹

§ 3321(11). *New Mexico*

You are instructed that the possession of recently stolen property, if unexplained, is a circumstance to be taken into consideration by the jury the same as any other fact or circumstance in the case, and given such weight as the jury may deem it entitled to; and, if in this case you believe from the evidence, beyond a reasonable doubt, that the defendants, or some of them, were in possession of the property stolen, if it was stolen, then you may take that fact or circumstance into consideration, and give it such weight as in your mind it is entitled to.³⁰

§ 3321(12). *Oklahoma*

You are instructed that, when the fact of the theft has been shown, and the question is whether or not the defendant committed it, his possession of the stolen property at a time not too long

²⁷ *State v. Weiss*, 219 S. W. 368.

²⁸ *State v. Baker*, 175 S. W. 64, 264 Mo. 339.

²⁹ *Palmer v. State*, 97 N. W. 235, 70 Neb. 136.

³⁰ *Territory v. Caldwell*, 98 P. 167, 14 N. M. 535.

after the stealing is a circumstance for the jury to consider and weigh in connection with all the other evidence, acts, and circumstances in the case. Its significance will vary with its special facts, and with the other facts of the case, among which are the nearness or remoteness of the proved possession of the larceny, the nature of the property, as passing readily from hand to hand, or not, together with such other facts and circumstances as would reasonably influence the opinion of the jurors as to the guilt or innocence of the defendant.³¹

§ 3321(13). South Carolina

You are instructed that there is one other phase of the law, which is this: That, when property is found traced to the possession of a man recently after a theft has been committed, then the burden of the proof is upon that man to account for how he got possession of the property or how he got it under his control and into his possession; and if he refuses to give an account, or gives an untrue account, of the way in which he got control or possession of the property, then, in law, the presumption is that he is the thief, and it would warrant a conviction of larceny if that fact was proved. Now, the possession of stolen goods, and requiring a man to account soon after the loss of those goods, is reasonable. If a man is in possession of stolen goods recently after having been stolen, and he is called upon to account for it, if he came by them honestly he can tell very easily where he got them, and how he got them, and explain it, and the possession would be no evidence of his guilt. But if he could not give an account, and refuses to give an account, or gives an account which, under the evidence in the case, you really believe to be untrue, then in such a case the possession of the stolen goods would raise an inference that he stole them, and the jury would be warranted in convicting upon such testimony.³²

§ 3321(14). South Dakota

I charge you, gentlemen, that possession of stolen property immediately after the larceny is a circumstance of guilt which the jury would have a right to consider with all other evidence in the case, and the weight, if any, that should be given to such a circumstance would be a question solely for the jury, and in arriving at and determining what weight you would give to such circumstance, if you find he was in possession of stolen property, you would have a right to take into consideration the lapse of time that intervened between the theft and the time at which the defendant was found in possession, the character of the property, etc. As I

³¹ Cox v. State, 175 P. 264, 15 Okl. Cr. 133.

³² State v. Garvin, 28 S. E. 570, 48 S. O. 258.

say, gentlemen, the weight to that circumstance, as well as any other circumstance, is a question solely for the jury.³³

§ 3321(15). Texas

You are instructed that, to warrant an inference of guilt from the circumstance of possession of recently stolen property (if such property was stolen), such possession must be personal and exclusive, unexplained, and must involve a distinct and conscious assertion of property by the defendant.³⁴

§ 3321(16). Wyoming

The jury are instructed that, if they believe from the evidence beyond a reasonable doubt that the property described in the information was stolen, and that the defendant was found in the possession of the property soon after it was stolen, then such possession, if unexplained, is a circumstance which you may consider, along with all the other facts and circumstances in the case, in arriving at the guilt or innocence of the defendant.³⁵

§ 3322. Same—Larceny of animals running on range

You are instructed that, if you find from the evidence that ——— was the owner of the gelding described in the information, and that said gelding was permitted to run on the range, proof of the further fact that said gelding was shortly thereafter in the possession of the defendant is sufficient to put upon defendant the burden of explaining such possession. The presumption, if any, arising from such fact of possession of range stock, if you find such fact from the evidence, is one of fact only, and is rebuttable, and such presumption is overcome whenever a reasonable explanation is made or arises from the evidence; that is, if an explanation which you deem reasonable, considering all the facts and circumstances of the case, is given, and is not shown to be untrue.³⁶

§ 3323. Same—Possession by butcher of carcass of stolen cow

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the prosecuting witness, ———, had in his possession the cow mentioned in the indictment, and that the same was stolen from him in the manner and form charged in the indictment, and that the defendant had an opportunity to steal the same at and about the time it is alleged to have been stolen, and that shortly thereafter the defendant received the carcass of a beef at his butcher shop, and then and there placed the same, not

³³ *State v. Guffey*, 163 N. W. 679, 39 S. D. 84.

³⁴ *Sisk v. State* (Cr. App.) 42 S. W. 985.

³⁵ *Younger v. State*, 73 P. 551, 12 Wyo. 24.

³⁶ *State v. Eubank*, 74 P. 378, 33 Wash. 293. The rule as to effect of possession, stated in the above instruction, is based upon a statute relating to the theft of animals running on range.

upon the cooling rack, but in the cooler, out of view, then this is a circumstance which may be taken into consideration by the jury, in connection with all the other evidence in the case, in determining the guilt or innocence of the defendant, unless the defendant has given a satisfactory account of how he obtained the property which he received on ———. The defendant cannot be found guilty unless the jury find, upon a full consideration of all the evidence, that he is guilty as charged in the indictment, beyond a reasonable doubt.³⁷

You are further instructed that the laws of the state of ——— require every butcher in this state to keep a record of the marks, brands, and color of any stock butchered by him, and that every butcher is required to keep all hides, together with the horns and ears, complete, for at least ——— days from the time of the butchering of stock during the month of ———.³⁸

§ 3324. Same—Sufficiency of explanation of possession

§ 3324(1). Alabama

The court charges the jury, while the law is that the recent possession of stolen goods, if unexplained, may justify a conviction, yet if defendant has explained his possession of the goods to the reasonable satisfaction of the jury, and if, upon a fair consideration of all the evidence, the jury have a reasonable doubt, growing out of any part of the evidence, as to defendant's guilt, the jury must acquit him.³⁹

§ 3324(2). Georgia

I charge you, where a larceny is shown to have been committed, that is to say, where the principal fact that a larceny has been committed is shown, and a person is found to have been in the recent possession of the goods that were stolen, that possession creates a presumption of fact which would authorize the jury to convict, if the possession is not satisfactorily explained to the jury. It is not a presumption of law, but a presumption of fact. This presumption of fact may be rebutted by any explanation which may be presented to the jury consistent with innocence that the jury may believe. Of course, where the explanation is made consistent with innocence and the jury believes it, the fact that a person is in possession of it raises no presumption that he is the person who stole the property alleged to have been stolen. Now, you are the judges of the fact of the recent possession and of the explanation of that possession; that is a question for you to determine, and the truthfulness of the explanation and all of those things are questions for you to deter-

³⁷ Kennon v. Territory, 50 P. 172, 5 Okl. 685.

³⁸ Kennon v. Territory, 50 P. 172, 5 Okl. 685.

³⁹ Hale v. State, 26 So. 236, 122 Ala. 85.

mine. If you believe, from the evidence, that the explanation was consistent with innocence, and you believe that explanation, if it is satisfactory to you, why then you would not be authorized to find a verdict of guilty in the case. If you are not entirely satisfied as to the explanation, you may consider that explanation along with the other testimony in the case on the question of a reasonable doubt.⁴⁰

§ 3324(3). Iowa

You have heard the testimony of the defendant in explanation of his being found in the place in question where the suit case was left, and you are instructed that it is not necessary for the defendant to explain to your satisfaction his possession of the property, if he was in possession of it, and that he came by it honestly. If the explanation he has given is sufficient to cause you to have a reasonable doubt as to his guilt, and if under all the evidence in this case you should have such a reasonable doubt, then you should acquit the defendant.⁴¹

The jury are instructed that, under the law, the unexplained possession of stolen property immediately after the same has been stolen creates the presumption that the person having such possession is the thief; but this presumption is one which may be rebutted by other evidence affording an explanation of such possession, or raising a reasonable doubt as to the guilt of the party having the same. And if, in this case, the jury find from the evidence, beyond a reasonable doubt, that all of the property of the said prosecuting witness, described in the indictment, was, during the evening or night of the day named in the indictment, abstracted and stolen from within the building named in the indictment, by one and the same person, and that on the next day, or within a few hours thereafter, the defendant was found in the possession of the said property, or a considerable part of the same, the jury would then be warranted in concluding that the property in question was stolen by the defendant from the said building, unless the explanation given by the defendant of his possession of the property found with him, either alone or in connection with the other facts and circumstances disclosed by the evidence, raises in your minds a reasonable doubt as to the honesty of the defendant's possession of the said property. But if the explanation offered by the defendant in his testimony, or the facts and circumstances proven in the case, create in the minds of the jury a reasonable doubt as to the guilty possession of the defendant, you should acquit him.⁴²

⁴⁰ *Davis v. State*, 100 S. E. 50, 24 Ga. App. 35.

⁴¹ *State v. McDermet*, 115 N. W. 884, 138 Iowa, 86.

⁴² *State v. Wilson*, 64 N. W. 266, 95 Iowa, 341.

§ 3324(4). Texas

You are instructed that, if you believe from the evidence that the property described in the information has been stolen from the prosecuting witness, and that recently thereafter the defendant was found in possession of the same, and when his possession was first questioned he made an explanation of how he came by the same, and you believe that such explanation is reasonable and probably true, and accounted for the defendant's possession in a manner consistent with his innocence, then you will consider such explanation as true and acquit the defendant. If, on the contrary, you believe such explanation was unreasonable, and did not account for the defendant's possession in a manner consistent with his innocence, or that such explanation is reasonable and is consistent with his innocence, but that the state has shown the falsity of the same, then you will take such explanation in connection with all of the other circumstances, if any, in evidence before you, and if you believe that the defendant is guilty beyond a reasonable doubt you will so find; otherwise, you will acquit him.⁴³

You are instructed that, if you believe from the evidence that the hogs described in the indictment had been stolen from the prosecutor, and that recently thereafter the defendant was found in possession of them, and when his possession was first questioned he made an explanation of how he came by them, and you believe that such explanation is reasonable and probably true, and accounted for defendant's possession in a manner consistent with his innocence, then you will consider such explanation as true, and acquit the defendant. If, on the contrary, you believe such explanation was unreasonable, and did not account for defendant's possession in a manner consistent with his innocence, or you believe that same accounted for defendant's possession in a manner consistent with his innocence, but the state has shown the falsity thereof, then you will take the possession of defendant, together with his explanation, in connection with all the other facts and circumstances, if any, in evidence, and if you believe defendant guilty beyond a reasonable doubt you will so find; otherwise you will acquit the defendant.⁴⁴

The jury are instructed that if, from the evidence, you believe that the defendant was found in possession of one of the horses described in the indictment recently after the alleged taking, and you further believe that he acquired said horse by trading for him, or if you have a reasonable doubt of the truth of such explanation, then you will acquit.⁴⁵

⁴³ Gill v. State, 208 S. W. 926, 84 Tex. Cr. R. 531; Davis v. State, 140 S. W. 349, 63 Tex. Cr. R. 453.

⁴⁴ Wheeler v. State, 30 S. W. 913, 34 Tex. Cr. R. 350.

⁴⁵ Bazan v. State (Cr. App.) 24 S. W. 100.

§ 3325. Consideration of evidence as to intoxication of defendant

Evidence has been offered on the part of the defendant that he was intoxicated. It is not shown exactly what the purpose of the offer was. The defendant comes on the witness stand and swears that he did not take this property. I believe that is his evidence, and I do not know but what he stated he did not know he had possession of it. Now, gentlemen, bearing upon that, we say to you that drunkenness, voluntary drunkenness, itself, is no excuse for crime, because a man has no right to put himself in that position; but nevertheless the law is that a man may become so intoxicated and so drunken that he would be incapable of forming an intent to carry out the particular crime. It is for you to pass upon this, with all the other evidence in the case. Where the existence of a particular specific intent is necessary to constitute a given act and crime, evidence that the defendant was intoxicated when he committed the alleged criminal act is relevant, to show he could not have entertained the intent. Bear in mind what we said to you before, in the definition of larceny, that the taking and carrying away of the personal property of another must be felonious—in other words, with the mind of a thief, with the intent to convert the goods to the use of some persons other than the owner. If from such evidence you are convinced the defendant was so intoxicated as to be unable to form a specific intent, you ought not to convict. The specific intent to deprive the owner of his property, as well as the taking away are essential ingredients of larceny. If the evidence shows the defendant was too drunk to entertain that intent at the time of the alleged commission of this offense, he should be acquitted. Right here is where you are to weigh the evidence carefully. You are to consider the condition of the defendant at the time he was in this alleged state of intoxication. Did he know what he was doing? You will consider his testimony as given here on the witness stand as bearing on that, his details of what took place there and immediately prior to that time and while he was there, of his coming out of the church after the entertainment was over, and the taking of the blankets off the horses and throwing them into his buggy. A defense of this character is one that ought to be scrutinized closely and carefully by the jury; you should view the whole evidence in relation to this alleged intoxication.⁴⁶

§ 3326. Limiting effect of evidence

In this case the state has introduced evidence that other cattle than those alleged in the indictment were taken, at about the same time and place. You are instructed that you can only consider such testimony for the purpose for which it was admitted; that is, to

⁴⁶ Commonwealth v. Ault, 10 Pa. Super. Ct. 651,

establish the identity in developing the *res gestæ* of the alleged offense, or to prove the guilt of the accused by circumstances connected with the theft, if any, or to show the intent with which the defendant acted with respect to the property for the theft of which he is now on trial, and you will consider it for no other purpose, for you cannot convict the defendant for the theft of any property other than that named in the indictment.⁴⁷

§ 3327. Sufficiency of evidence

§ 3327(1). United States

You are instructed that the precise time of the commission of an offense need not be proven as laid in the indictment; and if you believe that the defendant did steal, take, and carry away from the United States Mint the money described in the indictment, or any part thereof, between ——— and ———, and that such money was the property of the United States, it will be your duty to find the defendant guilty. I further charge you that, in order to convict the defendant, it is not necessary that you should find that the money alleged to have been stolen, or any part of it, was ever seen in his possession.⁴⁸

§ 3327(2). California

The jury are instructed that you cannot convict the defendant, unless you believe from the evidence beyond a reasonable doubt that the defendant stole the ——— as alleged in the indictment, or aided and abetted therein.⁴⁹

§ 3327(3). Colorado

You are instructed that if, by any testimony, whether that introduced in his own behalf or by the prosecution, defendant succeeds in raising in the minds of the jury a reasonable doubt as to any essential element in the case, including the element of possession of stolen property, you should find him not guilty.⁵⁰

§ 3327(4). Delaware

You have heard the evidence. If you are satisfied from the evidence beyond a reasonable doubt that defendant did take these goods without the consent of the owner and with the intention of converting the same to his own use, you should find him guilty. If you are not so satisfied, you should find him not guilty.⁵¹

⁴⁷ *Mueller v. State*, 215 S. W. 93, 85 Tex. Cr. R. 346.

⁴⁸ *Dimmick v. United States* (C. C. A. Cal.) 135 F. 257, 70 C. C. A. 141.

⁴⁹ *People v. Ruiz*, 77 P. 907, 144 Cal. 251.

⁵⁰ *Brooke v. People*, 48 P. 502, 23 Colo. 375.

⁵¹ *State v. Von Buren*, 102 A. 981, 7 Boyce, 79.

§ 3327(5). Illinois

The court instructs the jury that, although they may believe from the evidence that the wire in question was stolen by some party or parties, the burden of proof is on the prosecution to prove beyond a reasonable doubt that the wire, in the condition it then was, was worth more than \$—— in cash.⁵³

§ 3328. Effect of proof of receiving or buying stolen property

The jury are instructed that the buying or receiving of stolen property knowing the same is stolen is a substantive crime, but the person who is charged with having stolen the property cannot be convicted by evidence showing that he received or bought the stolen property. So that in this case, even though you may believe from the evidence and beyond a reasonable doubt that the defendant either bought or received the steer in controversy knowing it to have been stolen, this would not authorize his conviction for the crime of which he stands charged, and your verdict should be "Not guilty."⁵⁴

§ 3329. Sufficiency of evidence of possession**§ 3329(1). North Carolina**

You are instructed that in this case there is no evidence that the lot on which the bag of money is said to have been found was at any time in the actual or constructive possession of the defendant, and therefore, if the jury believe that the money so found was the property of ——, no presumption of defendant's guilt is raised thereby, as the defendant had no dominion or control over said premises (and the alleged finding of said money on said lot is not a circumstance against the defendant in this case).⁵⁴

§ 3329(2). Utah

The court instructs the jury that the defendant is charged with the stealing of a cow, not merely the hide. So, before you can report a verdict of guilty in this case, you must find by the evidence, beyond a reasonable doubt, that the defendant not only had the possession of the hide, but you must find beyond a reasonable doubt that such animal was in the possession of defendant at a time when it had been stolen, and that such possession, if you so find, has not been satisfactorily explained by the defendant.⁵⁵

I charge you, gentlemen of the jury, that the mere unsatisfactorily explained possession of the hide of the cow mentioned in the information, if you find that the defendant has failed to sat-

⁵³ Bishop v. People, 62 N. E. 785, 194 Ill. 365.

⁵⁴ Roberts v. State, 70 P. 808, 11 Wyo. 66.

⁵⁵ State v. Austin, 40 S. E. 4, 129 N. C. 534.

⁵⁵ State v. Bowen, 143 P. 134, 45 Utah, 130. Proper, when accompanied by other instructions as to felonious taking.

isfactorily explain his possession, is not sufficient evidence upon which to find a verdict of larceny against the defendant. There must be other and independent evidence that the defendant was in the possession of the cow in question before you will be warranted in inferring or judging that the defendant was ever in possession of said cow.⁵⁶

§ 3330. Sufficiency of evidence of asportation

As we have shown, one of the elements of the crime of larceny is the taking and carrying away of the alleged stolen property by the accused. This may be proved by direct evidence or by a proper amount of circumstantial evidence. In this case the state has shown the asportation by some one of the property mentioned in the indictment. The state has not attempted to show by direct evidence—that is by eyewitnesses—that the accused committed the crime charged, but relies wholly upon circumstantial evidence, that is, upon a chain of circumstances which it is claimed establishes the guilt of the accused.⁵⁷

§ 3331. Necessity of proving identity of property in connection with accused

§ 3331(1). Illinois

The court instructs the jury that one of the material questions in this case is whether or not the wire in question is the identical wire taken from the electric light house, and the burden of proof is on the prosecution to prove beyond a reasonable doubt the identity of the wire as coming from the electric light house.⁵⁸

§ 3331(2). Mississippi

The court instructs the jury that when the state undertakes to prove larceny by evidence that shows the recent possession of the property, or the asportation thereof only, it is incumbent upon the state to prove the identity of the property in connection with the accused, beyond every reasonable doubt, or they must acquit.⁵⁹

§ 3332. Corroboration of accomplice

The jury are instructed that in a prosecution for the larceny of an animal, being the fiddle-back steer involved in this trial, an accomplice's testimony is not corroborated as to defendant's connection with the crime by his having stated to officers the place near defendant's home or abode where the hide and brand were hidden; and the fact that such hide and brand were found as stated by the accomplice, ———, unless accompanied by other independent facts

⁵⁶ State v. Bowen, 143 P. 134, 45 Utah, 130.

⁵⁷ State v. White (Del.) 97 A. 231, 6 Boyce, 86.

⁵⁸ Bishop v. People, 62 N. E. 785, 194 Ill. 365.

⁵⁹ Knight v. State, 20 So. 860, 74 Miss. 140.

and circumstances in addition to the testimony of the accomplice, ———, is no corroboration of the accomplice's testimony.⁶⁰

§ 3333. Effect of reasonable doubt as to degree of offense

The jury are instructed that, if you have a reasonable doubt as to whether the property stolen, mentioned in the evidence, was of the value of more than ——— dollars, you should find it to be of less value than ——— dollars.⁶¹

§ 3334. Conviction of lesser offense of taking without felonious intent

The court instructs the jury that, although you may believe from the evidence that defendant has not been proved guilty of horse stealing under instruction No. ———, yet, if you believe from the evidence beyond a reasonable doubt that at the time and place named above the defendant, by himself or with another, did unlawfully take the horse in question from the stable of Mrs. ———, without her consent, but without the felonious intent then and there to convert the same to his own use and to permanently deprive the said Mrs. ——— of her property therein, you will find him not guilty of horse stealing as charged, but guilty of taking without felonious intent, and fix his punishment at a fine of not less than \$——— nor more than \$———; and, if you find him guilty under this instruction, you may or not provide that, unless the fine be paid or replevied, he shall be placed at hard labor.⁶²

§ 3335. Drunkenness of accused as affecting question of punishment

You are instructed that, if you find from the evidence beyond a reasonable doubt that the defendant committed the offense as charged, then, in passing upon the question of intent, you may, in mitigation of the penalty affixed to the offense, take into consideration the question of the drunkenness of the defendant. If you believe from the evidence that at the time the defendant took the money, if you should so find, he was so drunk as to be temporarily insane, then you may take this into consideration in assessing the penalty you may fix.⁶³

⁶⁰ Smith v. State, 67 P. 977, 10 Wyo. 157.

⁶¹ State v. Hathaway, 60 N. W. 449, 100 Iowa, 225.

⁶² Ford v. Commonwealth, 193 S. W. 1026, 175 Ky. 126.

⁶³ Stoudenmire v. State, 125 S. W. 399, 58 Tex. Cr. R. 258.

CHAPTER CLXXXVI

LEWDNESS

- § 3336. Elements of offense.
3336(1). Iowa.
3336(2). Missouri.
3337. Living in open and notorious adultery.
3338. What constitutes cohabitation.
3339. Inducing sexual intercourse by representations as to beneficial effect on health.
3340. Matters considered in determining question of guilt.

§ 3336. Elements of offense

§ 3336(1). Iowa

The court instructs the jury that the burden of the offense is the open, lewd, lascivious conduct of the parties living together as husband and wife. It is the publicity and disgrace, the demoralizing and debasing influence, that the law is designed to prevent. If, therefore, you find from the evidence in this case that the defendant and ——— lived together in the same house in the relation of master and servant, and not as husband and wife, and that they only had occasional acts of sexual intercourse, and these in a secret manner, such facts alone would not be sufficient to constitute the crime charged against defendant in this case.¹

§ 3336(2). Missouri

The court instructs the jury that, if it finds and believes from the evidence that said defendant, at the time and place detailed in the testimony and set out in instruction No. ———, did have intercourse with the witness ———, and that said acts occurred in such close proximity to other persons, and that the defendant knew it was in such close proximity to such other persons that they could see or hear and know of such intercourse and exposure of privates by the use of their ordinary senses of hearing and seeing, and that the defendant made no effort, and did not intend, to conceal the fact of such intercourse from the knowledge of such other persons, then it would be warranted in finding the defendant guilty as charged.²

§ 3337. Living in open and notorious adultery

You are instructed that the particular statute upon which the information is based is: "Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married,

¹ State v. Kirkpatrick, 19 N. W. 660, 63 Iowa, 554.

² State v. Pedigo, 176 S. W. 556, 190 Mo. App. 293.

both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery." The jury will observe that under the law ordinary adultery is simply the unlawful intercourse of a married person with one of the opposite sex other than his wife or her husband. The defendant, however, in this case is charged with the crime of unlawfully, voluntarily, and feloniously living in open and notorious adultery with a woman not his wife, and under the law the burden of proof is upon the state to not only prove the defendant committed the crime of adultery with the person named as _____, but also that he lived with her in open and notorious adultery, to warrant a conviction. If adultery is not open and notorious, it is not a crime punishable by law, unless the prosecution is commenced and carried on by the wife or husband of one of the offending parties. Simply having occasional illicit intercourse without a public or notorious living together is not sufficient to constitute the offense of living in a state of open and notorious adultery. The parties must reside together in open and notorious adultery, as charged against the defendant, publicly in the face of society as if the conjugal relation existed between them, and their illicit intercourse must be habitual to constitute the crime charged against the defendant.³

§ 3338. What constitutes cohabitation

You are instructed that a "cohabitation," within the meaning of the statute upon which this indictment is based, means the living together of a man and woman as husband and wife; the living together in one house; a boarding or tabling together at a fixed residence or abode, followed by the conduct which naturally arises between man and wife by reason of the marriage relation, and of course implies sexual intercourse.⁴

§ 3339. Inducing sexual intercourse by representations as to beneficial effect on health

You are instructed that the statute of this state provides a punishment for any person who shall undertake to medically treat any female person and while so treating her shall represent to such female that it is, or will be, necessary or beneficial to her health that she have sexual intercourse with a man and shall thereby induce

³ Spencer v. State, 169 P. 270, 14 Okl. Cr. 178, L. R. A. 1918F, 592.

⁴ State v. Naylor, 136 P. 889, 68 Or. 139.

her to have carnal sexual intercourse with any man, or if any man, not being the husband of such female, shall have sexual intercourse with her by reason of such representation, the person or persons so offending shall be—and so forth. And this information, gentlemen of the jury, is drawn under this section of the statute. That is the sole issue, gentlemen of the jury, in this case, as to whether the act of intercourse was induced by the offer of medical treatment or as a process of treatment for the health of the complaining witness, or whether it was done by the consent and knowledge of the complainant and not for her health. The issue, gentlemen of the jury, here, is whether the act of intercourse was done under the inducement of the defendant, and if you believe it was done under the inducement of the defendant by reason of offering or holding out to treat the complaining witness medically for bodily ill, and that she consented to the act of intercourse under the belief that it was for her health, then, gentlemen of the jury, if you believe that, and believe it beyond a reasonable doubt, it is your duty to convict this defendant. If you believe, however, that this complaining witness consented to it, as testified to by defendant, then your duty is to acquit this defendant.⁵

§ 3340. Matters considered in determining question of guilt

You are instructed that the crime charged may be shown by circumstances in connection with the other evidence in the case, if such circumstances are sufficient, in connection with such other evidence, to satisfy you beyond a reasonable doubt that the crime has been committed as charged in the indictment, under these instructions; and, in determining whether said parties were or were not living together as husband and wife, it is proper for you to consider any and all acts of sexual intercourse, if any have been shown by the evidence; the fact, if you find it to be a fact, that a child was born to ——— while she was living with defendant; and all other facts and circumstances disclosed by the evidence as surrounding the parties while living together.⁶

⁵ *People v. Williams*, 175 N. W. 137, 208 Mich. 586.

⁶ *State v. Kirkpatrick*, 19 N. W. 660, 63 Iowa, 554.

CHAPTER CLXXXVII

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A. DEFINITION AND ELEMENTS OF CAUSE OF ACTION

§ 3341. Elements of cause of action

§ 3341(1). Alabama

You are instructed that in this action, to authorize the plaintiff to recover, it is necessary for him to prove that the defendant, maliciously and falsely, spoke, of and concerning the plaintiff, the words charged in his declaration, or some of them; and when plaintiff proves, to the satisfaction of the jury, that defendant, falsely and maliciously, spoke or uttered, of and concerning plaintiff, the words charged in the declaration, then he may recover such damages as he has sustained.¹

¹ Stallings v. Newman, 26 Ala. 300, 62 Am. Dec. 723.

§ 3341(2). *Kansas*

You are instructed that libel is defined by our statute, so far as applicable to this case, as the malicious defamation of a person made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse.²

You are instructed that both of the articles complained of by the plaintiff in his petition, copies of which articles are attached to said petition, are libelous in themselves, and unless the defendant proves them to be true, by a preponderance of the evidence, then the plaintiff would be entitled to recover such damages as he has sustained by the publication of said articles.³

§ 3341(3). *Missouri*

The court instructs the jury that libel is the false and malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse.⁴

The court instructs the jury if you find and believe from the evidence in this case that the defendant, on or about ———, published a certain newspaper in ———, called the ———, and that defendant then published in said newspaper the article mentioned in evidence about the plaintiff, and that said article was libelous of the plaintiff and untrue, then your verdict will be for the plaintiff.⁵

You are instructed that, if for any reason as before explained you find that the said report was not privileged, and if you also find it was published concerning the plaintiffs as merchants, and the part above specified was false, and was calculated to have the effect above explained, and was published by defendant as before explained, then you should find the issues for the plaintiffs, and assess their damages at such sum as you think proper and just under the evidence and instructions in the case, not to exceed, however, the sum of ——— dollars.⁶

You are instructed that, under the Constitution of the state of ———, the jury in cases like this are empowered to determine, under the direction of the court, the law and the facts, which means that in this case the jury may themselves determine whether the

² Dever v. Clark, 25 Pac. 205, 44 Kan. 745.

³ Dever v. Clark, 25 Pac. 205, 44 Kan. 745.

⁴ Rail v. National Newspaper Ass'n, 192 S. W. 129, 198 Mo. App. 463.

⁵ Rail v. National Newspaper Ass'n, 192 S. W. 129, 198 Mo. App. 463.

⁶ Minter v. Bradstreet Co., 73 S. W. 668, 174 Mo. 444.

publication complained of is or is not a libel. For their information in determining this, the court declares that a libel is the malicious defamation of a person, made public by any printing or writing which tends to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or it may be said a libel is a malicious publication, expressed either in printing or writing, tending to blacken the reputation of a man, and expose him to public hatred and contempt or ridicule; or a libel may be defined as a censorious or ridiculing writing, made with a mischievous and malicious intent, towards governments, magistrates, or individuals.⁷

The court instructs the jury that our statute defines a libel to be the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; and if, therefore, you believe and find from the evidence that the article admitted to have been published by the defendant corporation of and concerning the plaintiff had a tendency to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, then the article in question is libelous under the statute.⁸

§ 3341(4). Pennsylvania

You are instructed that the person directly responsible for the article was ———, the reporter. The defendant personally was not connected with it at all; in fact, he was away from home on a visit. He had no further connection with the publication of the article at all; but nevertheless he would be responsible in law for whatever appeared in that newspaper either when absent or when present, if he was editor or publisher. Now, the disposition of this action by you, and our submission of it to you, is covered by an act of assembly, which provides that there shall be no recovery in a civil action of this character, on account of the libel or alleged libel, unless it was malicious or negligent; but, if the jury find it to be malicious or negligent, they may allow such damages as they deem proper. That is the act of assembly which is the foundation of the case. Now you must find—in order to find a verdict in favor of this plaintiff and against the defendant, it must be found first that the defendant was the editor and publisher of this newspaper, ———, and on that there can be no doubt. It is not denied. It is virtually

⁷ *Stark v. Publishers' George Knapp & Co.*, 61 S. W. 669, 160 Mo. 529.

⁸ *McCloskey v. Pulitzer Pub. Co.*, 53 S. W. 1087, 152 Mo. 339.

admitted. Should you find as the initial fact of the case, namely, that the defendant was editor and publisher of this paper, and therefore responsible for any article which appeared in the same and was uttered, then you must find in the second place that this article was published of and concerning the plaintiff. He would not be entitled to recover anything, unless the libel was about him and so understood.⁹

§ 3341(5). Texas

You are instructed that, in order to entitle plaintiff to recover, it must reasonably appear from a preponderance of the evidence—First, that the alleged charge is libelous in its nature; second, that the defendant did publish and circulate it as alleged; third, that plaintiff was injured thereby as alleged.¹⁰

You are instructed that libel is the printing and publication of any slanderous words of and concerning another, or of his acts, which is calculated to injure the reputation or character of the person spoken of, or to disgrace him or bring him into disrepute with others, and to injure the feelings of the person spoken of.¹¹

§ 3342. Elements of slander

§ 3342(1). Alabama

You are instructed that this is an action brought by the plaintiff to recover damages of the defendant for words spoken of and concerning the plaintiff. Slander may be defined to be, the false, willful, and malicious speaking or publishing of another any defamatory words, charging him with being guilty of a felony or crime.¹²

§ 3342(2). Indiana

You are instructed that if you find, from a preponderance of the evidence given in this cause, that the defendant spoke the words, in substance, as alleged in the complaint, that he intended in the use of said words to say and charge that the plaintiff had been guilty of the crime of larceny, and that said words were spoken maliciously and in the presence of some person other than the plaintiff, then you should find for the plaintiff.¹³

⁹ Wharen v. Dershuck, 108 Atl. 18, 264 Pa. 502.

¹⁰ Schulze v. Jalonick, 44 S. W. 580, 18 Tex. Civ. App. 296. This instruction was objected to as leaving it to the jury to say whether the words complained of were libelous,

but the instruction was held good in connection with other instructions.

¹¹ Houston Printing Co. v. Moulden, 41 S. W. 381, 15 Tex. Civ. App. 574.

¹² Stallings v. Newman, 26 Ala. 300, 62 Am. Dec. 723.

¹³ Durrah v. Stillwell, 59 Ind. 139.

§ 3342(3). Kansas

You are instructed that slander is the malicious defamation of a person with respect to his or her character, trade, profession, or occupation, by words or signs.¹⁴

§ 3342(4). Nebraska

You are instructed, gentlemen of the jury, that for the plaintiff to recover she must prove, by a preponderance of the testimony, the truth of the material allegations in her petition. The material allegations which she must prove are: That the defendant spoke, uttered, and published the slanderous statements, or some of them, as alleged and set out in her petition; that they were spoken of and concerning her; and that such statements were published by him, that is, they were spoken in the presence and hearing of one or more persons.¹⁵

§ 3342(5). Texas

The jury are instructed that slander or defamation of character is a defamation expressed by spoken words by one to another, tending to injure the reputation of the one spoken of, and thereby expose him to public hatred, contempt, or ridicule, or financial injury, or to impeach the honesty, integrity, or reputation of the party spoken of.¹⁶

§ 3343. Damages as prerequisite to recovery**§ 3343(1). Connecticut**

You are instructed that words spoken are to be given their natural and ordinary meaning, and are to be taken and understood in the sense which hearers of common and reasonable understanding would ascribe to them. If it is apparent from the context and attendant circumstances that no more was meant or intended by the words used than that the plaintiff was an embezzler, then special damages must be shown to justify recovery on account of the use of the word "thief," if you find it was so used. No special damage, however, is alleged or proved.¹⁷

§ 3343(2). Delaware

You are instructed that it is not necessary to a recovery by the plaintiff that he should have proved special damages, if he has otherwise suffered an actionable wrong at the hands of the defendant; nor is it necessary that the plaintiff should have shown any

¹⁴ *Good v. Higgins*, 161 P. 673, 99 Kan. 315.

¹⁵ *Bloomfield v. Pinn*, 121 N. W. 716, 84 Neb. 472. This is correct, where the alleged defamatory words are slanderous per se.

¹⁶ *Vadicek v. Trojack*, 226 S. W. 503,

¹⁷ *Carey v. Woodruff*, 94 Atl. 281, 89 Conn. 304. Defendant contended that an embezzlement was shown, and that therefore the only question was whether theft as a separate crime was charged.

actual intent or desire on the part of the defendant to injure the plaintiff by the publication in question. In other words, where the article complained of is a libel, and actionable per se, and there is no proof of express malice on the defendant's part, the jury may render a verdict in favor of the plaintiff, even though he has not proved any special damage.¹⁸

§ 3343(3). *Kansas*

You are instructed that, although the plaintiff alleges in his petition that he has, on account of the publications complained of, sustained a damage of ——— dollars on account of each of said publications, it is not necessary for him to prove any specific damage; for the law presumes the reputation of the plaintiff to be good, as also it presumes that his official duties as a public officer were honestly performed, and his professional obligations properly discharged, and an article which tends to hold him up to the public view as an unskilled lawyer and an incompetent officer is libelous per se ("per se" meaning "of itself"), and entitles the plaintiff to damages, unless the defendant establishes the truth of said publication by a preponderance of the evidence.¹⁹

§ 3343(4). *Nebraska*

You are instructed that words spoken falsely of a woman school teacher, that she is crazy and an unmerciful liar and unfit to teach school, when coupled together, are actionable in themselves, or per se, and in an action of slander against the person who made such a charge it is not necessary to either allege or prove special damages in order to maintain the action. The law implies that such words were maliciously spoken. If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, on or about the ——— and on or about the ——— of ———, or either of said dates, the slanderous words as alleged in the petition, in the presence and hearing of one ———, or other persons, then the plaintiff would be entitled to a recovery in this action.²⁰

§ 3343(5). *Virginia*

The court instructs the jury that the law presumes that damages result from the utterance of insulting words, and it is not necessary for the plaintiff to prove either actual or pecuniary loss in order to recover.²¹

¹⁸ *Todd v. Every Evening Printing Co.*, 66 Atl. 97, 6 Pennewill, 233.

¹⁹ *Dever v. Clark*, 25 Pac. 205, 44 Kan. 745.

²⁰ *Fitzgerald v. Young*, 132 N. W. 127, 89 Neb. 693. No prejudicial error.

²¹ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

B. TO WHOM INJURED PERSON MAY LOOK FOR REDRESS**§ 3344. Liability of newspaper proprietor for publication without his knowledge****§ 3344(1). California**

You are instructed that the proprietor of a newspaper in which a libel is published, though he has no knowledge of the publication at the time, is as responsible for it as he would have been had it been done by him personally, or under his direct supervision, and it is no defense to a libel that it was published in the absence of the proprietor by an employé, however competent said employé may be.²²

§ 3344(2). Oregon

You are instructed that it is not a justification in a newspaper proprietor merely to show that the article was published without his consent or knowledge.²³

§ 3344(3). Pennsylvania

You are instructed that, if you find that the defendant was the owner of the ———, that ——— was the duly authorized reporter of the ———, that he reported the article complained of in the due course of his employment, then the defendant is responsible to the plaintiff for the actions of ——— in so doing.²⁴

§ 3345. Liability of corporation—Effect of malice of agent

The court also instructs you that the defendant, being a corporation, can only act through its officers and agents, and is responsible for the willful, wanton, reckless, or malicious acts of its officers or agents, done within the scope of their employment; and if you believe from the evidence that one or more of the agents and officers of the defendant who were engaged in furnishing said report of ———, or in collecting or compiling the information for the same, were actuated by express or actual malice, or ill will towards plaintiffs, or acted with willful or wanton neglect of the rights of plaintiffs, or with a reckless disregard of the consequences of their acts and conduct, in the performance of the services imposed upon them by the defendant in relation to said report, then the acts, conduct, and motives of such officers or agents in that regard were the acts, conduct, and motives of the defendant, and the

²² *Davis v. Hearst*, 116 Pac. 530, 160 Cal. 143. (This is proper as a rule of law governing compensatory damages, but would be erroneous with respect to a claim of exemplary damages); *Dunn v. Hearst*, 73 Pac. 138, 139 Cal. 239.

²³ *State v. Mason*, 38 Pac. 130, 26 Or. 273, 26 L. R. A. 779, 46 Am. St. Rep. 629.

²⁴ *Wharen v. Dershuck*, 108 Atl. 18, 264 Pa. 562.

defendant is chargeable with actual or express malice in respect to said report.²⁵

§ 3346. Same—Liability for slander

The court instructs the jury that the liability of a corporation for oral slander uttered by its agents stands upon a different footing from written or published slander, the law ascribing an oral slander to the personal malice of the agent rather than to an act performed in the course of his employment and in the aid of the interest of his employers, and exonerating the company, unless it authorized, ratified or approved the act of the agent in uttering the particular slander complained of, or the agent was acting within the scope of his employment.²⁶

§ 3347. Same—Ratification

You are instructed that, inasmuch as the defendant is a corporation, it cannot be found actuated by malice if it did not authorize the article, or did not ratify it after it was published, because the corporation is not responsible for the actual malice of its employes, if it neither authorized the particular article nor subsequently ratified its publication. But in this connection you are instructed that in one of the paragraphs of the answer the defendant averred that each one of the defamatory statements in the publication complained of was and is true, and has assumed responsibility for the libel.²⁷

§ 3348. Liability of woman

The court instructs the jury that there is nothing in the antidueling law, or any other law, which will prevent the plaintiff from recovering in this case because the defendant is a woman, if they believe he is entitled to recover under the other instructions in this case.²⁸

C. DEFAMATORY WORDS

§ 3349. In general

§ 3349(1). Missouri

The court instructs the jury that the petition of the plaintiff in this case charges, and the answer of the defendant admits, that the defendant published of and concerning the plaintiff the following language: "S. himself failed to appear last night, and this morning his interests were in the hands of ———, his son, and J. (the plaintiff). J. is remembered here as a member of the Legislature who did well in a legislative way, but also as S.'s chief of police, of whom

²⁵ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

²⁶ *Lindsey v. St. Louis, I. M. & S. Ry. Co.*, 129 S. W. 807, 95 Ark. 534.

²⁷ *Tribune Ass'n v. Follwell*, 107 Fed. 646, 46 C. C. A. 526.

²⁸ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 632.

a Democratic Senate committee said, 'He is not a proper man for the position.' A Democratic Senate removed him and the commissioners who appointed him." And the court instructs the jury that our statute defines a libel to be the malicious defamation of a person made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; and if, therefore, you believe and find from the evidence that the article admitted to have been published by the defendant of and concerning the plaintiff had a tendency to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, then the article in question is libelous under the statute.²⁹

§ 3349(2). Wisconsin

You are instructed that to maliciously print and publish of and concerning a man that he has been guilty of a crime is a libel, if the charge is false. It is also a libel to maliciously print and publish false statements concerning a man, which tend to degrade or disgrace him, or subject him to degradation, contempt, or ridicule.³⁰

§ 3350. Words imputing crime

§ 3350(1). Alabama

You are instructed that to charge one with murder by killing another is actionable and slanderous, and, if falsely and maliciously spoken, warrants a recovery of such damages as the jury may think the party has sustained, commensurate with the injury sustained.³¹

§ 3350(2). Delaware

You are instructed that the words of the alleged slander impute to the plaintiff a crime punishable by the laws of this state, and are actionable in themselves. In such a case the law presumes malice, and implies that the plaintiff has sustained some damage; but the amount thereof is for the jury to determine. Upon the plea of not guilty the plaintiff would also be entitled to recover such actual or compensatory damages as he may have shown you by the proof in the case he has sustained, if any such proof there be.³²

§ 3350(3). Missouri

The jury are instructed that the defendant admits, in the answer filed by him to the ——— count of plaintiff's petition, that he spoke of and concerning the plaintiff, in the presence and hearing of ——— the following words, to wit: "From the dealings I have had

²⁹ *Julian v. Kansas City Star Co.*,
107 S. W. 496, 209 Mo. 35.

³⁰ *Pfister v. Milwaukee Free Press*
Co., 121 N. W. 938, 139 Wis. 627.

³¹ *Stallings v. Newman*, 28 Ala.
300, 62 Am. Dec. 723.

³² *Smith v. Singles*, 72 Atl. 977, 6
Pennewill, 544.

with ———, and from what I have heard about him, I am convinced that he is a damn thief." You are instructed that the speaking of such words constitutes slander as a matter of law, and you are therefore told to find for the plaintiff on the ——— count of his petition, if you should find that the plaintiff was damaged by the speaking of said slanderous words, unless you shall further find from the evidence that the said words, so spoken by defendant, were true.³³

§ 3350(4). Texas

You are instructed that to carry on what is termed a "blind tiger" in a town or community where the sale of liquor is prohibited by law is a criminal offense, and a publication charging a person with committing such offense constitutes libel, and would entitle the person thus charged to damages.³⁴

§ 3351. Charging one with conviction of crime

I instruct you, gentlemen of the jury, that to print and publish, concerning any person, that he has been a convict in the state penitentiary of the state of ——— is libelous per se, unless the same is true; and in this connection I further instruct you that there is no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that the same was published for justifiable ends.³⁵

§ 3352. Charge of false swearing

The jury are instructed that if the jury find from the evidence, or the admissions of the defendant in his answer, that the defendant, on or about the day named in the plaintiff's complaint, did, in the presence of divers persons, or even one person, say, of and concerning the plaintiff, such words as are set forth in the complaint, that the plaintiff had sworn to a lie, or used such words as amount to charging the plaintiff with swearing falsely, or with having sworn falsely, or did utter or publish words of or to or concerning the plaintiff which, in their common acceptance, would amount to such a charge, the words are actionable of themselves, and no special damage need be proven, and you will find for the plaintiff; and the words spoken by the defendant of and concerning the plaintiff are to be taken to mean what it is apparent the defendant intended them to mean, according to the common understanding of language, in its common acceptance and use.³⁶

³³ Rodefer v. Brooking, 229 S. W. 826.

³⁴ Schulze v. Jalonick, 44 S. W. 580, 18 Tex. Civ. App. 296.

³⁵ State v. Brady, 24 Pac. 948, 44

Kan. 435, 9 L. R. A. 606, 21 Am. St. Rep. 296.

³⁶ Stallings v. Whittaker, 18 S. W. 829, 55 Ark. 494.

§ 3353. Imputing want of chastity

As ground for criminal prosecution, see post, § 3429.

The jury are instructed that the law of this state makes it slander for one, in conversation with a third person, in the hearing of a third person, to use language falsely imputing to a female want of chastity, and from such false charge, without justification, malice is inferred and damages presumed. So, in this case, if the plaintiff has established by a preponderance of the evidence that the defendant, at the time charged in plaintiff's petition, in a conversation with Mrs. ———, used some or all of the language charged in plaintiff's petition, or language substantially as charged, and that by the use of such language he intended to impute to plaintiff a want of chastity, and in using said language he was understood by the said Mrs. ——— as imputing to the plaintiff a want of chastity, then the plaintiff will be entitled to recover such damages as she has sustained. If, however, the defendant did not use any of the language charged in plaintiff's petition, or language substantially as charged, or, if he did use said language, did not intend by such language to impute a want of chastity to the plaintiff, and was not so understood, then the plaintiff cannot recover, and your verdict should be for the defendant.³⁷

§ 3354. Imputing insolvency to plaintiff**§ 3354(1). Missouri**

The court instructs the jury that the plaintiffs' right to recover in this case depends upon, and is limited to, the falsity and publication, as elsewhere explained, of the following clauses of the report dated ———, mentioned in the evidence, to wit: "The opinion is expressed that a local bank has been secured." "Their present condition is not regarded as particularly flattering, and seems to suggest cash dealings." While you should take into consideration the whole of said report, in order to ascertain the meaning and significance of said part of it, still the fact that the other parts of said report may be true does not prevent the plaintiffs from recovering on said part, quoted above, if you find from the evidence that it was untrue; on the other hand, the plaintiffs are not entitled to recover on account of the falsity of any part of said report other than the clauses above set forth. Therefore, if you find from the evidence that the above-mentioned part was false, and imputed to the plaintiffs insolvency, or conduct which would prejudice them in their business or trade, or be injurious to their standing and credit as merchants or business men, and was published as else-

³⁷ *Charleson v. Russell*, 121 N. W. 531, 144 Iowa, 38.

where explained, then the plaintiffs are entitled to recover damages, to be estimated under all the instructions in the case.³⁸

The court instructs the jury that the matter set forth and quoted in the preceding instruction, and contained in the report mentioned in the evidence as bearing date ———, and headed, “———,” was libelous in its nature, if it was untrue, and charged upon and imputed to the plaintiffs insolvency, or conduct that would prejudice them in their business or trade, or be injurious to their standing and credit as merchants or business men; and it constitutes a cause of action if it was published, unless it is shown to have been within the protection of the privilege set up by the defendant. Therefore, if you believe from the evidence that the defendant did, on or about ———, publish of and concerning the plaintiffs, as merchants in ———, the said report, and that the matter before specified was false, and calculated to have the effect as explained above, then the defendant is liable to the plaintiffs for damages, unless you believe from the evidence in the case that said report was privileged.³⁹

§ 3354(2). Texas

You are instructed that to falsely write or publish anything that imputes insolvency, inability to pay one's debts, the want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, or which in any other measure is prejudicial to him, in the way of his employment or trade, is libelous per se, if without justification.⁴⁰

§ 3355. Charge of drunkenness

You are instructed that it is not actionable, or slanderous, in the sense of the law, to charge a man generally with being drunk, or being in the habit of getting drunk, or having been drunk. In order that such a charge be actionable it is necessary to couple it with some business in which drunkenness is a disqualification, or tends to constitute incapacity; that is to say, some business in respect to which the charge of drunkenness would tend to injure the party.⁴¹

§ 3356. Charging that plaintiff is a negro

The court instructs the jury that, if they believe from the evidence that the plaintiff is a white man, and that the defendant used the words in the declaration mentioned in bad faith and with malice, and that such words from their usual construction and com-

³⁸ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

³⁹ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

⁴⁰ *Brown v. Durham*, 22 S. W. 868. 3 Tex. Civ. App. 244.

⁴¹ *Broughton v. McGrew* (O. C. Ind.) 39 Fed. 672, 5 L. R. A. 406.

mon acceptance are construed as insults and tend to violence and breach of the peace, then the jury must find for the plaintiff.⁴²

The court instructs the jury that they must find for the plaintiff if the defendant used, with bad faith and malice, the words in the declaration contained, and such statement was untrue, even though the defendant may have heard the plaintiff was a negro.⁴³

§ 3357. Rule for construction of language used

Rule in criminal prosecution, see post, § 3431.

§ 3357(1). Michigan

You are instructed that, if the language of the defendant, under the circumstances, did not charge the plaintiff with larceny, and if none of the hearers understood it as charging him with larceny, then the defendant is not guilty.⁴⁴

§ 3357(2). Missouri

You are instructed that it is admitted that the defendant published of and concerning the plaintiff the words sued on. If, therefore, the jury believe and find from the evidence that said words, taken all together and considered fairly with their context, and with other facts proved, were on their face libelous, as elsewhere defined in these instructions, then the jury will find for the plaintiff, even though they may not believe the words sued on are reasonably susceptible of the construction placed upon them by the plaintiff in the innuendoes of his petition.⁴⁵

You are instructed that, in determining the question as to whether the article complained of was or was not libelous, you are to take the entire article into consideration, and give it that plain, ordinary, usual, natural interpretation which would be usually given to it by the general reader thereof. Neither the sense in which the plaintiff may have understood it nor the meaning which the defendant may have contemplated is to govern you in your determination. You are to look at it and regard it in the meaning in which it would ordinarily be accepted by the average man, for whom it was intended. If, therefore, you believe that the article complained of, or any part thereof, was untrue, as referring to the plaintiff, and was libelous, it being admitted to have been published by the defendant, your verdict will be for the plaintiff.⁴⁶

§ 3357(3). Virginia

The court instructs the jury that in determining whether or not the language complained of is insulting and tending to violence and

⁴² Mopsik v. Cook, 95 S. E. 426, 122 Va. 579.

⁴³ Mopsik v. Cook, 95 S. E. 426, 122 Va. 579.

⁴⁴ Ellis v. Whitehead, 54 N. W. 752, 95 Mich. 105.

⁴⁵ Julian v. Kansas City Star Co., 107 S. W. 496, 209 Mo. 35.

⁴⁶ Stark v. Publishers: George Knapp & Co., 61 S. W. 669, 160 Mo. 529.

breach of the peace, the words and sentences must be construed in the plain and popular sense in which the rest of the world would naturally understand them; that is, they are to be understood according to their usual construction and common acceptation. The charge or insult need not be in express terms; it may be by an insinuation. It is sufficient if the jury believe from the evidence that the said words and sentences imply a purpose or intention on the part of the plaintiff to commit a crime, or which amount to an allegation that if opportunity afford he would commit a crime, or is of a criminal disposition.⁴⁷

§ 3358. Defense that words charged were not to be taken literally

§ 3358(1). Illinois

You are instructed that the question of the defendant's malice is a question of fact for the jury upon consideration of all the facts and conversations, and that, if they believe the words spoken by the defendant to the plaintiff were spoken in heat and passion (without malice), and without intention to accuse her of the actual crime which the words import (and that it was so understood by the parties present at the time), they will find for the defendant.⁴⁸

§ 3358(2). Michigan

You are instructed that the word thief may be so used, qualified, or explained as to show that it was intended to have a different and unusual meaning, and not to mean larceny, or any crime at all.⁴⁹

You are instructed that the plaintiff did not commit the crime of larceny in taking this ice, and no one now claims in this case that he did. And if defendant's language used on the occasion complained of, taken as a whole, and all of it, did not, according to its fair meaning under the circumstances, charge plaintiff with larceny, or if the hearers did not understand that it charged him with larceny, but that it simply charged him with doing some unfair or dishonest thing, not amounting to larceny, as the hearers understood it, then defendant is not guilty, for then he would not charge plaintiff with crime, and the charge of the crime is the gist of the alleged slander.⁵⁰

§ 3358(3). Wisconsin

You are instructed that, even though the slanderous words (imputing forgery) were used, still there could be no recovery if the defendant at the same time and in the same connection made a

⁴⁷ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

⁴⁸ *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252.

⁴⁹ *Ellis v. Whitehead*, 54 N. W. 752, 95 Mich. 105.

⁵⁰ *Ellis v. Whitehead*, 54 N. W. 752, 95 Mich. 105.

statement indicating that he only intended to charge the plaintiff with writing his (defendant's) name on a check without authority.⁵¹

§ 3359. Effect of innuendo

We further say, as requested by the defendant, that an innuendo does not enlarge the sense of the words used in the publication, and that the jurors should therefore be neither guided nor biased by the innuendo used in the amended declaration of the plaintiff, but must take the law in regard to the interpretation of the words of the publication as laid down by the court; i. e., a fair and reasonable interpretation as to what was meant.⁵²

§ 3360. Province of jury with respect to construction of words alleged to be libelous

You are instructed that as to whether said letter is libelous or not is a question of law that has been settled by the court. It has been determined that the language of the letter, as explained and construed by the innuendoes or averments of the complaint, constitute a libel, for which plaintiff has a right of action; yet these innuendoes or averments raise a question of fact which it is the province of the jury to decide.⁵³

§ 3361. Province of court to determine whether language susceptible of meaning attributed to it

§ 3361(1). Maine

You are instructed that in libels the court ordinarily from an inspection of the language used can determine whether it was in its matter libelous or could be libelous. That is a matter for the court, not a matter for the jury. It is a question of law as the courts have held, whether the language used is susceptible of the meaning attributed to it—not whether it did mean that, in this case, but whether it could mean that. That is a matter of law. The meaning attributed to the language used in this case was that the plaintiff was there and then suffering from the loathsome and infectious disease of syphilis. Language is sometimes used that without some information the court cannot say from the words themselves what they do mean. Yet the words may be in more or less common use, so that the parties using them know what the words mean, and the court may not. In this case I have listened to the evidence of the parties in regard to the meaning attributed to the words in this locality where these parties live. You have heard the evidence, but it is for me to decide the question, and I instruct you, as a matter of law, that the use of the words, "he is a damaged goods

⁵¹ Greeler v. Redmond, 143 N. W. 152, 154 Wis. 503.

⁵² Todd v. Every Evening Printing Co., 66 Atl. 97, 6 Pennewill, 233.

⁵³ Young v. Clegg, 93 Ind. 371

chap," is susceptible of meaning that he is afflicted with syphilis in some degree or form. Not that he had suffered from it some time before and has been cured, but the language is susceptible of the meaning that he then was afflicted with it in some degree, in some way. So that the language in the light of the evidence we have as to its use and meaning is of a nature to be libelous.⁵⁴

§ 3361(2). **Wisconsin**

The jury are instructed that the words complained of, if uttered, would charge plaintiff with a serious offense, necessarily subjecting her to anguish of mind and humiliation.⁵⁵

D. MALICE

§ 3362. **What constitutes malice**

Matters considered in determining question of malice, see post, § 3402.

§ 3362(1). **United States**

You are instructed that if a person, in publishing a libel of a serious character against an individual, is affirmatively shown to have been guilty of recklessness or wantonness, neither knowing whether it was true or false, or not, nor making any adequate attempt to discover whether it was well founded or not, such wantonness of conduct is justly regarded as actually malicious in its character.⁵⁶

§ 3362(2). **Alabama**

The court charges the jury that if they believe from the evidence that the defendant made the statement as charged in the complaint, and that when he made such statement the defendant knew it was untrue, then that would be conclusive evidence of malice on the part of the defendant.⁵⁷

§ 3362(3). **Kansas**

You are instructed that malice means a wrongful act done intentionally without just cause or excuse.⁵⁸

§ 3362(4). **Pennsylvania**

Now we come to some most vital and not so easily determined ingredients of plaintiff's case, for you must find in the fifth place that the article was malicious, published with malice by ———. Of course, so far as the defendant, the publisher, is concerned, there is not the slightest proof of actual malice at all. It is only legally imputed, so far as he is concerned, from the acts of ———; but he is responsible for ———'s acts. Now malice we all know to be

⁵⁴ King v. Pillsbury, 99 Atl. 513, 115 Me. 528.

⁵⁵ Hacker v. Heiney, 87 N. W. 249, 111 Wis. 313.

⁵⁶ Tribune Ass'n v. Follwell, 107 Fed. 646, 46 C. C. A. 526,

⁵⁷ Phillips v. Bradshaw, 52 So. 662, 167 Ala. 199.

⁵⁸ Good v. Higgins, 161 Pac. 673, 99 Kan. 315.

an evil mind, with intention to do injury to somebody, without any justification or excuse, and the law recognizes two kinds of malice, one being actual malice; that is, the motive which actuates one who really sets out to hurt another, to injure him, to do him an injury. Then the law recognizes another kind of malice, namely, implied malice, not express, but implied from certain circumstances. I will draw them to your attention.⁵⁹

§ 3362(5). *Virginia*

The court further instructs the jury that while malice is the gist of this action, and proof that the defendant was actuated by malice in making said publication is necessary in order to a recovery against her, yet this does not necessarily mean hatred or ill will towards the plaintiff.⁶⁰

§ 3363. *Same—Effect of dislike or ill will*

The court instructs the jury that the term "malice," or "malicious," as used in these instructions, does not mean mere spite or ill will, but it means the intentional doing of a wrongful act without just cause or excuse.⁶¹

The court further declares the law to be that with reference to the words "malice," and "malicious," as used in these instructions, there are two kinds of malice; the one being what is known as implied malice, or malice in law; and the other, express malice, or malice in fact. The first, or implied malice, is the kind that a jury might presume or infer from facts and circumstances in the case, without any direct evidence offered to prove the same; but the second, or express malice, must be shown by some wrongful statements or conduct of a person, which prove such malice to the satisfaction of the jury; and you are further instructed that, although an act done because of spite or ill will would be a malicious act, yet mere dislike, spite, or ill will does not constitute malice, for the purpose of this case; and even though you should believe from the evidence that, at the time the article in question was published, the editor or owners of the ——— were unfriendly towards the plaintiff, and entertained hostile and spiteful feelings towards him, yet, unless you believe from all the evidence that the publication of said article was a wrongful act, and that it was done with the intent to injure the plaintiff, and without any legal justification or excuse—that is, that said act was either known by the defendant to be wrongful, or that it was done without restraint or reasonable cause, and in reckless disregard of the plaintiff's rights—then you

⁵⁹ *Wharen v. Dershuck*, 108 Atl. 18, 264 Pa. 562.

⁶⁰ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

⁶¹ *Rail v. National Newspaper Ass'n*, 102 S. W. 129, 198 Mo. App. 463.

cannot lawfully find a verdict for the plaintiff, unless you believe that the said article was libelous and was false and untrue, in which event the law infers malice.⁶²

§ 3364. Malice as an essential element of cause of action

Effect of malice as destroying claim of privilege, see post, § 3388.

Effect of malice as destroying truth as defense, see post, § 3390.

§ 3364(1). Alabama

You are instructed that malice is essential to the support of an action for slanderous words; but if one, falsely, wrongfully, and willfully charges another with a felony, the law will imply malice until the contrary is shown. On the part of the defendant it is insisted, that the words spoken by him were spoken under such circumstances as to rebut and repel all malice.⁶³

§ 3364(2). Kansas

You are instructed that the words must be uttered maliciously before a recovery can be had of the speaker.⁶⁴

§ 3365. Implied malice or presumption of malice

§ 3365(1). United States

You are instructed that it is also alleged that the words were maliciously uttered. Malice, too, may be presumed without direct proof. If one has uttered slanderous words of another, and the proof shows that they were spoken on an unjustifiable occasion, malice may be inferred. Malice does not necessarily mean actual ill will or hate. The law presumes a wrongful intention where the words are shown to have been uttered without justification.⁶⁵

§ 3365(2). Missouri

The court instructs the jury that, although you may believe from the evidence that a part or the whole of the article set out in plaintiff's petition consisted of statements made to defendant by the wife of plaintiff, and although you may believe from the evidence that the defendant published the same believing in good faith that the same was true, yet, if you believe the article itself was false and libelous, the court instructs you that the defendant's good faith or belief in the truth of said article does not constitute a defense in this case, but the jury should consider the same in mitigation of damages.⁶⁶

⁶² *Fish v. St. Louis County Printing & Publishing Co.*, 74 S. W. 641, 102 Mo. App. 6.

⁶³ *Stallings v. Newman*, 26 Ala. 300, 62 Am. Dec. 723.

⁶⁴ *Good v. Higgins*, 161 Pac. 673, 99 Kan. 315.

⁶⁵ *Broughton v. McGrew* (C. O. Ind.) 39 Fed. 672, 5 L. R. A. 406.

⁶⁶ *McCloskey v. Pulitzer Pub. Co.*, 53 S. W. 1087, 152 Mo. 339.

§ 3365(3). Pennsylvania

You are instructed that, generally speaking, there are two kinds of malice, malice in fact, and malice in law; either of them would sustain an action for libel. Now, did ——— have actual malice? You may ask yourselves this question first. As I say, there is no proof of any ill will or intention on his part; didn't even know the plaintiff. He attended that meeting, as he had a right to do, public meeting of the school board, for the purpose of recording the public proceedings there, as he had a right to do, and it does not seem to the court as if you could find from any of the circumstances actual or express malice. Nevertheless, if ——— knew the article to be false—and here is one of the vital questions of fact in the case for you to answer—if he knew it to be false when he made the statement, that would make it malice in law. That would be implied malice. In the absence of any proof to show express malice or actual malice, you as jurors would not only have the right, but it would be your duty, to infer malice, if ——— knew the article to be false. Now, did he know it to be false? It is for you to say.⁶⁷

§ 3366. Same—Presumption of malice from falsely speaking or writing words defamatory per se**§ 3366(1). Iowa**

You are instructed that the article in question contains an imputation that the plaintiff was unchaste. You are therefore instructed that, if you find such imputation was false, the law presumes, in the absence of evidence to the contrary, that plaintiff was damaged in her feelings and her reputation, and that in publishing the article in question the defendant was actuated by legal malice. It follows from this that your verdict in this case must be for the plaintiff, and that the only question for you to determine is the amount of her damage.⁶⁸

§ 3366(2). Kansas

You are instructed that, while ordinarily the words must have been uttered maliciously and it must so appear before a recovery can be had of the speaker, yet you are instructed that the words falsely imputing to a party the commission of a crime are actionable per se., that is, actionable in themselves, and the law presumes that the party uttering them intended maliciously to injure the person concerning whom they were spoken unless the contrary appears from the evidence, occasion, or manner of speaking them.

⁶⁷ Wharen v. Dershuck, 108 Atl. 18, 284 Pa. 562.

⁶⁸ Hulbert v. New Nonpareil Co., 82 N. W. 928, 111 Iowa, 490.

Such malice so presumed is known as implied malice as distinguished from express malice.⁶⁹

§ 3366(3). **Michigan**

I instruct you, gentlemen, without any further evidence, that the mere fact of the publication itself—those parts of the publication which have not been justified, and which I have instructed you are libelous—should be considered by you as a voluntary act by the defendant, and to have proceeded from a malicious motive. The willful publication by defendant of this libelous statement necessarily involved a design on his part to produce such injury upon the plaintiff as is a necessary consequence of the libel, and the defendant would be liable, without other proof than the publication itself, for all the necessary damages which resulted to the plaintiff from the publication of all those parts of the publication which have not been proved to be true.⁷⁰

§ 3366(4). **Missouri**

The court instructs the jury that by malice is not meant necessarily spite or ill will—though an act done because of spite or ill will would be malicious—but is also meant the doing of a wrongful act intentionally, without just cause or excuse; and that, therefore, if the jury believe in this case that the article complained of was not true, and was a libel upon the plaintiff, then the law presumes that it was maliciously published. A man is presumed by law to intend what are the natural, ordinary consequences of his acts; and if an article is published, and is untrue, and has the effect of injuring the reputation of him of whom it is written by exposing him to public hatred, contempt, and ridicule, or affecting him as herein above described in the definition of libel, then the publisher is presumed to have intended that effect.⁷¹

You are instructed that if, in this case, the jury find that defendant spoke the slanderous words as charged in the second and third counts of plaintiff's petition, then the law presumes they were spoken maliciously, and it is not necessary to prove any express malice in order to warrant a verdict for plaintiff.⁷²

§ 3366(5). **Nebraska**

The jury are instructed that words charging a woman with being a whore are actionable in themselves, and the law presumes that a party uttering them intended maliciously to injure the person concerning whom they are spoken, unless the contrary appear from the circumstances, occasion, or manner of the speaking of the

⁶⁹ Good v. Higgins, 161 Pac. 673, 99 Kan. 315.

⁷⁰ Austin v. Hyndman, 78 N. W. 663, 119 Mich. 615.

⁷¹ Stark v. Publishers: George Knapp & Co., 61 S. W. 669, 160 Mo. 529.

⁷² Lewis v. McDaniel, 82 Mo. 577.

words; but all the plaintiffs are bound to prove in the case, to entitle them to recover, is the speaking by the defendant of enough of the slanderous words charged in the petition to amount to a charge that the plaintiff C. was a whore, and express malice or ill will need not be proved; but, if the jury believe from the evidence that the plaintiffs have failed to prove enough of the words to amount to a charge that the plaintiff was a whore, then the plaintiffs cannot recover, and your verdict should be for the defendant.⁷³

§ 3366(6). New York

The jury are instructed that, so far as malice is necessary to the right of action of plaintiff, it is properly inferable from the falsity of the words charged in the complaint as libelous, if you find from the evidence that such words were false.⁷⁴

§ 3367. Same—Knowingly making false statements as evidence of malice

The court charges the jury that if they believe from the evidence that the defendant made the statement as charged in the complaint, and that when he made such statement the defendant knew it was untrue, then that would be conclusive evidence of malice on the part of the defendant.⁷⁵

§ 3368. Distinction between implied and express malice

You are instructed that, in considering the question of damages, it is necessary, to enable you to make an intelligent disposition of it, to understand what is meant by the term "malice," which you have heard used so frequently in the course of the trial. The word "malice," when used in relation to the action of libel, means no more than "willfulness." A willful injury without just reason is properly called "malicious." Malice is said to be express or implied. So far as any explanation of that distinction is necessary for our purposes here, I instruct you that implied malice is the kind of malice which the law presumes actuated the defendant in publishing the libel in question; it is what the law assumes influenced him in making the publication; while express malice is such further or additional or actual malevolent design or purpose as may have been entertained by defendant in making the publication in question.⁷⁶

⁷³ *Boldt v. Budwig*, 28 N. W. 280, 19 Neb. 739.

⁷⁴ *Lewis v. Chapman*, 19 Barb. (N. Y.) 252.

⁷⁵ *Phillips v. Bradshaw*, 52 South. 662, 167 Ala. 199.

⁷⁶ *Austin v. Hyndman*, 78 N. W. 663, 119 Mich. 615.

§ 3369. Necessity of proof of express malice**§ 3369(1). Delaware**

You are instructed that express malice must be proved. It is never implied or presumed. It may, however, be proved by direct or indirect evidence. In determining whether there was express malice in this case, you should consider all the facts and circumstances disclosed by the evidence which tend to show the motive or spirit which actuated the words complained of.⁷⁷

§ 3369(2). Maine

I instruct you that if the statements made by the defendant were made in an honest belief in their truth, and he used the same degree of care that an ordinarily prudent man would use, and should use, before accusing the plaintiff of crime, and he could not discover, by the exercise of that care, that the signature to the note was his signature, then no actual malice can be inferred; but it does not lie in the mouth of that man to shut his eyes to the truth so that he does not see. If the defendant knew, or should have known, that that was his note, then it is no excuse for him that he shut his eyes and would not learn the truth.⁷⁸

§ 3370. Imputing malice to corporation

The court also instructs you that the defendant, being a corporation, can only act through its officers and agents, and is responsible for the willful, wanton, reckless, or malicious acts of its officers or agents, done within the scope of their employment; and if you believe from the evidence that one or more of the agents and officers of the defendant who were engaged in furnishing said report of ———, or in collecting or compiling the information for the same, were actuated by express or actual malice, or ill will towards plaintiffs, or acted with willful or wanton neglect of the rights of plaintiffs, or with a reckless disregard of the consequences of their acts and conduct, in the performance of the services imposed upon them by the defendant in relation to said report, then the acts, conduct, and motives of such officers or agents in that regard were the acts, conduct, and motives of the defendant, and the defendant is chargeable with actual or express malice in respect to said report.⁷⁹

⁷⁷ *Smith v. Singles*, 72 Atl. 977, 6 Pennewill, 544.

⁷⁸ *Sullivan v. McCafferty*, 102 Atl. 324, 117 Me. 1.

⁷⁹ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

E. PUBLICATION

§ 3371. What constitutes

Matters considered as evidence of publication, see post, § 3407.

Rule in criminal proceedings, see post, § 3433.

You are instructed that "publication," as here spoken of, is the preparation and delivery of a copy of the alleged libelous matter to some third person. To entitle the plaintiffs to recover, it is not necessary to prove the issue or publication of numerous copies of said report, and if you believe from the evidence that, at a date prior to the institution of this suit, the defendant prepared and delivered a copy of said report to any firm, person, or corporation other than the plaintiffs themselves, then there was complete publication thereof in contemplation of law.⁸⁰

§ 3372. Communicating news item to reporter of newspaper

You are instructed that the mere fact of communicating a statement to a person known to be a reporter of a newspaper, unaccompanied with a request to reduce the same to writing, or to publish the same, is not sufficient itself to justify the jury in arriving at the conclusion that the defendant either wrote or caused to be written, or published or caused to be published, the article.⁸¹

You are instructed that if you believe from the evidence in this case that F., who was a reporter for the ———, of his own volition went into the office of the defendant, in quest of news, and while there, in a conversation, the defendant communicated the information to F., and that F. afterwards retired to his office, and there, from memory, reduced to writing the information he so received from defendant, and handed the same to the editor of the ——— for publication, and if you further believe that defendant at no time made any request to have the matters published, and never saw what had been written until after the same had been published, then you should bring in a verdict of not guilty.⁸²

§ 3373. Liability of corporation for act of agent

You are instructed that, if you find from the evidence that the agent or agents of the defendant corporation showed and exhibited the publication in question as to ——— to the public, or to any individuals constituting the public, but did so without instructions or authority from their principal, the defendant corporation is not responsible for such circulation of the publication.⁸³

⁸⁰ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

⁸¹ *State v. Osborn*, 38 Pac. 572, 54 Kan. 473.

⁸² *State v. Osborn*, 38 Pac. 572, 54 Kan. 473.

⁸³ *Schulze v. Jalonick*, 44 S. W. 580, 18 Tex. Civ. App. 296.

§ 3374. Liability for second publication

You are instructed that, if you find from the evidence in this case that the defendant H. printed the statement as alleged in the complaint with the reasonable expectation that it would be read by some third person, and suffered the same to come into the hands of the defendant S., and the same did come into the hands of the defendant S., and he, the said S., read a copy of the same and exhibited the same to various third persons so that they could see, and did see, the contents of such printed statement, and that the same tended to bring plaintiff into disrepute and to degrade and disgrace him, or to expose him to ridicule and contempt, and as a result thereof plaintiff suffered damages, then both of the defendants would be liable to the plaintiff for the second publication, and if you so find your verdict should be for the plaintiff and against both of the defendants, unless you further find that the statements set forth in such printed statement were true.⁸⁴

F. PRIVILEGED COMMUNICATIONS**§ 3375. Communications on subject with respect to which defendant has an interest or moral or social duty to perform**

You are instructed that a communication made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. Communications within the privilege are not actionable merely because they are false and defamatory, but express malice must be shown.⁸⁵

You are instructed that, if you believe from the evidence that the defendant, in the pursuit of his business of collecting facts concerning all such matters as may affect the risk of insuring buildings and property, printed in the pamphlet in evidence the matters therein stated in regard to the building of plaintiff, and stated therein that the occupancy thereof was 'blind tiger'; that he did so believing it true, and in good faith, and furnished said pamphlet to the defendant company and other insurance companies in the usual course of business, for the purpose of furnishing them such information as is commonly needed and obtained by insurance companies—such publication would be privileged, and the defendant would not, by reason thereof, be liable to damages. And, if you further believe from the evidence that the defendant company

⁸⁴ *Sourbier v. Brown*, 123 N. E. 802, 188 Ind. 554.

⁸⁵ *Schulze v. Jalonick*, 44 S. W. 580, 18 Tex. Civ. App. 296.

the — Fire Insurance Company, merely used the pamphlet thus obtained by sending it to their agent or agents in the town of —, with instructions to be governed by the rates and other contents of the book in attending to and transacting the business of the company, and that they did so, believing the information obtained from such publication to be true, and did not instruct their agent or agents to use such information for any purpose except the business they transacted for defendant, such publication and communication would be privileged, so far as the defendant company is concerned, and would not subject them to damages.⁸⁶

You are instructed that the defendants have pleaded that the alleged slanderous communication sued upon was privileged. In this connection, you are charged that any communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a moral or social duty to perform, is qualifiedly privileged, even though it contains a charge of crime, which without such privilege would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation, if it be made to a person having a corresponding interest or duty. Now, if you believe from the evidence that the communication alleged to have been made by the defendants herein sued upon was privileged as hereinabove defined, you are directed to find for the defendants, unless you find from the evidence that defendants were actuated by actual malice in making said communication. In this connection you are instructed that if you believe from the evidence that the communication was privileged, then you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that defendants were actuated by actual malice in making said statement. You are further instructed that actual malice means ill will, or any wrongful or wicked motive which prompts or induces the act complained of.⁸⁷

§ 3376. Newspaper comment on conduct of private citizen

I instruct you that, if you find that the following language: "Is it true, as is charged by a woman who claims that B. wronged her aged mother and herself in the matter of disposing of an estate of one of B.'s clients, that — 'knows too much about B.' " when used in connection with the balance of the published article —refers to the said B. as a private citizen, or an attorney at law, and that the same tends to expose the said B. as such private citizen, or an attorney at law, to hatred, contempt, or obloquy, or to

⁸⁶ *Schulze v. Jalonick*, 44 S. W. 580, 18 Tex. Civ. App. 296.

⁸⁷ *Vadcek v. Trojack* (Tex. Civ. App.) 226 S. W. 505.

deprive him of the benefit of public confidence, or social intercourse, the defendant was not privileged to publish such language under the law of privilege as heretofore defined to you, and the publication of such language is, by the law, deemed malicious, and the defendant cannot excuse such publication, as I have heretofore defined excuse to you, and the burden is upon the defendant to show that he published the same without malice.⁸⁸

§ 3377. Comment on conduct of public officers or of candidates for public office

§ 3377(1). Iowa

The court instructs the jury that when a man becomes a candidate for public office, his character for honesty and integrity, and his qualifications and fitness for the position, are put before the public, and are thereby made proper subjects for comment, and all matters having a bearing on the character and fitness of a candidate for such office may be published if they are in good faith, and on probable cause believed to be facts. Where a person, honestly believing that a candidate for public office is guilty of conduct affecting his fitness for the position to which he aspires, communicates that belief through a newspaper to the electors, whose support the candidate seeks, acting in good faith in the discharge of his duty to the public, such publication is privileged.⁸⁹

§ 3377(2). Kentucky

The court instructs the jury that (the defendant having admitted making the alleged publication and that it concerned the plaintiff) you must find for the plaintiff, if the publication was false and malicious, and that malice is inferable from the falsity of the publication, but that, if you believe from the evidence that the publication of which complaint is made was substantially true, or a reasonable and fair criticism of the plaintiff's conduct as ———, and was made in good faith, without malice, then you must find for the defendant.⁹⁰

§ 3377(3). Missouri

To further enable you to decide the questions submitted to you in this case, the court instructs you: (1) That, in the absence of evidence to the contrary, the law presumes the reputation and character of a man to be good. That the board of president and directors of the ——— public schools had no right to engage any one to lobby for or against any bill in the legislature affecting in its provisions their terms of office, and to appropriate or expend

⁸⁸ State v. Sefrit, 144 Pac. 725, 82 Wash. 520.

⁸⁹ Ott v. Murphy, 141 N. W. 463, 160 Iowa, 730.

⁹⁰ Vance v. Louisville Courier Journal, 95 Ky. 41, 23 S. W. 591, 15 Ky. Law Rep. 412.

any of the public funds under their control for such purpose; nor had any officer of theirs, as a representative of the board, the right, nor was it his duty, in his official capacity to lobby for or against any such bill, or work for or against any such bill affecting their terms of office, and to receive public money of the school fund for expenses in such employment; and that any such conduct, and appropriation of money, or acceptance of the same under such appropriation is without warrant of law, is against the policy of republican form of government, and can properly be criticised, commented upon, and rebuked by any paper or individual in any appropriate and proper terms. For while any individual is permitted, and often is moved by duty, to present by way of petition or public argument his views and opinions and reasons for or against any measure pending before the Legislature of the state, this right belongs to him as a constituent part of the sovereignty, and cannot be employed by an individual acting officially or by public officials while serving the people, and intrusted only with certain duties, responsibilities, and trusts. It is their duty to carry out the law within the limits of the powers conferred upon them, and not otherwise to either persuade, direct, or force legislation, or attempt so to do, in regard to matters affecting their terms of office, or duties relating thereto. You are further instructed that a lobbyist is one who frequents the lobby or precincts of a legislature or other deliberative assembly with the view of influencing the votes of members, or who solicits or seeks to influence the votes of members, or seeks to influence their official action, whether in the lobby of the Legislature or elsewhere.⁹¹

§ 3377(4). South Dakota

You are instructed that the law provides that a privileged communication, so far as it relates to this case, is one made in a communication, without malice, to a person or persons interested therein, by one who is also interested, or by one who stands in such relations to the persons interested as to afford a reasonable ground for supposing the motive for the communication innocent. The defendant claims that, the plaintiff being at the time a candidate for office at the hands of the voters of this community and he (the defendant) being a resident of the city of ——— he was interested in the result, and that the residents of the city, to whom the publications were addressed, and who read the paper published by him, were also interested in like manner; that he was not actuated or inspired by malice in publishing the articles referred to; and that they are, therefore,

⁹¹ Stark v. Publishers: George Knapp & Co., 61 S. W. 669, 160 Mo. 529.

privileged, under the rules which I have given you, and were, therefore, not libelous. And, generally, upon the question of privileged communications, I charge you that the law is that the fitness and qualifications of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper, or by a voter or person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of voters of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice; nor will such a publication be actionable, without proof of express malice, although it may be harsh, unjust, and unnecessarily severe, for these are matters of opinion, of which the party making the publication has a right to judge for himself. In the case of such a publication the occasion rebuts the inference of malice which the law would otherwise raise from the falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. You will, however, understand that this privilege accorded to a newspaper publisher or any other person cannot avail any one as a defense, who may seek under cover of it to maliciously attack or traduce the character of any person by publishing of such person false and libelous articles concerning himself. If a publication attacks the private character of a candidate for office by falsely imputing to him a crime in some respect not specially going to the question of his fitness for the office to which he aspires, it is not privileged by the occasion, either absolutely or qualifiedly, is actionable per se, and the law implies malice; and it is no justification that the publication was made with honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can only be justified by proof of their truth.⁹²

§ 3377(5). *Virginia*

The court instructs the jury that the conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be fully published, with fitting comments or strictures, and that whoever fills a public office renders himself open to public discussion, and if any of his acts are wrong he must accept the attack as a necessary, though unpleasant, circumstance attaching to his position. It is not only the right, but the duty, of a citizen to make complaint of any misconduct on the part of officials to those charged with supervision over them, and it is the right and privilege of the latter to discuss the fitness or misconduct of such officials with taxpayers in the town in which they live.⁹³

⁹² *Myers v. Longstaff*, 84 N. W. 233, 14 S. D. 98.

⁹³ *Gatewood v. Garrett*, 56 S. E. 335, 106 Va. 552.

§ 3378. Right to publish news item where all parties concerned have previously denied its truth

Now, I think this is a good case to submit to twelve men in ——— county, to say what damages a plaintiff shall have who has been treated as the plaintiff has. Has he been injured, or has the defendant pursued a proper and justifiable course towards a citizen, who is a man of good character, and where the defendant does not set up the truth? Or has the defendant, while the plaintiff is away, tried to find out what the truth is, and then published the libel with the truth? Now, you will have this article before you. It is put in the declaration exactly, I understand, as it was printed, and the first question is: Do you find that to be, as I have suggested—that paragraph with the whole article—to be practically a charge of adultery? If it is, and it is not true, and it is not claimed to be true, then the plaintiff is entitled to whatever damages you think a man is entitled to, who has a good character, and who is above reproach, who is accused in a public journal like the ——— of that crime, and sent out under the circumstances which this was. You are to take into consideration that the defendant had published what was published in ———, that the article was not true, and that, when the defendant published this article, it had not only the fact that the wife of plaintiff, but that plaintiff also, denied that there was any truth in that accusation. But still the defendant published it with their denial. Now, it is for you to say whether the defendant is justified in doing that, or whether, when the defendant found out both from the plaintiff and his wife, acting separately and from different sources, that there was not a word of truth in the article, that it was a gross libel, whether the defendant can go on and publish it, and then set up as an excuse that the defendant consulted both the plaintiff and his wife, and that they both said that it was not true. And, if you say it is a libel under the rules I have given you, you are to say what the damages are.⁹⁴

§ 3379. Filing information charging insanity

You are instructed that the real question for you to determine first in this case is: Was the information made by the defendant and filed by him honestly and in good faith, upon probable cause, he believing at the time that the plaintiff was insane, or laboring under an insane delusion, and done for a laudable purpose, to protect himself, his property, or society? And if you find, from the preponderance of the credible evidence in the case, that it was so done, then your verdict should be for the defendant.⁹⁵

⁹⁴ Bishop v. Journal Newspaper Co., 47 N. E. 119, 168 Mass. 327.

⁹⁵ Comfort v. Young, 69 N. W. 1032, 100 Iowa, 627. Defendant did not object to this instruction.

You are instructed that, if you find that the said information was made and filed without probable cause, or without honestly believing that the statements therein were true, but was done to injure the plaintiff in his good name and reputation, or for some advantage over him, then the law would imply malice, and you should find for the plaintiff.⁹⁶

§ 3380. Publication of report of judicial proceedings—Inserting matters not shown by record

You are instructed that there is no dispute in the case but that the article in question was published by the defendant, and that, in so far as it referred to the plaintiff, it was untrue. The defendant claims that the article was privileged; that is, that it had a right to publish the same, whether true or false, by reason of its being the report of a judicial proceeding. There was, however, nothing in the legal proceedings or in the information furnished by the justice that identified the plaintiff as being the prosecuting witness in the so-called ——— case. When, therefore, the defendant did so identify her in the article in question, it did so at its peril, and the statements with reference to the plaintiff having turned out to be false, the plea of privilege cannot avail the defendant.⁹⁷

§ 3381. Same—Necessity of fair and impartial report

The court instructs the jurors that while the publication of an abridged or condensed report of a public trial or judicial proceeding, if prepared impartially, truthfully, and fairly, will be deemed privileged, and protect the publisher against an action therefor, yet the addition by the publisher of any unfavorable insinuations or comments of his own as to the person assailed, or the omission or suppression of parts of the proceedings which would tend to qualify or explain the defamatory matter and place it in a more favorable light for the person defamed, is evidence of malice and destroys the privilege, and therefore, unless the jurors believe and find from the evidence that the report published by defendant of the proceedings of the ——— extradition matter before the Governor of ——— was a fair, truthful, and impartial report or abridged report of said proceedings, as above explained (so far as it related to the plaintiff herein and the accusations there made against his character), the jury will disregard the defense of privilege made by the defendant and find against it on said defense.⁹⁸

⁹⁶ *Comfort v. Young*, 69 N. W. 1032, 100 Iowa, 627.

⁹⁷ *Hulbert v. New Nonparell Co.*, 82 N. W. 928, 111 Iowa, 490.

⁹⁸ *Brown v. Globe Printing Co.*, 112 S. W. 462, 218 Mo. 611, 127 Am. St. Rep. 627.

§ 3382. Communications concerning matters in which defendant and those addressed have a common financial or business interest

§ 3382(1). United States

You are instructed that it is right under some circumstances to utter words which otherwise would be slanderous, the words being privileged by reason of the circumstances under which they are uttered. The particular privilege set up in this case is that the defendant himself was a stockholder in this railroad company; that there was a meeting of stockholders, and that at this meeting, if at all, he uttered the words charged. It appears in the evidence, without dispute, that the president of the road was present at the meeting and some of the directors at least and a number of attorneys. I believe it is shown that two of these attorneys were not stockholders. Whether they were in the room at the time the meeting was in progress, and when defendant made whatever statements he did make in the course of the meeting, is a matter of fact for you. I will say, however, that at such a meeting as that is shown to have been, defendant, or any party interested in the railroad, had a right—it was his privilege—to communicate to the president of the road and to the directors and every stockholder present whatever he knew, or had reason to believe, and did in fact believe, in respect to the management of the road or the conduct of any of its employes; and if defendant did use, in that meeting, the words charged, or any of them; and if upon information that he had received, either from others or by his own observation, or from both sources, he believed that the statement which he made was true, then the fact that it was made in that meeting would constitute the communication one of privilege, and not actionable.**

The suggestion is made that the presence of parties who were not stockholders destroys this privilege. So far as I have observed, the evidence does not reveal the presence of any who were not stockholders, except two or three attorneys who have been witnesses. The testimony shows that these gentlemen were present at the instance and request of the officers of the road—of the president, at least, and possibly of some of the directors. There has been some criticism upon these attorneys for being present. I make no comment upon that. It is aside from anything I need instruct you about, and is left to your own judgment. I do say that these gentlemen, who were in the employment of the company as attorneys, being thus present at the request of the president of the road, their presence did not take away from defendant, or any other director present, the right to make communications of the kind in

** *Broughton v. McGrew* (C. C. Ind.) 39 Fed. 672, 5 L. B. A. 406.

question, directly to the board, or to the president or to the stockholders assembled there. Their presence in that manner did not affect the privilege or right of a stockholder to criticise the management of the road or the conduct of employés.¹

Something has been said to the effect that the election of directors was over when the words were spoken, and therefore they could not have been uttered with a view of affecting the election. The privilege, however, in such a case, does not depend upon the fact that the election had or had not been held. The president was there, and some of the directors, and the privilege might well and properly be exercised after the choice of the new board, in order to indicate what reforms ought to be accomplished in the management; and it is not material whether or not the defendant had tried to get a new board of directors. That fact would not affect the right of any officers remaining or coming in control to make the necessary investigation and correction, if there were such evils prevailing as stated in the words complained of; so that the question whether the election had taken place is not material to the determination of this question of privilege. If the utterance was to the people who had the management of the road, or some of them, and in the presence of others who were interested in it, and who were called to participate in that meeting, it was privileged, no matter to what stage the business had reached.²

You are instructed that a question arises which is somewhat different; that is, whether the meeting had not terminated, and whether the words were uttered to any who were not entitled to receive them as privileged communications. It is claimed on behalf of the plaintiff, and I believe his counsel rest their case on that assertion, that the words were not uttered in the room where the meeting was held, but were spoken outside of the door to attorneys and to men who were not members of the board, or interested in the board directly. Now, whether the words were uttered outside of the door or inside does not determine necessarily whether they were privileged or not. There might be a meeting going on where the party would have the right to utter the words, if he chose to, to those who were interested in the subject, and there he might turn aside to some individual who was not interested, and utter the words to him without any justification for so doing; so that whether these men had passed the door or were still inside the room has little to do with the question. If the words were really addressed to an individual or individuals having no interest in the subject, and not to the meeting, nor to others who were concerned in the

¹ Broughton v. McGrew (C. C. Ind.)
39 Fed. 672, 5 L. R. A. 406.

² Broughton v. McGrew (C. C. Ind.)
39 Fed. 672, 5 L. R. A. 406.

management of the road, they might be actionable or slanderous. Now then, were the words uttered in the hall to ———, ———, and ———, and overheard by ———, slanderous? Strictly speaking, the words so uttered would not be privileged if then spoken for the first time; but if the same words had been uttered in the meeting, or words to the same effect, embodying the charge of drunkenness against plaintiff, so that the accusation became known to all present, in a way to be privileged, and then, as the parties were leaving the room, there was a repetition of the matter by defendant to men who were present and heard the words first uttered, I would say that no action ought to be maintained for the repetition of the words to those who had already heard them when it was proper to utter them. It was a matter from which it could not be said any damage could result, because the parties had already heard it; especially if the second utterance occurred in a discussion between the defendant and these attorneys, who were controverting his statement made in the meeting. In determining, therefore, whether or not the utterance of the words to these attorneys is an actionable or slanderous utterance it is important for you to determine whether substantially the same charge had first been made in the meeting, and to the meeting, in a way to be privileged. If the charge had not been made to the meeting, and this was a voluntary utterance by the defendant to these attorneys, then, in my judgment, the words ought not to be held privileged, and I so instruct you; and you would be entitled to find for the plaintiff on account of what was thus voluntarily said to the attorneys, whether done inside the door or outside the door. If the defendant got the attorneys aside, or happened to be aside with them, and brought up for the first time the charge against plaintiff, it was a slanderous and unjustifiable charge, which would support the action; but if it was a mere repetition, growing out of a discussion in respect to what he had said in the meeting on the same subject, then I think the privilege ought to be considered as covering the repetition of the words, and so instruct you.⁸

§ 3382(2). *Alabama*

I charge you, gentlemen of the jury, that if you believe the evidence of P. that defendant, on ———, an occasion previous to that laid in the complaint in this charge, stated to the said P. that the plaintiff had stolen ——— bales of cotton belonging to the ——— Company, or had converted it to his own use, or words to that effect, as testified by P., and you further believe from the evidence that the defendant had the right to believe at that time that P. was the superintendent of the farm, and that the words were spoken

⁸ Broughton v. McGrew (C. C. Ind.) 39 Fed. 672, 5 L. R. A. 406.

by the defendant in what he honestly conceived to be in the discharge of his duties to the interest of the ——— Company, that the utterances of the defendant on that occasion to the said P. were privileged communications, from which the law withdraws an inference of malice, and the same are not malicious, nor can you consider them as evidence of malice in the utterances charged in the complaint in this cause.⁴

§ 3382(3). *Arkansas*

The court instructs the jury that although you may find from the evidence in the case that the language set out in the complaint was used by the agent or employé of the company, and that such language, in its common acceptation, amounts to charging the plaintiff with a breach of the criminal law, or other dishonest practice, yet if you further find from the evidence that such language was spoken by the agent of the company to another in the course of his duty, and that it was necessary or proper in the course of the investigation for such communication to have been made, in the course of duty, and that it was not made with a malicious intent to injure the plaintiff, then the court tells you as a matter of law that this would be a privileged communication for which neither the agent nor the company would be liable, and your verdict would be for the defendant.⁵

§ 3382(4). *Kentucky*

The court instructs the jury that if the jury believe from the evidence that, at the time he wrote the letter and imparted its contents, as set forth in the first instruction, the defendant had received from sources which he believed to be reliable the information contained in said letter, and if they believe from the evidence that, at the time said letter was written and its contents imparted, as afore-said, defendant in good faith believed that the information contained in said letter was true, and if the jury further believe from the evidence that, in writing said letter and imparting to ——— and ——— the information therein contained, the defendant in good faith and without malice so acted in the exercise of his right and duty to communicate to said persons, as state agents of the ——— Company, any facts or information affecting its interests as surety in plaintiff's bonds, and to protect said company, the jury should find for the defendant.⁶

§ 3382(5). *Virginia*

The court instructs the jury that the letter written by defendant to ———, set out in the declaration, was a privileged communica-

⁴ *Phillips v. Bradshaw*, 52 South. 862, 167 Ala. 199.

⁵ *Lindsey v. St. Louis, I. M. & S. Ry. Co.*, 129 S. W. 807, 95 Ark. 534.

⁶ *McClintock v. McClure*, 188 S. W. 867, 171 Ky. 714, Ann. Cas. 1918E, 96.

tion, for the protection of his interests and the interests of the ——— Corporation, and as such the defendant is not liable in this action, and whether the statements contained therein are true or not, if the jury believe from the evidence that defendant acted in good faith in writing and sending said letter, without malice to the plaintiff and for the purpose of protecting his interest or the interests of the ——— Corporation, believing the language of said letter to be true, then they must find for the defendant in this action, unless they shall believe from the evidence that the language of said letter was not justified by the occasion so as to amount to an abuse of the defendant's privilege in writing said letter to the ———.⁷

The court instructs the jury that the letter signed by C., dated ———, mentioned in the declaration, was a privileged communication by the defendant for the protection of its own business, and as such the defendant company is not liable in this action; and whether the statements therein contained were true or not, if the jury believes from the evidence that C., as president of said company, acted without malice in writing and sending said letter to ———, and for the purpose of collecting the debt therein mentioned, believing the language to be true, then they must find for the defendant.⁸

§ 3383. Report by commercial agency to client

The court instructs the jury that plaintiffs complain that defendant published of and concerning them the following libelous things: First. The opinion is expressed that a local bank has been secured. Second. Their present condition is not regarded as particularly flattering, and seems to suggest cash dealings, which they claim were each of them false, malicious, and defamatory. The publication complained of consists in defendant giving out to others papers containing said charges. Now, if you find from the evidence that defendant only gave out such papers to such persons or firms or corporations as were interested in knowing the financial condition of plaintiffs at the time, by reason of having had, or being about to have, business transactions with plaintiffs, or who were subscribers of defendant, and had made request upon defendant for information concerning plaintiffs, and that for such reasons, or any of them, defendant made and furnished such papers in good faith, then such publications were privileged, and do not sustain the allegations of plaintiffs' petition, and your finding must be for defendant, unless plaintiffs have proved by the greater weight of all the evidence in this case that defendant was actuated in making

⁷ *Vaughan v. Lytton*, 101 S. E. 865, 126 Va. 671.

⁸ *Reusch v. Roanoke Cold Storage Co.*, 91 Va. 534, 22 S. E. 358.

such publications by malice toward plaintiffs, as said term "malice" has been defined in other instructions.⁹

You are instructed that the privilege claimed by the defendant is not absolute, but qualified, and to entitle the defendant to the benefit of the same you must find from the evidence that defendant only issued and delivered said report to such persons, firms, or corporations as were interested in knowing the financial condition of the plaintiffs at the time by reason of having had, or being about to have, business transactions with plaintiffs, or who were subscribers of the defendant company, and had made requests upon defendant for information concerning plaintiffs, and that for such reasons, or any of them, defendant made and furnished said report in good faith, and, unless you do so find, then said publication was not privileged.¹⁰

§ 3384. Communications in line of official duty

In this case I instruct you that, if you find that ———, his superior officer and colonel of his regiment, sent plaintiff's letter relating to the promotion of plaintiff to the defendant, the captain of plaintiff's company, for explanation or indorsement at a time when a first sergeant was under consideration, then the defendant was privileged to make and send to such colonel an indorsement on it for the information of his said superior officer and colonel, as to the effect which such promotion would have on the company and the military service, although the matter therein was defamatory and false, provided such communication was made in good faith, and belief in its truth, with intent to perform defendant's duty to the company and the service.¹¹

§ 3385. Communication by postmaster for protection of property intrusted to his care

The court instructs the jury that the communication signed by defendant, dated ———, mentioned in the declaration, was a privileged communication by the defendant for the protection of her property and the property intrusted to her care, and as such the defendant is not liable in this action unless the jury shall believe from the evidence that such privileged occasion has been abused, within the meaning set out in the other instructions given in this case; and, whether the statements therein contained were true or not, if the jury believe from the evidence that defendant, as postmistress, acted in good faith, without malice in writing and sending said letter, and for the purpose of protecting her property and that in-

⁹ Minter v. Bradstreet Co., 73 S. W. 668, 174 Mo. 444.

¹⁰ Minter v. Bradstreet Co., 73 S. W. 668, 174 Mo. 444.

¹¹ Gray v. Mossman, 90 Atl. 938, 88 Conn. 247, Ann. Cas. 1917C, 27.

trusted to her care, believing the language to be true, then they must find for the defendant.¹²

§ 3386. Exceeding privilege

The court instructs the jury that even should they believe from the evidence that the defendant's communication, dated ———, was written and published in good faith, still it is not privileged, and the defendant will not be protected, if they believe from the evidence that it goes beyond the occasion or exigency, and is unnecessarily defamatory of the plaintiff.¹³

The court instructs the jury that, even should they believe from the evidence that the defendant's communication set out in declaration was written and published in good faith, still it is not privileged, and the defendant will not be protected, if they believe from the evidence that it goes beyond the occasion or exigency, and is unnecessarily defamatory of the plaintiff, or was more extensively published than the circumstances of the case required.¹⁴

§ 3387. Necessity of showing actual malice or want of reasonable and probable cause in order to defeat claim of privilege

§ 3387(1). Michigan

You are instructed that under the proof in this cause, the words spoken by the defendant come under the class which the law designates as "privileged communication," and the plaintiff cannot recover unless she shows actual malice—that is, hatred or ill will—on the part of the defendant, or shows a want of just cause or excuse in making the accusation.¹⁵

You are instructed that if you shall find that the defendant had no malice—that is, hatred or ill will—against the plaintiff, and that he had just cause or excuse for making the accusation, but that he made the charges simply to recover the things which he supposed the plaintiff had taken, then your verdict must be for the defendant, so far as the charges of slander are concerned.¹⁶

§ 3387(2). Pennsylvania

You are instructed that, if you find from the evidence that ———, as reporter of defendant's newspaper, caused the article complained of to be published in said newspaper, but that he did not know it to be false, the implication of malice could not be drawn from the article itself, as in ordinary cases of libel, because in my judgment—and we say it to you as a matter of law—if it was based on reasonable and probable cause, if the article was published, if the state-

¹² *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

¹³ *Vaughan v. Lytton*, 101 S. E. 865, 126 Va. 671.

¹⁴ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

¹⁵ *Moore v. Thompson*, 52 N. W. 1000, 92 Mich. 498.

¹⁶ *Moore v. Thompson*, 52 N. W. 1000, 92 Mich. 498.

ment incorporated was made upon reasonable and probable cause, it was a privileged communication. Now, that is a legal proposition entirely for the court. A communication is privileged when made upon a proper occasion, from a proper motive, in a proper manner, and based upon reasonable and probable cause. And when so made in good faith, the law does not imply malice, as in the ordinary case of libel, from the mere proof of what is said about the man, and actual malice must be proved. Now I say concerning this article that the occasion was proper. Here was a public meeting of the school board, open to the public, rightfully open to the public, and matters of public interest being discussed, behavior of a teacher, and we say, without any discussion or debate on the proposition, that it was a proper occasion. We say to you, further, that so far as you can observe, either from the surrounding circumstances or from the article itself, the motive and the manner were proper, and therefore all the requirements of a privileged communication would be met, if it was not known to be false (which, of course, would destroy the privilege as we have already charged you), or if, though untrue, it was made upon reasonable or probable cause. So, if you do not find that ——— knew it to be false, you must find want of reasonable or probable cause—that is, negligence—in order to sustain a recovery in an action by the plaintiff, and that brings us to the next ingredient or requirement, negligence. It must be found to be either malicious in the light of the instructions which I have just given you on that subject, or negligent in the light of the instruction which I now give you.¹⁷

§ 3388. Effect of malice as destroying claim of privilege

§ 3388(1). United States

Many things have been said, gentlemen, about other questions—whether the road was in good condition; whether defendant had cause for seeking a change of management; and whether he was acting in good faith in regard to the interests of the road. Much has been said about getting control of the corporation, or organizing it in the interest of a scheme. All these things are remote in their bearing. The question for you, first and mainly, is whether defendant uttered these words about the plaintiff, and whether he uttered them without justification. He claims he did it justifiably in discharge of his duty to the board. The mere fact that he uttered them to the board would not necessarily be a justification. He must, of course, have done it in good faith. If he uttered the words to the board, and did not believe them to be true, there was for that, of course, no justification. If you find he did make the charge of

¹⁷ Wharen v. Dershuck, 108 Atl. 18, 264 Pa. 562.

drunkenness against plaintiff as alleged, did he do it in good faith? He has testified, and much proof has been introduced in respect to the information that he had on the subject. If he had been told by creditable men of facts which fairly led him to believe, and entitled him to believe, there was something wrong in plaintiff's conduct in this respect, he had the right to bring the matter up, and you may presume he did it in good faith unless the evidence shows the contrary. Of course, if the evidence convinces you that he did not have good cause to bring it forward, had not received information that would warrant a prudent man in bringing such a charge forward, you will say he did not act in good faith, and will not give him the benefit of the privilege to which otherwise he might be entitled. Every presumption is in favor of good faith if he had information on the subject that a reasonable man might have acted upon.¹⁸

§ 3388(2). Iowa

You are instructed in this case, if you find from the evidence and a fair preponderance thereof that the article published on ———, was so privileged, then the burden of proof is upon the plaintiff to show malice. If a party publishing an article did not honestly believe the facts published to be true, any claim of privilege would not be a protection to him. A man who knowingly makes false charges cannot take advantage of a privilege; and, if he had no reasonable cause for believing the statements to be true and the statements were false, it would amount in legal contemplation to a wanton statement, or a statement made without knowing or caring whether it was true or malicious.¹⁹

The court instructs the jury that the term "malice," as employed in the definition of libel per se, does not necessarily mean hatred or ill will toward the person at whom the libel is directed, but the want of legal excuse for an act done to the injury of another amounts to such malice, without regard to the motive which prompted it, unless privileged or justifiable.²⁰

The court instructs the jury that, as bearing upon the question of malice in the publication of an article, under the plea of privilege, you must consider every fact and circumstance in evidence in the case as well as the article published, and from all such facts and circumstances, and the article itself, determine whether or not malice in the publication of the article has been proved. To apply the law to this case in considering the defense of privilege, it is

¹⁸ Broughton v. McGrew (C. C. Ind.) 39 Fed. 672, 5 L. R. A. 406.

¹⁹ Ott v. Murphy, 141 N. W. 463, 160 Iowa, 730.

²⁰ Ott v. Murphy, 141 N. W. 463, 160 Iowa, 730.

for you to say from all the facts and circumstances whether or not the defendants published the article of ———, in good faith, and for justifiable ends, believing the same to be true, and the burden of proof is upon the plaintiff to show that malice existed on the part of the defendants in the publication of said article. If the plaintiff has so proved malice, then the defense of privilege fails. If he has not so proved malice, and you find plaintiff was a candidate for said office in ———, then under the instructions heretofore given you it will be your duty to find that the plea of privilege as to the article published on ——— has been established, and is a complete defense, and exonerates the defendants from any liability because of the publication of said article on said date.²¹

§ 3388(3). Kentucky

The court instructs the jury that if the jury believe from the evidence that in the letter dated ———, written by the defendant to ——— and ———, the statements, "Mr. M.'s mother lost her mind," "While Mr. M. at present seems to be all right, he has done several things in the last year that I do not think look exactly right," "My judgment is when we are safe is a good time to drop out," and "My judgment is we had just as well drop this bond and also Mr. M.'s bond as cashier of the ——— Bank of ———," or any of them, were false, or that by said statements, or any of them, defendant meant to express and did express a doubt as to plaintiff's mental condition for the purpose of creating a false impression upon the minds of said ——— and ———, and in order to bring about a cancellation of plaintiff's bonds in which the ——— Company was surety, and, if the jury further believe from the evidence that in writing said letter and imparting to said persons by said letter the information therein contained, the defendant was prompted by malice toward the plaintiff, the jury should find for the plaintiff, and unless the jury so believe they should find for the defendant.²²

§ 3388(4). Missouri

You are instructed that, even though said defense of privilege, as above indicated, is sustained by the evidence, yet it is not available to the defendant, if the jury find and believe, taking into consideration the character of the publication and all other facts and matters in evidence, that the defendant was actuated by actual malice or ill will towards the plaintiff when it made said publication.²³

The court further instructs you that, even if said report was only

²¹ Ott v. Murphy, 141 N. W. 463, 160 Iowa, 730.

²² McClintock v. McClure, 188 S. W. 867, 171 Ky. 714, Ann. Cas. 1918E, 90.

²³ Brown v. Globe Printing Co., 112 S. W. 462, 213 Mo. 611, 127 Am. St. Rep. 627.

furnished to such persons above explained, still the same was not privileged, if you believe from the evidence that the same was prompted and accompanied by actual malice upon the part of defendant. "Actual malice," as used in this connection, means that the report in question was prepared and published, not in good faith, but with intent to injure plaintiffs, or with a willful and wanton neglect of the rights and interests of the plaintiffs, and, if you believe from the evidence that there was such actual malice in the furnishing of the said reports, then the same was not privileged, as claimed by the defendant.²⁴

§ 3388(5). Virginia

The court instructs the jury that though the occasion is privileged, it must be used in good faith and without malice. Strong and violent language or insinuations disproportional to the occasion may raise an inference of malice, and thus lose the privilege that would otherwise attach to it, and the same is true if the jury believe from the evidence that the defendant availed herself of the occasion not to protect her interests or the property intrusted to her care, but to gratify her ill will and insult the plaintiff, and whether such an inference of malice is to be drawn from the language used, the manner of its publication, or the circumstances under which it was used, is a question for the jury. The question of good faith, belief in the truth of the statements or insinuations, and the existence of actual malice under all the circumstances of the case remains with the jury.²⁵

The court instructs the jury that if they believe from the evidence that the defendant wrote and published the communication complained of, and believe further that the same was not written in good faith, but with malice, and that the defendant availed herself of the occasion not to protect her interest, or property committed to her care, but to gratify her ill will and insult the plaintiff, and if they further believe that the words complained of were such as from their usual construction and common acceptance are construed as insults and tend to violence and a breach of the peace, they shall find for the plaintiff.²⁶

²⁴ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

²⁵ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

²⁶ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

G. JUSTIFICATION

§ 3389. Effect of proving truth of alleged defamatory words

§ 3389(1). United States

The jury are instructed that this is an action on the part of plaintiff to recover damages. Plaintiff claims that V., his superior officer in the defendant company, made a statement to M. that the stock in the store of the defendant company in ———, and of which plaintiff was manager, was short, and that the cash in said store was also short. The defendant claims that M. was a friend of plaintiff and lived in the same house with him, and that V. was endeavoring to locate plaintiff and get some explanation of his conduct, and that the statement made by V. to M. as to the shortage in the stock and shortage in the cash was true, and was made in good faith and without malice. In actions of this character, proof of the statement of which complaint is made, if true, is a complete defense. To slander a person implies a false statement about them, and a true statement of and concerning a person is not an insult for which there can be a recovery. The burden is on the plaintiff to establish his case; he must show that the defendant used the language set out in the declaration, and the jury must believe this language, if true, to be slanderous, or such as from its usual import is insulting, and calculated to cause breach of peace, before there can be any recovery. If, after hearing the evidence, the jury believe that the stock mentioned was short, and the cash mentioned was also short, then the verdict must be for the defendant, whether said shortage was due to carelessness, ignorance, lack of attention, dishonesty, or other cause.²⁷

§ 3389(2). Delaware

You are instructed that, although the defendant has entered the plea of not guilty, he has also pleaded the truth of the alleged slanderous words, and upon that plea he relies. If you believe the defendant has clearly and fully established by the evidence that the plaintiff did, at the time referred to, and upon a matter material to the case, knowingly swear falsely, he has made out a complete defense to this action, and your verdict should be in his favor.²⁸

§ 3389(3). Michigan

The court instructs the jury that, if you find from the evidence that the defendant has proved under his notice of justification by a preponderance of evidence that the statements made in the claimed

²⁷ Grand Union Tea Co. v. Lord, 231 Fed. 390, 145 C. C. A. 384, Ann. Cas. 1918C, 1118.

²⁸ Smith v. Singles, 72 Atl. 977, 6 Pennewill, 544.

libelous publication are true, then he has made a complete defense, and in that case your verdict should be no cause of action.²⁹

§ 3389(4). Missouri

You are instructed that, on the other hand, the defendant contends that the article complained of is true, and that it has the right to make the publication if made in good faith, and that it published the article without any malice, as a proper and legitimate comment upon the conduct of the plaintiff in respect to a matter of vital public interest. As regards the truth of the article published, if you believe from the evidence that, so far as it relates to the plaintiff, it was true—that is, that the statements as made therein of and concerning the plaintiff were true, giving to them their natural meaning as hereinbefore defined—then your verdict should be for the defendant.³⁰

§ 3390. Effect of malice as destroying truth as defense

§ 3390(1). Kansas

You are instructed that the truth of the alleged defamatory matter constitutes a defense to this action, no matter what the motives of the defendant may have been in the publication thereof. It is no concern of yours. It is no concern of the plaintiff, or of anybody else, what the defendant's motives in such publication may have been. It is a complete defense to this action, if he has succeeded in establishing the truth of the matters published by him concerning the plaintiff.³¹

§ 3390(2). Missouri

You are instructed that, although one may publish of another defamatory and malicious matter, yet the truth of the matter published forms a complete defense to any action for damage for such publication; and in this case, even if the jury should believe from the evidence that defendant published of the plaintiffs any or all of the matters charged as libelous, yet if they further find from the evidence that the matters so published were true as published, then the defense has been made complete, and in that case it is immaterial whether the party composing, or the party publishing, was or was not actuated by malice against plaintiffs, and you must find for the defendant. And if the jury find from the evidence that any one of the two allegations or charges are true, then, in arriving at the assessment of damages, they must not allow any damages on account of such charge so proved to be true.³²

²⁹ Kovacs v. Mayoras, 141 N. W. 662, 175 Mich. 582.

³⁰ Stark v. Publishers: George Knapp & Co., 61 S. W. 668, 180 Mo. 529.

³¹ Dever v. Clark, 25 Pac. 206, 44 Kan. 745.

³² Minter v. Bradstreet Co., 73 S. W. 668, 174 Mo. 444.

§ 3390(3). Rhode Island

You are instructed that, in order to entitle the defendant to a verdict on the ground that the publication of the matter is true, the truth of the matter that is published is substantiated by the evidence, it is necessary that the defendant should prove it is true by a fair preponderance of the evidence. In other words, the burden is upon the defendant to establish the truth of its article. The Constitution of this state reads as follows, in regard to the press and the publication of libel or slander: "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, unless published for malicious motives, shall be sufficient defense to the person charged." So, gentlemen, you see, under the law of this state, if the defendant has satisfied your minds by a fair preponderance of the evidence that the matters published in the article are true, and that the publication was actuated by no malice, but it was published in good faith, then your verdict should be for the defendant. If, however, it is true, and it was published from a malicious motive, then you can see, under this provision of the Constitution which I have just called your attention to, the truth would constitute no defense.³³

§ 3391. Sufficiency of justification

Sufficiency of evidence, see post, § 3409.

§ 3391(1). Texas

You are instructed that, in order to justify himself, the defendant must show that all of said libelous statements are true. The evidence for the defendant on this point must cover each and all such libelous statements. The defendant, however, is not required to show that all the statements made in said newspaper articles exhibited to you in evidence are true, but only that those are true which are libelous in themselves, as shown you in the ——— and ——— paragraphs of this charge.³⁴

§ 3391(2). Washington

You are instructed that, to prove that plaintiff is a thief, it is not enough for the defendant to show that plaintiff took money that was the property of defendant, but he must go further and show that plaintiff took defendant's money fraudulently and with a criminal intent to deprive the defendant of it. This must be established by a preponderance of the evidence. If, on the other hand, the plaintiff took the defendant's money under a good-faith claim, made

³³ Cardarelli v. Providence Journal Co., 80 Atl. 583, 33 R. I. 268.

³⁴ Bailey v. Chapman, 38 S. W. 544, 15 Tex. Civ. App. 240.

at the time thereof, that he was entitled to or had a right to take it, and did so openly and avowedly, and if you so find, then the claim of the defendant that the plaintiff was in truth a thief has failed.³⁵

§ 3392. Same—Showing substantial truth of statements complained of

The jury are instructed that you are to go through these, and compare them with the evidence, and see whether the statements made here, compared with the facts as the evidence discloses them to you, are true—are substantially true. I do not say that they must be actually and literally true, because the difference may be a difference of no consequence. Suppose I should charge some man with stealing a bay horse, and, when I come to court to testify, it should prove to be a white horse; there would be no earthly difference in the charge, and I should prove it substantially if I should prove that the horse was a white horse, instead of a bay horse. Fix the real gist of the charge. Suppose this house, which was said to be 19 H. street, should prove to be 21 H. street; that would be an illustration of an immaterial error; the matter would be substantially true, although he got the wrong number of the house, by some few numbers. Now, if the statements of defendant are substantially true, comparing the words which he used here with the evidence you heard upon the stand—if they are substantially true—then the defendant has made out that defense.³⁶

§ 3393. Partial justification

§ 3393(1). Kentucky

The court instructs the jury that, if the jury believe from the evidence that the statements and implication, if any, in said letter, mentioned in instruction No. ———, were true in words or in substance, at the time the same were written, the jury should find for the defendant. If, however, the jury believe from the evidence that all of the aforesaid statements and implications are not proved to be true, but that some part of them are so proved, in words or in substance, the jury should award nothing for those that are proved to be true, if they find for the plaintiff.³⁷

§ 3393(2). Michigan

The court instructs the jury that, if you find that the defendant has justified to any part of the article, as to that part no recovery can be had.³⁸

³⁵ *Eddy v. Cunningham*, 125 Pac. 961, 69 Wash. 544.

³⁶ *Conner v. Standard Pub. Co.*, 67 N. E. 506, 183 Mass. 474.

³⁷ *McClintock v. McClure*, 188 S. W. 867, 171 Ky. 714, Ann. Cas. 1918E, 90.

³⁸ *Kovacs v. Mayoras*, 141 N. W. 662, 175 Mich. 582.

You are instructed that, if you find evidence to sustain one or more of these charges, as contained in the said publication, which charges I have now enumerated, but do not find evidence to sustain the truth of all of them, still the plaintiff would be entitled to a verdict at your hands, and the effect of justifying as to a part of the charges, and not the whole, would be only to mitigate, or reduce the damages which the plaintiff would otherwise be entitled to recover at your hands.³⁹

§ 3393(3). Missouri

The jury are instructed that in this case the defendant pleads justification; that is, it declares the statements contained in the publication complained of are true of and concerning the plaintiff. Under this plea, it is defendant's duty to prove the truth of the statements in the publication complained of in plaintiff's petition. And it is not sufficient for defendant to prove the truth of merely a portion of the statements contained in the publication complained of. Even though the defendant proved the truth of a portion of said publication, yet your verdict should be against defendant's plea of justification if you find from the evidence that it has failed to prove any material statement in the publication complained of, providing such statement is found by you from the evidence to be false and a libel upon plaintiff.⁴⁰

§ 3394. Proof of other offense than that imputed

You are instructed that it is not a defense to a libel that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character.⁴¹

§ 3395. Effect of unsuccessful attempt at justification

Filing plea of justification as evidence of malice, see post, § 3404.

§ 3395(1). California

You are instructed that, where a defendant reiterates the alleged libelous charges in his answer and offers no evidence to prove their truth and the jury are satisfied that it is made with a knowledge of its falsity and maliciously and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff and may be considered by the jury in assessing damages.⁴²

§ 3395(2). Colorado

The jury are instructed that, if a material part of a plea of justification fails, the plea fails altogether, and if a defendant in an

³⁹ Hay v. Reid, 48 N. W. 507, 85 Mich. 290.

⁴⁰ Rail v. National Newspaper Ass'n, 192 S. W. 129, 198 Mo. App. 463.

⁴¹ Tribune Ass'n v. Follwell, 107 Fed. 646, 46 C. C. A. 528.

⁴² Dauphiny v. Buhne, 96 P. 880, 153 Cal. 757, 126 Am. St. Rep. 136.

action of libel interposes a plea of justification, and abandons or fails to prove his plea, such failure to prove or abandonment of the plea, may be taken into consideration by the jury in estimating damages. It is evidence tending to show malice, and continued malice.⁴⁴

H. PLEADING

§ 3396. Necessity of proof of words as alleged in complaint

§ 3396(1). United States

The burden of proof is upon the plaintiff to make out his case as he has alleged it to be. He must show that the defendant spoke of him in relation to his employment in the management of the railroad the words, or a substantial and essential part of the words, charged, and as charged. It is not necessary that the proof shall show that every word in the sentence was uttered just as averred, but it must be shown that the essential words were uttered. The words necessary to convey the meaning alleged must be shown to have been uttered as charged. It is not enough to show that fragmentary parts of sentences or words taken from different sentences uttered by the defendant, if put together, would support the allegation. It must appear that the defendant used sentences containing substantially the same words as are charged in the complaint. It is not necessary that the complainant shall, in the first instance, offer any proof bearing directly on his previous good character, or proof that the words, if uttered, were false. He can rely, in the first instance, upon the presumption of good character, without offering proof on the subject. When he has made proof that the words were uttered as charged, the jury will presume that they were false unless proof to the contrary is introduced. While the burden is upon the plaintiff to make out his case as charged, with proof, he is helped out in this respect by the presumption, and is under no necessity to offer direct proof upon the subject.⁴⁵

§ 3396(2). Illinois

The jury are further instructed that all the words laid in the declaration need not be proven to maintain the action, unless it takes them all to constitute the slander, and if they believe from the evidence that a sufficient number of the words laid in the declaration to amount in their common acceptation to a charge of — against the plaintiff have been proved to have been spoken by the defendant, then they must find for the plaintiff.⁴⁶

⁴⁴ *Downing v. Brown*, 3 Colo. 571.

⁴⁵ *Broughton v. McGrew* (C. C. Ind.) 39 Fed. 672, 5 L. R. A. 406.

⁴⁶ *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149.

§ 3396(3). *Indiana*

You are instructed that, if the jury find from the evidence that the defendant spoke of and concerning the plaintiff and of and concerning his character, substantially, any one or more of the sets of words as alleged in the complaint, imputing and charging the crime of ——— against the plaintiff, it is sufficient to sustain the issue as to the speaking of that set of words, and on that issue they should find for the plaintiff.⁴⁷

§ 3396(4). *Missouri*

You are instructed that, if the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, in the presence and hearing of ———, or others, as mentioned in the petition, the words in the petition alleged, to wit, “——— killed my hogs, and I can prove it, and he is the biggest thief on this creek, and I can prove by ——— and his boys that he has stolen my hogs,” or if you find that defendant spoke so much of the said words as may be sufficient to constitute the charge that the plaintiff stole hogs, then the jury must find for the plaintiff.⁴⁸

§ 3396(5). *Nebraska*

You are instructed that the plaintiffs are not bound to prove the speaking of all the words charged in the petition. If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, in the presence and hearing of others, any of the slanderous words charged in the petition, the fair import of which would be to charge the plaintiff with being a whore, then she is entitled to a verdict.⁴⁹

EVIDENCE

§ 3397. *Presumption as to sense in which words charged used*

You are instructed that the words should be presumed to have been used in their ordinary meaning, and that it is for defendant, by proof, to overcome such presumption by showing that the words spoken were not so intended and understood by the speaker and those who heard him.⁵⁰

§ 3398. *Presumption and burden of proof as to truth or falsity of defamatory words*§ 3398(1). *Alabama*

You are instructed that the charge must be falsely made; but the falsity of the accusation is to be implied until the contrary is shown.⁵¹

⁴⁷ *Tucker v. Call*, 45 Ind. 31.⁴⁸ *Lewis v. McDaniel*, 82 Mo. 577.⁴⁹ *Boldt v. Budwig*, 28 N. W. 280,
19 Neb. 739.⁵⁰ *Emerson v. Miller*, 88 N. W. 803,
115 Iowa, 315.⁵¹ *Stallings v. Newman*, 26 Ala.
300, 62 Am. Dec. 723.

§ 3398(2). Delaware

You are instructed that under the plea of the truth of the alleged slander, or defamatory words, the burden is upon the defendant to satisfy the jury that the defamatory words he uttered in respect to the plaintiff were true.⁵²

§ 3398(3). Indiana

The jury are instructed that the plaintiff is presumed to be innocent of the offense imputed to her by the words complained of until the contrary is proved by a preponderance of the evidence.⁵³

The jury are instructed that defamatory words are presumed to be false until their truth has been proved.⁵⁴

§ 3398(4). Kansas

You are instructed that the defendant, as already stated, pleads as a defense that the matters published by him and complained of by the plaintiff are true, and it devolves upon him to prove, by a preponderance of the evidence, the truth of said matter; and if he has succeeded in establishing the truth of the matter charged as defamatory in the plaintiff's petition, by a preponderance of the testimony, then your verdict must be for the defendant.⁵⁵

§ 3398(5). Missouri

The court instructs the jury that the falsity of all defamatory words is presumed in plaintiff's favor and she need give no evidence to show them false. The burden is on the defendant to rebut this presumption by giving evidence, if any, in support of the plea of justification.⁵⁶

§ 3399. Burden of proof as to malice—On issue of exemplary damages

The jury are instructed that the burden of this issue is also on the plaintiff to satisfy you by the greater weight of the evidence that the words written were written with malice toward the plaintiff. What is malice, gentlemen of the jury? Malice is ill will, spite. Did the words charge these crimes, and, if so, were they written because the defendant had ill will or spite toward the plaintiff? If you find by the evidence and from its greater weight that the words were written with malice, that is, with ill will and spite towards the plaintiff, then you will answer this fourth issue "Yes." If you do not so find, you will answer it "No."⁵⁷

⁵² *Smith v. Singles*, 72 Atl. 977, 6 Pennewill, 544.

⁵³ *Hallowell v. Guntle*, 82 Ind. 554.

⁵⁴ *Tucker v. Call*, 45 Ind. 31.

⁵⁵ *Dever v. Clark*, 25 Pac. 205, 44 Kan. 745.

⁵⁶ *Rail v. National Newspaper Ass'n*, 192 S. W. 129, 198 Mo. App. 463.

⁵⁷ *Hall v. Hall*, 103 S. E. 136, 179 N. C. 571.

§ 3400. Same—Where it is sought to nullify claim of privilege**§ 3400(1). Oklahoma**

A "privileged communication" is one made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, and which contains matter which, without the occasion upon which it is made would be defamatory or actionable. In this connection you are further instructed that if you find and believe from the evidence that the relation of attorney and client existed between ——— and ———, or the defendant, and that the communications set forth in the second cause of action in plaintiff's petition are privileged communications within the above definition, then the law does not presume malice therefrom, and the burden is upon the plaintiff to prove express malice on the part of the defendant in writing said communication.⁵⁸

§ 3400(2). Virginia

You are instructed that if the jury believe from the evidence that the defendant spoke the words, or any of them, as charged in the declaration, of and concerning the plaintiff, yet the presumption of law is that he spoke them honestly, believing in the truth of his statement, although such statements in fact were false or founded upon the most erroneous information; and, in order for the plaintiff to recover in this action, the burden is upon him to prove to your satisfaction that such statements were spoken with actual malice in fact towards the defendant.⁵⁹

The court instructs the jury that, the letter in question being a privileged communication, malice will not be inferred from its publication by the defendant, but it is incumbent on the plaintiff to prove that the defendant company was actuated by malice against the plaintiff in writing and sending the same to ———.⁶⁰

§ 3401. Matters considered in determining truth or falsity of words spoken

You are instructed that you are entitled on this whole matter to take into consideration what you have observed in the courtroom—what ——— has called Exhibit 1; that is, the little girl herself. It is for you to say. She looks like a healthy child. Her relations with the plaintiff seem affectionate. It is for you to say what weight should be given to that.⁶¹

⁵⁸ Bland v. Lawyer-Cuff Co., 178 Pac. 885.

⁵⁹ Gatewood v. Garrett, 56 S. E. 335, 106 Va. 552.

⁶⁰ Reusch v. Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358.

⁶¹ Press Pub. Co. v. Montelth, 180 Fed. 356, 103 C. C. A. 502. The alleged libel consisted in charging plaintiff with cruelty to a child adopted by her.

§ 3402. Matters considered in determining question of malice**§ 3402(1). Delaware**

You are instructed that express malice is never presumed, but must be proved by the plaintiff. It may, however, be proved by direct or indirect evidence. In determining whether there was express malice in this case, you should consider all the facts and circumstances disclosed by the evidence. You may therefore consider all the circumstances surrounding the publication of the article in question as disclosed by the evidence which tend to show the motive or spirit which actuated the publication, including any information or knowledge which the defendant possessed, or had the means at hand of obtaining, touching the truth or falsity of the charges made.⁶²

§ 3402(2). Michigan

You are instructed that, if the defendant communicated to — and others a criminal charge against the plaintiff, and in doing so acted wantonly and recklessly, you may consider such reckless and wanton conduct as bearing upon the question of malice.⁶³

§ 3402(3). Missouri

The court instructs the jury that if you believe and find from the evidence that the defendant, in the presence and hearing of —, or others, spoke of and concerning plaintiff slanderous and defamatory words similar and of like import to those charged in the petition, you may consider such evidence as tending to prove express malice on the part of the defendant.⁶⁴

You are instructed that in reaching a conclusion as to whether or not the defendant, through its agents, furnished as true reports the statements set forth in the other instructions, knowing them to be false, or furnished the same in order to injure the plaintiffs, or with a willful neglect of the rights and interests of the plaintiffs, or with a reckless disregard of the consequences of the act, you may take into consideration all the facts and circumstances detailed in evidence, giving to each part thereof such weight as you think it is entitled to.⁶⁵

§ 3403. Reiteration as evidence of malice

The court instructs the jury that, if from the evidence they believe that the words contained in the declaration were used by the defendant, and were untrue, and if they further believe from the

⁶² *Todd v. Every Evening Printing Co.*, 66 Atl. 97, 6 Pennewill, 233.

⁶³ *Moore v. Thompson*, 52 N. W. 1000, 92 Mich. 498.

⁶⁴ *Anderson v. Shockley*, 181 S. W. 1151, 266 Mo. 543, Ann. Cas. 1918B, 500.

⁶⁵ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

evidence that the defendant has reiterated the said words, then this is a circumstance tending to show malice on the part of the defendant.⁶⁶

§ 3404. Filing plea of justification as evidence of malice

§ 3404(1). Michigan

The court instructs the jury that if they believe from the evidence and from the facts and circumstances proved on the trial that when the plaintiff filed his plea of justification he had no reasonable hope or expectation of proving the truth of it—and by a plea of justification is that plea in which he pleaded that the plaintiff was guilty of the burning of the cottages—then if the jury believes from the evidence that the defendant is guilty of slander, in the declaration, they may, in fixing the amount of plaintiff's damages, regard the filing of the plea as evidence tending to show malice, and as evidence of such malice as justifies them in increasing the damages, if any, they allow the plaintiff, limiting the damages at all times however to the actual damages.⁶⁷

§ 3404(2). Virginia

The court instructs the jury that in this case the defendant has filed a plea of justification; that is to say, she has undertaken to prove that the language complained of, its proper inferences, and insinuations therefore are true. If you believe from the evidence that the defendant has not established the truth of her plea of justification, you may take this fact into consideration in determining whether the defendant has been actuated by malice or not in using and publishing the communication set out in the declaration.⁶⁸

§ 3404(3). Wisconsin

You are instructed that, if it appears that —— has attempted, but failed, to prove the truth of any defamatory statement in any of the articles complained of, you may consider that fact as bearing also upon the question whether he was or not actuated by malice or ill will in publishing the statement.⁶⁹

§ 3405. Matters considered in rebuttal of presumption of malice

You are instructed that, for the purpose of rebutting and repelling the idea of malice, the defendant has the right to prove and explain all the facts and circumstances surrounding the speaking of the words; also, he has the right to show and explain all the

⁶⁶ *Mopsik v. Cook*, 95 S. E. 426, 122 Va. 579.

⁶⁷ *Rablor v. Kelley*, 160 N. W. 392, 194 Mich. 107.

⁶⁸ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

⁶⁹ *Pfister v. Milwaukee Free Press Co.*, 121 N. W. 938, 139 Wis. 627.

facts and circumstances surrounding the speaking of the words in mitigation of damages.⁷⁰

You are instructed that confidential communications, made in usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries; they should look whether the words were spoken with intent to defame, or in good faith to communicate facts interesting to one of the parties.⁷¹

§ 3406. Evidence as to reputation of plaintiff

Consideration of reputation of plaintiff in mitigation of damages, see post, § 3420.

You are instructed that the fact, if true, that the plaintiff's reputation for chastity had not, or has not, been called in question in the neighborhood in which she resides, is evidence that her reputation in that respect is good.⁷²

§ 3407. Matters considered as evidence of publication

The jury is instructed that in this case the defendant denies publication. It is not necessary that there should be any direct proof of publication. The establishment, to the satisfaction of the jury, of any fact or facts from which they may legally infer publication by the defendant, will be sufficient; and in this connection the jury is instructed that the admission of the defendant contained in his answer, that he "used the words set out in the complaint," may be considered by the jury as competent evidence in connection with the other evidence in the case, as tending to establish publication.⁷³

§ 3408. Sufficiency of proof of words charged

You are instructed that the question for you first to consider in logical order is, were the words uttered as charged, or any set of the words? There are three or four different sentences in the complaint which defendant is charged with having spoken in relation to the plaintiff in connection with his office as manager of the railroad. Has it been proven to your satisfaction that defendant did utter any one of those sentences substantially in the words stated in the complaint? If so, the plaintiff is entitled to recover, unless some matter of defense is established. Now, all questions of fact are for the jury, and this question of the utterance of words as much as any other. I shall not attempt to review the evidence upon the question whether the speaking of any of the words, or any set of the words charged, has been sufficiently proven. If the preponderance of the evidence

⁷⁰ *Stallings v. Newman*, 26 Ala. 300, 62 Am. Dec. 723.

⁷¹ *Stallings v. Newman*, 26 Ala. 300, 62 Am. Dec. 723.

⁷² *Hallowell v. Guntle*, 82 Ind. 554.

⁷³ *Daniels v. Stock*, 126 Pac. 281, 21 Colo. App. 651. It was contended that the jury were told that they could find the fact of publication from the admissions in the answer.

fairly satisfies you that the words were uttered as charged the plaintiff will be entitled to your verdict unless the words were privileged; and that leads to the inquiry whether the words, if spoken, were privileged or not.⁷⁴

§ 3409. Sufficiency of evidence in support of plea of justification

§ 3409(1). Arkansas

You are instructed that defendant admits making the statement complained of by plaintiff as defamatory, and pleads the truth of the statement in justification. In order to maintain this plea, the defendant must prove to the satisfaction of the jury, by a preponderance of evidence, that the plaintiff swore falsely upon the trial referred to. The evidence must be such as to satisfy your minds that the plaintiff was guilty of swearing falsely, as stated by the defendant; and, if the defendant fails to prove his statement, that plaintiff swore falsely, to be true, the jury must take it to be false.⁷⁵

§ 3409(2). Indiana

The jury are instructed that the defendant, in order to justify his accusation against the plaintiff of the crime of ———, must satisfy you from the evidence beyond reasonable doubt of the truth of such charge.⁷⁶

J. DAMAGES

§ 3410. In general

§ 3410(1). United States

You are instructed that, if you find for the plaintiff, then the question arises, what damages will be proper? The action, as I have already explained to you, proceeds upon the theory that the injury has affected the plaintiff in his business. The mere charge of drunkenness is not an actionable injury, and is significant in this case, because the injury that you will consider will have reference to the effect of the slander upon the complainant's business and his business prospects, not upon his character as an individual in a community, because in that respect all men are affected alike by an accusation of drunkenness, and the law does not recognize it as good cause for an action except when it affects the man in his business or prospects of business, and therefore the jury, in determining the amount of damages to be awarded, must revert to that phase of the subject. Damages may be compensatory, and they may be vindictive or punitive. Punitive or vindictive damages are assessed, if at all, on the ground of public policy, and not on the ground that the

⁷⁴ Broughton v. McGrew (C. O. Ind.) 39 Fed. 672, 5 L. R. A. 406.

⁷⁵ Stallings v. Whittaker, 18 S. W. 829, 55 Ark. 494.

⁷⁶ Tucker v. Call, 45 Ind. 31.

plaintiff has any right to the money. In order to prevent a repetition of a wrong the jury may assess vindictive damages, in the way of punishment, which will go to the plaintiff because assessed in his suit, but not on the theory of compensating him, so much as of punishing the wrong-doer. Punitive damages, however, are not to be assessed unless the words were not only wrongful, but were uttered with actual malice on the part of the defendant; so that, unless the evidence shows to you that the defendant uttered the words with actual malice, ill will, or hatred towards the plaintiff, or with such clear want of ground for doing it as to warrant an inference of ill will or hatred, you will assess only compensatory damages. Compensatory damages are for the purpose of making whole the plaintiff for the injury done him, for the injury in respect to his business and business prospects that has actually arisen or is likely to arise, from the words uttered in the manner and at the time they were spoken. Of course, there is no fixed standard by which such damages can be measured. Characters have no price in the market. The extent of the injury must be determined from the evidence. The jury must exercise sound judgment and discretion.⁷⁷

§ 3410(2). Delaware

Having decided that the publication complained of was not privileged, but was a libel and actionable per se, we are bound to say to you that the plaintiff is entitled at your hands to a verdict for some amount, and whether that amount shall be nominal or substantial is for you to say, after carefully considering all the evidence in the case.⁷⁸

You are instructed that, if you should not be satisfied by a preponderance of the evidence that express malice has been shown, you cannot in your verdict include any sum for exemplary, punitive, or vindictive damages; and in such case, should you find a verdict for the plaintiff, it must be restricted to compensatory damages, which should be in such an amount, within the limits claimed in the declaration, as will compensate the plaintiff for the wrong done him, without respect to any question of punishment. The amount to be awarded to the plaintiff should be such as would reasonably compensate him for any wrong done to his reputation, good name, or fame, and for any mental suffering caused thereby as shown by the evidence. If you should not be satisfied by a preponderance of the evidence that the plaintiff sustained or suffered any actual damage or injury, your verdict should nevertheless be in his favor, but only for a nominal sum.⁷⁹

⁷⁷ Broughton v. McGrew (C. C. Ind.) 39 Fed. 672, 5 L. R. A. 406.

⁷⁸ Todd v. Every Evening Printing Co., 66 Atl. 97, 6 Pennewill, 233.

⁷⁹ Todd v. Every Evening Printing Co., 66 Atl. 97, 6 Pennewill, 233.

§ 3410(3). *Indiana*

The jury are instructed that, if you determine from the evidence that the plaintiff's complaint is made out by a fair preponderance, your duty is to find for the plaintiff, and assess her damages. If you find that way, you may consider, in assessing the damages, the extent of injury you believe was done to plaintiff's name and fame as a virtuous woman; and, if you determine that the slanderous words were uttered and published deliberately and with malice, you may also add exemplary damages in such sum as you all determine upon as right, under all the facts and circumstances established.⁸⁰

§ 3410(4). *Kentucky*

You are instructed that it is admitted by the pleadings and is the undisputed evidence in this case, that the defendant, on the ———, wrote and procured to be printed and published in the ——— the following article, to wit: (Here follows the libelous article.) And the court now instructs you that the law presumes that defendant wrote and procured said article to be published maliciously, or with malice and the court further instructs you to find for the plaintiff such sum in damages as you may believe, from the evidence, will reasonably compensate him for injury to his character, if any, caused by the writing and publishing of said article by defendant, or humiliation and mortification to his feelings, if any of either, so caused, for mental anguish, if any, so caused, but not exceeding the amount claimed in the petition, to wit, ——— dollars, and you will at least find for plaintiff nominal damages. And the court further instructs you that you may or may not, in the exercise of your sound discretion, in addition to the compensatory damages above mentioned, assess such exemplary or punitive damages as you may think right and proper under the facts proven in this case, unless you shall believe, from the evidence, that the publication of the said article was made without malice, in which event you will not find any punitive damages against the defendant.⁸¹

§ 3410(5). *Missouri*

The court instructs the jury that, if their finding makes it necessary for them to consider the question of damages, they must determine them, not arbitrarily, but by the sound, temperate, deliberate, and reasonable exercise of the functions vested in them by law, and they cannot allow any damages sustained by plaintiffs on account of any derogatory reports put in circulation or published by any one other than defendant.⁸²

⁸⁰ *Hibner v. Fleetwood*, 49 N. E. 607, 19 Ind. App. 421.

⁸¹ *Reid v. Nichols*, 179 S. W. 440, 166 Ky. 423.

⁸² *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

§ 3410(6). West Virginia

The court instructs the jury that damages recovered in actions of this character are of two classes: First, actual or compensatory damages, which embrace loss of reputation, shame, mortification, and injury to the feelings; second, exemplary or punitive damages, which are damages that may be awarded by the jury where they believe that the slanderous or insulting words, if they believe such slanderous and insulting words were used and spoken by the defendant of and concerning the plaintiff, were falsely, maliciously, willfully, and deliberately spoken of, and concerning the plaintiff by the defendant.⁸³

§ 3411. Compensatory damages**§ 3411(1). United States**

You are instructed that you have a right to consider all the circumstances in the case. If the slander was uttered under one set of circumstances it might have greater effect than if uttered under other circumstances, and when uttered to some persons it might do more harm than when uttered to others. In this case there is some evidence that there had been rumors of these things circulating in the community, rumors of charges of this kind, before defendant uttered the words. If that is a fact, you have a right to take it into consideration. A man that starts a false report may be held to greater responsibility than a man who merely repeats or adds to the story. The fact that the defendant uttered the words on his own authority, or on the authority of others of whom he had heard the reports, may be taken into consideration. If he said these things on his own authority, claiming to know them himself, that would tend to give them greater weight and currency than if he professed merely to speak from rumors or information derived from others, indicating the source of his information. The character of the defendant himself, his standing in the community, is a matter which you may consider in determining the amount of damages. A man of high character, of known force and influence in the community, may injure another by talking about him more than a man of less character could do. So, on the other hand, the character of the party spoken about is a matter that may be taken into consideration. If he has a well-established character that there is less likelihood of the slander hurting him may be considered; whereas, if he was a new man starting in the effort to build up a reputation, the same slander might well cause more harm. You will consider the persons to whom the slanders were uttered, and the relation they occupied to the parties. These at-

⁸³ *Michaelson v. Turk*, 90 S. E. 395, 79 W. Va. 31.

torneys of the road were not in a position, as I have instructed you, to be treated as officers of the road, to whom such communications could be made as matter of privilege; yet, I think, if defendant had gone to the attorneys of the road with the accusation against plaintiff, and urged upon them to go to ——— with the matter, I am not sure but that his action might have been privileged. It would certainly be a strong circumstance to rebut malice. Upon the circumstances as stated here, however, while I instruct you that if the words charged were uttered to these attorneys in the first instance, and not as a repetition of what was said in the meeting, they were not matters of strict privilege; yet the fact that these gentlemen were attorneys of this road, and had friendly relations to the officers, or to the plaintiff, you may consider in determining how much damage ought to be assessed. If these three gentlemen were the persons to whom these words were spoken, you can consider their relations to the plaintiff and the likelihood of words spoken to them concerning him reaching the public through their agency, and to what extent they would be likely to cause him injury. The plaintiff cannot claim damages for acts of his own or for the publicity given to the matter by the bringing of this suit, because that was brought of his own choice. It is for you, if you find for the plaintiff, to say upon all the facts and circumstances in proof what damages you think ought to be awarded, whether compensatory, or both compensatory and vindictive.⁸⁴

§ 3411(2). *Arkansas*

You are instructed that, in an action for slander, the law implies some damage from the uttering of actionable words; and the law further implies that the person using the actionable words intended the injury the slander is calculated to effect, and in this case, if you find for the plaintiff on that part of the complaint alleging slander, you will determine from all the facts and circumstances proved what damages ought to be given her, and in assessing the damages you are not confined to any mere pecuniary loss sustained; physical pain, mental suffering, humiliation, and injury to reputation or character, if proved, are proper elements of damages.⁸⁵

§ 3411(3). *Delaware*

You are instructed that, if the defendant has not satisfied you that the defamatory words he uttered were true, the plaintiff would be entitled to some amount, because the law presumes malice from the character of the words uttered. He would be entitled, in addi-

⁸⁴ *Broughton v. McGrew* (C. C. Ind.) 39 Fed. 672, 5 L. R. A. 406.

⁸⁵ *Townsley v. Yentsch*, 135 S. W. 882, 98 Ark. 312. "Physical pain," in this instruction, is considered to mean nervous shock.

tion thereto, to any damages which he has shown by the evidence he actually sustained by reason of the slanderous words.⁸⁶

§ 3411(4). *Kansas*

You are instructed that if you find for the plaintiff as provided in the next preceding instruction, then the next question for your determination is the amount of damages to be allowed. When words imputing a crime are intentionally and falsely spoken of another, the law not only presumes that the words were spoken maliciously, but that the person of whom the words were spoken was thereby damaged, and in such case the jury should allow "actual damages," which are such as are recoverable at law from a wrongdoer as a matter of right as compensation for the actual damage sustained by him by reason of the wrong. The term "actual damages" is synonymous with the term "compensatory damages."⁸⁷

§ 3411(5). *Kentucky*

The court instructs the jury that, if they find for the plaintiff, they should award him such sum, as compensatory damages, as they may believe from the evidence will fairly and reasonably compensate him for the injury, if any, that the jury may believe from the evidence resulted to the plaintiff's occupation or business described in the proof, and to his reputation and character by reason of the writing, in the letter mentioned in the first instruction, of the statements therein contained, and the consequent cancellation of plaintiff's bonds, and for the humiliation or mental distress suffered by plaintiff, if any, by reason of the aforesaid statements in said letter; and if the jury find for the plaintiff, they may, or may not, in their discretion, award the plaintiff by way of punitive damages, in addition to compensatory damages, as above defined, such further sum as under all the evidence they deem proper, not exceeding, however, in all, \$——, the amount claimed in the petition.⁸⁸

§ 3411(6). *Missouri*

The court instructs the jury that if you find for the plaintiff you will assess her damages at such sum as you may believe from the evidence will compensate her for the damage to her reputation and good name, if you believe her reputation and good name has been damaged, and for the mortification and humiliation and mental suffering endured by her, if you believe she did so suffer by reason of the printing and publishing by the defendant of the article complained of, not to exceed, however, the sum of \$——.⁸⁹

⁸⁶ *Smith v. Singles*, 72 Atl. 977, 6 Pennewill, 544.

⁸⁷ *Bothe v. True*, 175 Pac. 395, 103 Kan. 562.

⁸⁸ *McClintock v. McClure*, 188 S. W. 867, 171 Ky. 714, Ann. Cas. 1918E, 96.

⁸⁹ *Rail v. National Newspaper Ass'n*, 192 S. W. 129, 198 Mo. App. 463.

You are instructed that, if you find the issues for the plaintiff, you may allow as compensatory or actual damages such fair and reasonable compensation that you find naturally resulted from the speaking of the words complained of, and also for any pain or anguish of mind that you find was caused thereby.⁹⁰

You are instructed that, if you find for the plaintiffs under other instructions, the damages may be compensatory, or punitive and compensatory. Compensatory damages are to be given when the evidence satisfies the jury that the plaintiffs have sustained material or substantial injury, and that such injury was the result of the wrongful act of the defendant, and compensatory damages should be a sum sufficient to compensate the plaintiffs for such injury.⁹¹

§ 3411(7). Nebraska

You are instructed that if, from the evidence and the instructions of the court, the jury find for the plaintiffs, then the jury are to determine, from all the evidence and the circumstances as proved on the trial, what damages ought to be given to the plaintiffs, and find your verdict accordingly, but not exceeding the amount claimed. In finding the measure of damages, the jury may take into consideration the mental suffering produced, if any, by the uttering of the slanderous words, if they believe from the evidence that such suffering has been endured by the plaintiff, and the present or probable future injury, if any, to the plaintiff's character which the uttering of the words was calculated to inflict. If you find for the plaintiff, she will be entitled to at least nominal damages, without proof of actual damages.⁹²

§ 3411(8). North Carolina

The court instructs the jury that, if the words were spoken by defendant as charged, the plaintiff is entitled to some damages. If the jury should find that the words were spoken by defendant of the plaintiff as charged, but that the defendant, in so speaking them, was not actuated by any actual malice, then the plaintiff is entitled to recover compensatory damages only, by which is meant such damages as will compensate plaintiff for any injury to her character which you may find from the evidence she has sustained by reason of the words so spoken.⁹³

§ 3411(9). Texas

You are instructed that, if you find for the plaintiff, then you should award her such compensatory damages as would ordinarily

⁹⁰ *Vanloon v. Vanloon*, 140 S. W. 631, 159 Mo. App. 255.

⁹¹ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

⁹² *Boldt v. Budwig*, 28 N. W. 280, 19 Neb. 739.

⁹³ *Bowden v. Balles*, 8 S. E. 342, 101 N. C. 612.

and probably result from the article as published, and in estimating her damages, if any, you may consider plaintiff's mental suffering, if any, caused by the publication of said article, but you cannot allow her any exemplary damages.⁹⁴

§ 3411(10). Virginia

The court further instructs the jury that, in determining the amount of damages to which the plaintiff may be entitled, if they believe he is entitled to recover under all the instructions, they shall take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which they are expressed and its tendency, the occasion on which they were published, the extent of their circulation, the probable effect upon those to whose attention they came, and their natural and probable effect upon the plaintiff's personal feelings, and his standing in the community in which he lives; and, if under the other instructions herein he is entitled to recover, they should award him such sum by way of damages as will fairly and adequately compensate him: (1) For the insult to him, including any pain and mortification and mental suffering inflicted upon him; and (2) for any injury to his reputation as a man and citizen.⁹⁵

§ 3412. Matters considered on question of damages

§ 3412(1). Illinois

You are instructed that if the jury believe, from the evidence, that the defendant is guilty of uttering the slanderous words charged in the declaration, you may take into consideration the pecuniary circumstances of defendant, and his position and influence in society, in estimating the amount of damages; and if you shall also find, from the evidence, that the defendant obtruded himself into plaintiff's house, and there offered undue familiarities to ———, his wife, at the time and on the occasion of the uttering of the words in question, these circumstances may also be taken into consideration in fixing damages, and the jury in their discretion may give damages by way of punishment to the defendant, proportioned to the circumstances in evidence, as well as for compensation.⁹⁶

§ 3412(2). Massachusetts

You are instructed that if you find this is a charge of adultery, or that the article, as a whole, has a tendency to injure the standing and character of the plaintiff, and hold him up to disgrace, then

⁹⁴ *San Antonio Light Pub. Co. v. Lewy*, 113 S. W. 574, 52 Tex. Civ. App. 22.

⁹⁵ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

⁹⁶ *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252.

you come to the question of damages. It is not a case, if you find that to be a charge of adultery, where the plaintiff has to prove special damages, to show that he lost this or that patient, because the jury have a right to say, when a man is charged with a crime, that that does him an injury, and to say how much his damage shall be, without special proof of damages. He is entitled to damages for anything he suffered by way of personal feeling—grieving—on account of such a charge being published. And you have a right to consider what a citizen of good standing—how he would feel to have an article of that kind published about him, accusing him of having succumbed to the pretty charms of the caterer's wife, under the circumstances stated. You have a right to consider what would be the injury to any honorable man's feelings by having such a charge as that published in the ———, in the way this was published and circulated among his friends and neighbors. And he is entitled to damages on that account, because it is what a man suffers in consequence of a libel, and that is one of the elements. He has told you himself in some degree how it affected him, and how it affected the business that he was engaged in, and it was a source for a long time of jest, but of more serious matter than jest, among his friends. That may be taken into consideration in determining what the damages are. In other words, being just to the defendant, and being just to plaintiff, you are to say what is a reasonable compensation in dollars and cents for having such an article as that published under the circumstances that this was published; and all the natural results coming from that article, in the way of damages, he is entitled to recover. You cannot give more than the ad damnum in the writ, ——— dollars; and you cannot give less than nominal damages; and you have all the latitude between those two sums in determining what the damages are to the plaintiff, and I do not see that I can aid you any further in regard to the matter.⁹⁷

§ 3412(3). *Michigan*

I can give you no definite rule of law by which you are to reach a conclusion. You must apply your best judgments to the facts brought before you, considering the situation of the plaintiff and the defendant, the character of each, the character of the words uttered, and from all the surroundings of the case say how much should be given by one to the other. In determining that amount you should, however, carefully consider what might not be a defense or justification on the part of the defendant. You should consider whether there is any evidence showing express, positive malice

⁹⁷ *Bishop v. Journal Newspaper Co.*, 47 N. E. 119, 168 Mass. 327.

on her part against the plaintiff. If you were satisfied by the testimony in the case that she was governed in the utterance of these words by actual, existing malice, then the compensation or award of damages should be higher and more severe than if you were satisfied that the words were uttered without any express malice. If they were thoughtlessly uttered, without due consideration of the import of the words, without any intent to injure the plaintiff—if there is no express malice proved in the case to your satisfaction—you should give less damages than you would if it is proved. You should take another matter into consideration in fixing the amount of damages. Satisfy your minds before fixing upon the amount, whether this defendant originated this story herself, or whether she simply repeated what she heard. If she originated the story, and it is false; if it was the outgrowth of a wicked heart; if it is the offspring of her own brain; the coinage of her own mind; her guilt would be greater than it would be if she received it from some one else, and simply gave it further circulation thoughtlessly, without any design to injure, without any intent to wrong. The proof upon this point you should carefully consider, and see to it that your verdict is not as light in the one case as it would be in the other.⁹⁸

§ 3412(4). Missouri

You are instructed that, if your verdict is for the plaintiff, you will assess his compensatory damages at such sum as, from the evidence and under the instructions, you believe will fairly compensate him for the injury he has sustained by reason of said publication; and in determining what is such a fair compensation you may take into consideration the extent of said circulation of the defendant's newspaper at the time of the said publication both in the city of ——— and elsewhere, as shown by the evidence; the general character of the publication, and the probable effect, if any, of the said publication upon the reputation of the plaintiff considering his standing and repute in the community at and prior to ———, as shown by the evidence; the mortification, if any, to his feelings, which plaintiff may have suffered by reason of the publication; the distress of mind, if any, which he may have suffered on account thereof; and, considering all these matters, you may assess the compensatory damages of the plaintiff at such sum as, in your opinion, will be a fair compensation to him for the injury, if any, you believe he has suffered from the publication of the said article.⁹⁹

⁹⁸ *Burt v. McBain*, 29 Mich. 280.

Knapp & Co., 61 S. W. 669, 160 Mo.

⁹⁹ *Stark v. Publishers: George*

529.

§ 3412(5). Oklahoma

You are further instructed that you cannot consider the evidence of the witness ——— in arriving at the amount, if any, the plaintiff is entitled to recover of the defendant, for the reason that the plaintiff does not allege that the making of the said statement to the said witness ——— damaged the plaintiff in any sum whatsoever or contributed to such damage. You are further instructed that you cannot consider the evidence of the witness ——— as to the statement made by the defendant to him, for the reason that the plaintiff does not in his petition allege such as a cause of damage, or that the plaintiff was damaged thereby.¹

§ 3413. Repetition of slanderous words

You are instructed that, if you find that the plaintiff has suffered any damage not necessarily confined to the publication of the words charged by defendant himself, but that there was a repetition or circulation of the slanderous words, which was directly caused by defendant's publication thereof in the first instance, if any, that may be taken into account in estimating the amount of plaintiff's damage. And if you find from all the facts and circumstances in the case that defendant uttered the words claimed by plaintiff, and that the same became current in the community, or among any number of persons in the community, then the damage which plaintiff may have suffered, if any, by reason thereof, may be taken into account by you in arriving at the measure of his damage, if any. And this element of the case would bear only upon the amount of damage to plaintiff's reputation and feeling, and humiliation in the community where he lived.²

§ 3414. Financial standing of defendant

You are instructed that, if you find that the slanderous words were spoken by defendant against the plaintiff, then, in estimating the plaintiff's damages, you may take into consideration the wealth and standing of the defendant in the community; with the view of determining the weight and influence which his false statements may have had in injuring plaintiff.³

§ 3415. Exemplary damages**§ 3415(1). California**

You are instructed that, if you should find that the article in question was published wantonly, recklessly, and with an utter disregard as to whether it was true or false, then I charge you the

¹ *Beshiers v. Allen*, 148 Pa. 141, 46 Okl. 331, L. R. A. 1915E, 413.

² *Everhart v. Clute*, 168 N. W. 952, 203 Mich. 115.

³ *Botsford v. Chase*, 66 N. W. 325, 108 Mich. 432.

plaintiff is entitled to recover exemplary and also compensatory damages.⁴

§ 3415(2). *Delaware*

You are instructed that plaintiff would be also entitled to punitive or exemplary damages, in case you are satisfied from the evidence that the defamatory words were uttered wantonly, maliciously, and with the intent to injure the plaintiff. If you do not believe the words complained of were uttered with the intent to injure the plaintiff, you cannot include in your verdict any sum by way of exemplary or punitive damages.⁵

You are instructed that, if the jury find that the plaintiff has established express malice, then you may award such exemplary or punitive damages as you think proper under the evidence, in addition to such damages as would compensate the plaintiff for the injury which he has sustained.⁶

You are instructed that exemplary damages are to be given only where express malice is proved. Such malice exists when, in addition to the publication of the libelous article, it is shown to the satisfaction of the jury that the publication was made wantonly, maliciously, and with intent to injure, degrade, or destroy one's reputation. In such case exemplary, vindictive, or punitive damages may be awarded by way of punishment in addition to compensatory damages.⁷

§ 3415(3). *Kansas*

You are instructed that, in an action for a slander, punitive or exemplary damages can be allowed only when defendant is found to have been actuated by express malice. Express malice is defined in paragraph — of these instructions.⁸

You are instructed that as to whether you award any sum as punitive damages rests in your sound discretion, and you would not be compelled to award any sum as punitive damages, even though you should find that the defendant did maliciously speak the words as alleged in the petition.⁹

§ 3415(4). *Missouri*

The court instructs the jury that, if they believe from the evidence that the defendant maliciously printed and published the article complained of about plaintiff, then you may, in addition to any compensatory damages above referred to that you may have assessed against said defendant, assess also against said defendant

⁴ *Graybill v. De Young*, 73 Pac. 1067, 140 Cal. 323.

⁵ *Smith v. Singles*, 72 Atl. 977, 6 Pennewill, 544.

⁶ *Todd v. Every Evening Printing Co.*, 66 Atl. 97, 6 Pennewill, 233.

⁷ *Todd v. Every Evening Printing Co.*, 66 Atl. 97, 6 Pennewill, 233.

⁸ *Good v. Higgins*, 161 P. 673, 90 Kan. 315.

⁹ *Good v. Higgins*, 161 Pac. 673, 90 Kan. 315.

such punitive or exemplary damages as you may deem proper from the evidence, as a punishment to said defendant for the wrong done to plaintiff and as a warning to others, not, however, to exceed the sum of \$———. ¹⁰

The court instructs the jury, if your verdict is for plaintiff, in addition to compensatory damages, you may, if you think proper, under all the facts and circumstances shown in the evidence, assess in plaintiff's favor such further sum as exemplary or punitive damages, or smart money, as in your judgment, considering all the facts and circumstances in the case in evidence, you believe should be assessed against defendant by way of punishment for the act complained of, and to serve as a warning to prevent defendant and others from being guilty of a like act. And in determining such damages you may take into consideration the motive or purpose of defendant in making the publication as you may find it from the evidence; and in determining the motive or purpose you may consider any information concerning or relating to the subject-matter of the libel which defendant received before the publication complained of and on which you may believe that it acted, and any other publication of defendant as shown in the evidence, whether published before or after the publication of ———. And weighing all these matters, you may award plaintiff such exemplary or punitive damages, if any, as you may deem proper. ¹¹

You are instructed that, if the jury find from the evidence that the defendant published the article complained of in good faith believing the same to be a proper item of news and a part of the report of occurrences in the matter of the ——— extradition, and without malice or ill will towards the plaintiff, and not negligently, or in wanton disregard of plaintiff's rights, then the plaintiff is not entitled to recover any exemplary damages herein. ¹²

You are instructed that punitive damages are awarded for the purpose of punishing the defendant for the wrongful act, and setting an example before the community, but are not allowed unless the evidence is sufficient to satisfy the jury that in doing the thing complained of the defendant was actuated by feelings of ill will or hatred towards the plaintiffs, or reckless disregard of the consequences of the act. ¹³

You are instructed that, if you find for the plaintiffs, then, in assessing the damages, you are not restricted to the mere pecuniary

¹⁰ *Rail v. National Newspaper Ass'n*, 192 S. W. 129, 198 Mo. App. 463.

¹¹ *Meriwether v. Publishers: George Knapp & Co.*, 123 S. W. 1100, 224 Mo. 617.

¹² *Brown v. Publishers: George Knapp & Co.*, 112 S. W. 474, 213 Mo. 655.

¹³ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

loss, if any, which plaintiffs may have sustained by reason of the report complained of, but, in addition thereto, you may inflict damages for example's sake, and by way of punishment of the defendant, and, in estimating the same, you will take into consideration all the facts and circumstances detailed in evidence, and award such damages as will be a compensation and adequate recompense for the injuries sustained, and such as may serve for a wholesome example to others in like cases, not exceeding, however, the sum of _____ dollars.¹⁴

You are instructed that, in addition to compensatory damages, you may, if you think proper, under all the facts and circumstances shown in evidence, assess in favor of the plaintiff such further sum as exemplary or punitive damages, or smart money, as, in your judgment, considering all the facts and circumstances in evidence in the case, you believe ought to be assessed against the defendant by way of punishment for the act complained of, and to serve as a warning to prevent the defendant and others from being guilty of a like act; and in determining such damages you may take into consideration the capital and resources of the defendant, as shown in the evidence, and the motive or purpose of the defendant in making the publication as you may find it from the evidence; and in determining the motive or purpose you may consider any information or reports concerning or relating to the subject-matter of the alleged libel which the defendant received before the publication complained of, and on which you may believe it acted in good faith, and the meaning which you may believe from the evidence the defendant intended to convey by the article complained of, and any other publication of the defendant shown in evidence, whether published before or after the publication of _____.¹⁵

§ 3415(5). North Carolina

In addition, gentlemen of the jury, to actual damages, if you answer the fourth issue "Yes"—that is, that the words were written with malice toward the plaintiff—you may allow punitive damages. Punitive damages, sometimes called "smart money," are allowed in case where the injury is inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been malicious or wanton, displaying a spirit of mischief toward the plaintiff, or of reckless and criminal indifference to his rights, and when these elements are present damages commensurate with the injury may be allowed by way of punishment of the defendant, but these damages are awarded on the grounds of public policy, for example's

¹⁴ *Minter v. Bradstreet Co.*, 73 S. W. 668, 174 Mo. 444.

¹⁵ *Stark v. Publishers: George Knapp & Co.*, 61 S. W. 669, 160 Mo. 529.

sake, and not because the plaintiff has a right to the money. So, in addition to the actual damages, gentlemen of the jury, if you find that the plaintiff is entitled to recover damages at all, you may allow punitive damages—that is, damages by way of punishment to the defendant for his conduct. In regard to this matter and in answering the issue, you may find, first, what actual damages he has sustained, and then add to that such amount as you may find that the defendant shall be punished in this case by way of punitive damages, and the two together will be your answer to the issue; that is, if you decide to allow punitive damages against the defendant.¹⁶

The court instructs the jury that, if the jury should find that the words charged were spoken by the defendant of the plaintiff, and that the defendant, in so speaking them, was actuated by actual malice, they may award exemplary or vindictive damages; and so they may award exemplary or vindictive damages if they should find from the evidence that the words were spoken by defendant as charged, and that the conduct of defendant was marked by gross and willful wrong, or was oppressive, and, in estimating the amount of damages, if the jury should find that the words were spoken as charged, and that they were spoken with malice, they would consider the evidence as to the pecuniary condition of defendant for the purpose of determining the amount of damages to be awarded. In estimating the amount of damages, the jury may consider in mitigation thereof the evidence tending to prove the bad character of the plaintiff. By exemplary or vindictive damages is meant such damages as are given, not merely as pecuniary compensation for the loss actually sustained by plaintiff, but likewise as a kind of punishment to the defendant, with the view of preventing similar wrongs in future.¹⁷

§ 3415(6). Virginia

The court instructs the jury that, in assessing plaintiff's damages, they may not only give him damages for the insult, and damages to compensate for any injury done to him or his business as shown by the evidence, but damages also to punish the defendant for his act and to deter others, but said damages shall not exceed \$——, the amount named in the declaration in this action.¹⁸

The court instructs the jury that, if the jury believe, from all the evidence in the case, that the acts complained of were influenced by actual malice and a willful design to injure or oppress the plaintiff, he may recover in this action, in addition to such damages as

¹⁶ Hall v. Hall, 103 S. E. 136, 179 N. O. 571.

¹⁷ Bowden v. Balles, 8 S. E. 342, 101 N. C. 612.

¹⁸ Mopsikov v. Cook, 95 S. E. 426, 122 Va. 579.

those mentioned above, punitive or exemplary damages; that is to say, that the jury will not be limited in the amount of its verdict, for the plaintiff, to compensation to him for the actual damages sustained as above indicated. They may give him such further damages as they may think right, in view of all the circumstances of the case, as a punishment to the defendant and as a salutary example to others to deter them from offending in a like manner, but not exceeding \$——. In determining whether defendant, in publishing and circulating the charges complained of was influenced by actual malice or a design to injure or oppress the plaintiff, the jury should consider the relation of the parties to each other, the acts of the defendant before and after the publications in question, and all the circumstances surrounding them.¹⁹

§ 3416. Gross negligence as ground for exemplary damages

You are instructed that if you shall believe from the evidence that the defendant, in publishing and circulating said article complained of by the plaintiff, was guilty of gross negligence toward the plaintiff, then in addition to such actual damages as you may allow plaintiff, as hereinbefore explained, you may, in addition thereto, allow him such further sum by way of exemplary or punitive damages, as you may deem proper to allow under the facts and circumstances in evidence before you. By the expression "gross negligence," as herein used, is meant that the publication and circulation of said article by the defendant was done in such manner and under such circumstances as to show a reckless disregard on the part of the defendant towards the rights of the plaintiff, and so wholly without care as to indicate an entire disregard of the consequences to plaintiff that might follow from the publication and circulation of said article.²⁰

§ 3417. Mitigation of damages

§ 3417(1). Delaware

We will say to you that, even though the article complained of is libelous and unjustifiable in law, you may, in reaching your verdict, take into consideration, in mitigation or reduction of damages, any and all facts and circumstances disclosed by the evidence which tend to show that the article was published with a proper motive, and not with any intent or desire to injure the plaintiff.²¹

§ 3417(2). Kentucky

The court further instructs you that if you shall believe from the evidence that at, or just previous to, the time said article was writ-

¹⁹ *Ramsay v. Harrison*, 89 S. E. 977, 119 Va. 682.

²⁰ *Houston Chronicle Pub. Co. v. Quinn* (Tex. Civ. App.) 184 S. W. 660.

²¹ *Todd v. Every Evening Printing Co.*, 66 Atl. 97, 6 Pennewill, 233.

ten and published of and concerning the plaintiff by the defendant, a news item dealing with the same matter was published in ———, and you further believe it was founded upon the news item published in said ———, on the ——— day of ———, and you further believe that said news item was sent out by the Associated Press, undertaking to give a statement of facts about which said editorial is written, on which complaint is made, and further believe said Associated Press news was reasonably reliable then you may consider these facts in mitigation of the damages, if any, that you will find for the plaintiff.²²

§ 3418. Same—Good faith of defendant

§ 3418(1). Maryland

You are instructed that, if you believe from the evidence that the defendant honestly and in good faith believed the statements contained in the letters to be true, and had grounds for such belief sufficient to satisfy an ordinarily prudent and cautious man that such statements were true, then you may take into consideration all the circumstances of the case, and, in the exercise of your discretion, award to the plaintiff nominal damages merely.²³

§ 3418(2). Missouri

As regards the right of the defendant to make the publication, you are instructed that a newspaper has no right to publish in a case like this an untruthful article of another. So far as plaintiff's actual or compensatory damages are concerned, it makes no difference what defendant's belief may have been in regard to the truth of the article, or its good faith, or its motive or purpose. It had and has the right, as has every individual, to write on any subject; and thus it had the right to publish any matter pertinent and material to the pendency in the state Legislature of the civic federation school bill, provided it acted in good faith and without malice; but it is responsible for all abuse of that liberty, and that liberty is abused wherever it publishes of any one an untruthful or libelous article, except in certain instances of absolute privilege, among which this case is not to be classed.²⁴

§ 3419. Same—Effect of disclaiming personal knowledge in making alleged defamatory statement

The court instructs the jury that if defendant, at the time he spoke the words complained of, stated that he had heard such a

²² Democrat Pub. Co. v. Harvey, 205 S. W. 908, 181 Ky. 730.

²³ Gambrill v. Schooley, 48 Atl. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414.

²⁴ Stark v. Publishers: George Knapp & Co., 61 S. W. 669, 160 Mo. 529.

report from others, and gave it as a matter of rumor, and he has proved that he heard it, then, while it would not amount to a justification, for no one has the right, even through idle wantonness, to keep a slanderous report afloat against another, yet it may be considered as tending to show that he did not originate the story in malice, and given its due weight in mitigation of damages.²⁵

§ 3420. Same—Reputation of plaintiff

§ 3420(1). United States

You are instructed that proof of the bad character of the plaintiff is competent, because one whose character is bad is not entitled to the same measurement of damages as one of unblemished fame. This does not mean proof of particular offenses of a similar character to those which are imputed to him in the libel, but proof of general bad character.²⁶

§ 3420(2). Arkansas

You are instructed that, in determining the amount of damages you will award to the plaintiff, in the event you find for the plaintiff, you have the right to take into consideration all of the evidence in the case, and, if you find that prior to the publication of said article plaintiff's reputation for morality was bad, and that he further bore the reputation of being a defaulter, then you may consider such evidence in mitigation of any damages you may award the plaintiff by way of compensation.²⁷

§ 3420(3). Indiana

The court instructs further that, if the jury find that the plaintiff's reputation for chastity was bad, still that is no defense to this action, but is to be considered by you in mitigation of damages.²⁸

§ 3420(4). Wisconsin

You are instructed that if you believe from the evidence that the plaintiff, at the time of the publication, was a woman of disparaged reputation, then that must be taken into consideration, because a woman whose reputation for chastity is bad cannot suffer the same damages as a woman of good reputation would, if an article was published about her, reflecting upon her chastity.²⁹

§ 3421. Same—Commission of other wrongs by plaintiff than those imputed in libel

The jury are instructed that it is no defense and does not tend in mitigation of damages that it be shown that the plaintiff has been

²⁵ *Hinkle v. Davenport*, 38 Iowa, 355.

²⁶ *Tribune Ass'n v. Follwell*, 107 Fed. 646, 46 C. C. A. 526.

²⁷ *Simonson v. Lovewell*, 175 S. W. 407, 118 Ark. 81.

²⁸ *Hallowell v. Guntle*, 82 Ind. 554.

²⁹ *Nellis v. Cramer*, 56 N. W. 911, 86 Wis. 337.

guilty of other crimes, or has committed other wrongs than those which were imputed to him by the libel. In other words, if a libel charges the plaintiff with the guilt of murder, it is not either by way of defense, or mitigation or reduction of damages, of any value to prove that he was guilty of fraud; and if a man is charged with having procured a policy, or a lot of policies, upon lives with intent to defraud insurance companies, it is not in the least a defense, or in the least a mitigation of the defendant's conduct in publishing such a libel, to show that he has been guilty of defrauding a fire insurance company.³⁰

§ 3422. Same—Effect of provocation of defendant

§ 3422(1). Illinois

You are instructed that, if the jury should find, from the evidence, that ———, one of the plaintiffs in this suit, was a quarrelsome person, and so exhibited herself at the time, and that the language alleged and proved to have been used by the defendant to her was caused by a quarrel between them, you will take that fact into consideration in considering the amount of damages which the plaintiffs are entitled to recover.³¹

§ 3422(2). Nebraska

You are further instructed that anger is no justification for the use of slanderous words; and it ought not to be considered even in mitigation of damages, unless the anger is provoked by the person against whom the slanderous words were used; and, in this case, if the jury believe from the evidence that the defendant ——— spoke of the plaintiff any of the slanderous words charged in the petition, then it matters not who commenced the conversation, and that the defendant was angry at the time, unless her anger was wrongfully provoked, in whole or in part, by the acts or language of the plaintiff herself, in which event such anger may be considered by you in mitigation of damages.³²

§ 3423. Effect of plea in mitigation of damages

You are instructed that in this case there is no justification pleaded, but only a general denial and a plea of mitigation, and the publication is admitted in the pleadings. Under the evidence and the pleadings the defendant can only mitigate the damages. In this connection you are instructed that the mitigation must not be taken as a defense nor as mitigating the actual damages, but it can only reduce the punitive damages.³³

³⁰ *Morning Journal Ass'n v. Duke*, 128 Fed. 657, 63 C. C. A. 459, certiorari denied 24 S. Ct. 856, 194 U. S. 632, 48 L. Ed. 1159.

³¹ *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252.

³² *Boldt v. Budwig*, 28 N. W. 280, 19 Neb. 739.

³³ *Jones v. Murray*, 66 S. W. 981, 167 Mo. 25.

§ 3424. Nominal damages

That is the case before you. If, with that case before you, you give this lady, as counsel for the defendant urges, six cents, the courts of justice should feel the same sense of shame and mortification plaintiff must have felt when the publication was made. It would be an utter disgrace to the administration of law to say that such a publication, such a damage to reputation, such an invasion of feelings, was to be compensated for by six cents. It is your duty in this case to see that she has substantial compensation for this grievous wrong.³⁴

§ 3425. Necessity of proof as to amount of damage

You are instructed that, in order for the jury to allow actual damages, it is not necessary that any witness testify to the amount of damage done or the sum necessary to compensate the injured person; but, in this class of cases, it is for the jury to determine what amount of damages, if any, will compensate the injured person, limited, of course, by the amount claimed in the petition.³⁵

§ 3426. Form of verdict

In your verdict, if it be for the plaintiff, you will assess and state separately your finding as to compensatory damages and your finding as to punitive or exemplary damages. If your verdict is for the defendant, you will merely state that you find issues in this cause in favor of the defendant.³⁶

K. CRIMINAL PROSECUTION

See, also, ante, § 3376.

§ 3427. Elements of offense in general**§ 3427(1). Missouri**

The court instructs the jury that before the jury can convict they must find and believe beyond a reasonable doubt that the prints alleged and set forth in the information herein were of a libelous nature, and had the effect of charging ——— with being dishonest, and guilty of unfair dealing, and that, further, said prints were sent to the said ——— by the defendant, or by some one at his instance and request, and, further, that the inference to be drawn from the prints of "bad debt," etc., on the alleged envelope, were, as a matter of fact, untrue.³⁷

³⁴ Knowlden v. Guardian Printing & Publishing Co., 55 Atl. 287, 69 N. J. Law, 670.

³⁵ Bothe v. True, 175 Pac. 395, 103 Kan. 562.

³⁶ Stark v. Publishers: George Knapp & Co., 61 S. W. 669, 160 Mo. 529.

³⁷ State v. Armstrong, 16 S. W. 604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

§ 3427(2). Texas

You are instructed that, if you should find from the evidence that the defendant made the statements that he is alleged to have made to the witness ———, before you could convict the defendant, it would be necessary for you to further find beyond a reasonable doubt that said statements were false, and that same were wantonly or maliciously made by the defendant.³⁸

§ 3428. Scandalous character of alleged defamatory words

I charge you that the following portions of said article are scandalous within the meaning of the criminal statute of this state, and are sufficient on which to base a conviction of the defendant for criminal libel, provided you find that all of the other elements necessary to make out the crime of criminal libel exist, to wit, the following portions of said article: "I was kidnapped while walking from my place of work to my home on the streets of ———, and taken as a prisoner, and confined in the convent of ———." Also, "I was abused by the priests and Mother Superior from time to time." Also, "To-night the priests from many parts of the valley have gathered themselves at ———, and are holding a drunken orgy; their unmentionable treatment of myself and other nuns who have taken the black veil became unendurable to me." Also, "I know if they catch me this time they will murder me." Also, "But I would rather die than submit myself any more to their licentious treatment." Also, "But after I took the black veil they told me plainly I was to be what the concubines were to Solomon and David and other men of Bible times. They forced me to do this." Kidnapping is a crime in this state made so by statute. To constitute the crime of kidnapping there must be forcible seizure and confinement or inveiglement of another by a person acting without lawful authority, with intent to cause such other person to be secretly confined and imprisoned in this state against his will.³⁹

I charge you as a matter of law that the extracts hereinbefore pointed out to you from the article published in this case, and which is set forth in the indictment, if it be proven to your satisfaction that the article was published, are scandalous within the meaning of the criminal law, and are sufficient to render the defendant guilty, so far as that branch of the case is concerned, provided the other elements necessary to constitute criminal libel exist.⁴⁰

³⁸ Elder v. State, 151 S. W. 1052, 68 Tex. Cr. R. 520.

³⁹ State v. Hosmer, 142 Pac. 581, 72 Or. 57.

⁴⁰ State v. Hosmer, 142 Pac. 581, 72 Or. 57.

§ 3429. Imputing want of chastity to female

The court instructs the jury that, if you believe from the evidence that the reputation of the prosecuting witness for chastity is bad, or if, upon all the evidence, you have a reasonable doubt upon the subject of such reputation, the defendant should be acquitted, or if you believe from the evidence that the alleged statement concerning the want of chastity of the prosecuting witness is true, or you have a reasonable doubt as to its truth, you should acquit the defendant.⁴¹

§ 3430. Advertising, by method of correspondence, that plaintiff does not pay his debts

The jury are instructed that if they believe from the evidence that the defendant, on or about ———, caused the envelope given in evidence to be sent to ———, in the city of ———, through the mails, willfully and maliciously intending and meaning to indicate to the public and to all persons seeing said envelope that she, the said ———, was dishonest, or did not pay her just debts, or that she had been guilty of unfair dealing, or was a "dead beat," and that said envelope was so understood by those persons who saw it; and if the jury further believe that the reception through the mails of such envelope containing the inclosure set out in said information tended to provoke the said ——— to wrath, and to expose her to public hatred, contempt and ridicule, and to deprive her of the benefit of public confidence and social intercourse; and if the jury further believes that said defendant willfully and maliciously intended by said acts to advertise said ——— as a dead beat, or as dishonest—then the jury will find the defendant guilty, unless they further find that said ——— is a dead beat, and is dishonest, and unfit to be trusted, and unfit for public confidence.⁴²

§ 3431. Rule for construction of alleged defamatory words

The jury are instructed that the only meaning that they can put upon the words "bad debt" upon said envelope are the usual and ordinary meaning attached to them as used in the English language; and they are not to place the meaning and meanings alleged by way of innuendo in the information, unless they find that the words "bad debt" and the said meaning and meanings so alleged by way of innuendo are the true meanings and sense of the said words "bad debt."⁴³

⁴¹ McDonald v. State, 164 S. W. 831, 73 Tex. Cr. R. 125.

⁴² State v. Armstrong, 16 S. W. 604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

⁴³ State v. Armstrong, 16 S. W. 604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

§ 3432. Malice—Presumption**§ 3432(1). Missouri**

The jury are instructed that malice is the willful doing of a wrongful act without just cause or excuse; and they may infer malice upon the facts, if they believe it to be the natural inference to be drawn from them.⁴⁴

§ 3432(2). Oregon

The court instructs the jury "that malice does not mean a personal ill will towards a person libeled. If the publication be found libelous, the law implies malice. If the publisher published carelessly, not knowing or indifferent what, he is held responsible, as though he read every word. It is a settled principle of the law that every person is presumed to intend the reasonable and natural consequences of his own act. So, as I have said, if you are satisfied that the defendant published the newspaper article set out in the indictment, and that it was false and scandalous, you are obliged to presume that it was done maliciously and willfully, with intent to injure and defame."⁴⁵

§ 3433. Publication

The jury are further instructed that if defendant caused said envelope to be sent through the mails directed to the said _____ at the city of _____, then such acts constitute a publication of the libel in said city.⁴⁶

§ 3434. Liability for acts of agent

The court instructs the jury that the mere fact that the defendant may have been a subscriber to or employer of the _____ Collecting Agency of _____, will not render him liable for their criminal acts; and that said defendant is not responsible for the sending or publishing of the alleged libelous matter, unless such was done, by him or upon his direction and instruction.⁴⁷

§ 3435. Province of court and jury**§ 3435(1). Iowa**

You are instructed that our law provides that in all prosecutions for libel the jury, after receiving the direction of the court, shall have the right to determine, at their discretion, the law and the fact. In construing this law you are instructed to review carefully the whole case, looking to these instructions for the law, and to the evidence for the facts, and, after both and all, then with a

⁴⁴ State v. Armstrong, 16 S. W. 604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

⁴⁵ State v. Mason, 38 Pac. 130, 26 Or. 273, 26 L. R. A. 779, 46 Am. St. Rep. 629.

⁴⁶ State v. Armstrong, 16 S. W. 604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

⁴⁷ State v. Armstrong, 16 S. W. 604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

rigid regard for the rights of the people and those claimed to be injured on the one hand, and with rigid and watchful care for the rights of the defendant on the other, seek to determine the truth of the issue. As to the right of the jury to determine the law and the fact you are instructed that if the jury can say on their oaths that they know the law better than the court does, they have the right to do so, but before assuming so solemn a responsibility they should be sure that they are not acting from caprice and prejudice, that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong, and that they are right. Before saying this on their oaths, it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right.⁴⁸

§ 3435(2). *Missouri*

The court instructs the jury that under the constitution of ——— and the statutes thereof the jury are themselves the judges of the law of libel, as well as of the facts, and that they are not required to accept the instructions given by the court as being conclusive of what the law of criminal libel is.⁴⁹

§ 3435(3). *Wyoming*

You are instructed that by the Constitution of this state it is provided that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right; and in all trials for libel, both civil and criminal, the truth, when published with good intent and for justifiable ends, shall be a sufficient defense, the jury having the right to determine the facts and the law, under direction of the court. You are the sole judges of the law and the facts upon every proposition involved in this case.⁵⁰

You are instructed that this provision of the Constitution does not place the jury above the law, or confer upon them the lawful right to decide simply as they see fit, regardless of the law. Under the constitutional law, if the jury can say on their oaths that they know the law better than the court does, they have the right to do so; but, before assuming so solemn a responsibility, they should be sure that they are not acting from caprice or prejudice; that they are not controlled by their will or wishes, but from a deep and confident conviction that the court is wrong and that they are

⁴⁸ *State v. Heacock*, 76 N. W. 654, 106 Iowa, 191.

⁴⁹ *State v. Armstrong*, 16 S. W.

604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

⁵⁰ *Nicholson v. State*, 157 Pac. 1013, 24 Wyo. 347.

right. Before saying this on their oaths, it is their duty to reflect whether, from their habits of thought, their duty and experience; they are better qualified to judge of the law than the court. If under all those circumstances, they are prepared to say that the court is wrong in its exposition of the law, the Constitution has given them that right.⁵¹

§ 3436. Sufficiency of evidence

The jury are instructed that they are the sole judges of the weight of the evidence and the credibility of the witnesses, and it is for them to find from the evidence in this case whether there was any intention on the part of the defendant, in the use of the means employed to collect a debt, to libel the prosecuting witness, ———; and, if they find there was no such intention, then they will return a verdict of not guilty.⁵²

⁵¹ *Nicholson v. State*, 157 Pac. 1013, 24 Wyo. 347.

⁵² *State v. Armstrong*, 16 S. W. 604, 106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

CHAPTER CLXXXVIII

LICENSES

§ 3437. Requirement of license to do business as merchants—Who are merchants.

3438. License to enter upon real estate.

§ 3437. Requirement of license to do business as merchants—Who are merchants

The jury are instructed that the storing of a quantity of goods, wares, and merchandise in a room or place, there to be kept until delivered to customers, and there kept until afterward delivered to twenty-five or thirty customers, and by them (the customers) then and there paid for, will, in law, constitute and make the party so storing and delivering the goods, wares, or merchandise to the said several and divers customers, and receiving the purchase price therefor from several customers, a merchant at the room or place where the goods, wares, or merchandise were stored, kept, delivered, and paid for.¹

The jury are instructed that if the jury shall believe beyond a reasonable doubt, from the evidence introduced in this cause, that the defendant did on ———, occupy a part of the warehouse situated on ———, in the town of ———, and did then and there have placed and stored in said warehouse and building goods, wares, or merchandise, and did then and there deliver to ———, ———, and other persons, any goods, wares, or merchandise (that is, groceries of any kind and barrels), and did then and there receive the purchase price of said goods, wares, or merchandise from said parties to whom defendant, or any one for him, then and there delivered any goods, wares, or merchandise; and if the jury shall further believe that the defendant occupied said building for the purpose of delivering said goods to said parties, and receiving the purchase price thereof, then the jury must find the defendant guilty, unless they shall further find from the evidence that the defendant had at the time (that is, on ———), or prior thereto, procured from the marshal of the town of ——— a license to deal as a merchant in said town of ———.²

The jury are instructed that a sale of goods, wares, or merchandise by sample, to be afterward delivered at a certain place, to be paid for on delivery at that place, in law, constitutes a sale at the

¹ Town of Canton v. McDaniel, 86 S. W. 1092, 188 Mo. 207.

² Town of Canton v. McDaniel, 86 S. W. 1092, 188 Mo. 207.

place and at the time when and where the goods are to be delivered and paid for.³

§ 3438. License to enter upon real estate

The jury are instructed that, in order to constitute a license to enter, it is not necessary that plaintiff should expressly authorize defendant to enter; but if defendant went to plaintiff's house to see him on business, and was allowed to enter, or did enter without force, this would be deemed a license.⁴

³ *Town of Canton v. McDaniel*, 86 S. W. 1092, 188 Mo. 207.

⁴ *Cutler v. Smith*, 57 Ill. 252.

CHAPTER CLXXXIX

LIFE ESTATES

§ 3439. Right to remove timber.

§ 3439. Right to remove timber

The court instructs the jury that a person holding a life estate in land has no right or authority to cut and remove therefrom the valuable and marketable timber thereon, nor can he confer such authority upon a stranger without the consent of the persons owning the immediate remainder in fee; and the persons owning the immediate remainder in fee are not authorized to cut and remove from said land said timber before the life estate is terminated, without the consent of the person owning the life estate.¹

¹ *McDodrill v. Pardee & Curtin Lumber Co.*, 21 S. E. 878, 40 W. Va. 564.

CHAPTER CXC

LIFE INSURANCE

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See, also, Accident Insurance; Health Insurance; Mutual Benefit Insurance.

A. NATURE, REQUISITES, AND VALIDITY OF CONTRACT

§ 3440. Right of recovery on policy in general

§ 3440(1). Rhode Island

You are instructed that, if the deceased, being of sound mind and acting on good faith, signed the applications submitted in evidence, and if thereafter the defendant delivered to him the policies submitted in evidence, then the plaintiff is entitled to recover in this action if she is the beneficiary named in said policies, and if the said deceased died more than one year after the delivery of said policies, when all premiums due under said policies had been paid.¹

§ 3440(2). Texas

You are instructed that if you believe from a preponderance of the evidence in this case that the ——— of the ——— issued and delivered to J. the certain beneficiary certificate and policy of insurance offered in evidence upon this trial before you, and that said J. complied with all the conditions and requirements thereof, and paid all premiums due thereon during his life and to the date of his death, and that more than two years had elapsed since the date of said policy, and that said J. is now dead, then you will find for plaintiff in the sum of \$——, together with ——— per cent. interest thereon from the date of proof of death of J., to wit, ———, and that you will find for plaintiff the further sum of \$——, the contract price of the tombstone contracted to be placed at the grave of deceased. This judgment you will apportion between the plain-

¹ Mohr v. Prudential Ins. Co. of America, 78 A. 554, 32 R. I. 177.

tiffs as follows: Three-fourths to ——— and her five children, ———, ———, ———, ———, and ———, and one-fourth to ——— and ———.²

§ 3441. What is contract of life insurance

The court instructs the jury that a contract of life insurance is an agreement between the insurer and the insured, whereby the insurer undertakes to pay a certain sum of money to a certain person, who may be and usually is a person other than the insured, upon the happening of a particular event, usually the death of the insured, in consideration of the payment by the insured of certain premiums, made at stated periods.³

§ 3442. Insurable interest and invalidity of contract as being a gambling transaction

The court instructs the jury that such an undertaking, though based upon a contingency that has in it an element of chance, when entered into with legal requisites and for a lawful purpose, is in this day a perfectly legal and commonplace transaction, but the legitimate scheme of life insurance is inclined to be distorted and to some it affords an invitation for a mischievous kind of gambling. To avoid this misuse of a most useful character of undertaking, in which a beneficiary may become interested in the early death of the insured, it is held that the insurance upon a life shall be effected and resorted to only for some benefit incident to or contemplated by the insured, and that insurance procured upon a life by one or in favor of one under circumstances of speculation or hazard amounts to a wager contract and is therefore void, upon the theory that it contravenes public policy. Just what constitutes a wager contract and therefore a void contract of insurance, varies with the different circumstances of each case and the different principles of law applicable thereto.⁴

The court instructs the jury that, if the beneficiary has an insurable interest and the transaction is otherwise legal, the policy is valid; if he has not such an interest, the policy may still be valid, if the transaction is bona fide and free from speculation.⁵

The court instructs the jury that, if you find that the contract of insurance sued upon was procured and entered into by ———, the insured, and the premiums were paid by ———, the insured, either personally or through his agent, and the circumstances otherwise indicate a bona fide nonspeculative transaction, the contract cannot

² Woodmen of the World v. McCoslin, 126 S. W. 894, 59 Tex. Civ. App. 574.

³ Baltimore Life Ins. Co. v. Floyd (Del.) 91 A. 653, 5 Boyce, 201.

⁴ Baltimore Life Ins. Co. v. Floyd (Del.) 91 A. 653, 5 Boyce, 201.

⁵ Baltimore Life Ins. Co. v. Floyd (Del.) 91 A. 653, 5 Boyce, 201.

then be held a gambling contract, and your verdict should be for the plaintiff, for the amount of his claim, and interest, whether the plaintiff, as beneficiary, had or had not an insurable interest in the life insured for him. If, however, you find that the plaintiff had an insurable interest in the life of the insured, in the manner before defined to you, evidence of such an insurable interest is evidence which you may consider in connection with all the other evidence in the case, in determining the good faith of the transaction and in reaching a verdict for the plaintiff. But if you find that the plaintiff had no insurable interest in the life of the insured, that is, he was not related to the insured as a relation or in a friendly way, and that the plaintiff procured or was the instrumentality in procuring the contract of insurance for the insured, but in his own favor as beneficiary, and that the contract was not procured by the insured and the premiums thereon were not paid by him or by his agent with his money or upon his obligation, you may find the transaction void as a wager transaction and then your verdict should be for the defendant.*

§ 3443. Same—Validity of policy taken out by son on life of father

If you shall find, from the evidence, that the applications for insurance bearing date, ——— and ———, offered in evidence, and purporting to have been made by J. H., were really, in substance, the application of P. H., for insurance on the life of his father, then you will inquire whether P. had an insurable interest in the life of his father which would support a policy for \$———. In determining this question, you will inquire whether, from the evidence, it appears that, at the time of making such applications, said P. had any pecuniary interest, as creditor or otherwise, in the life of his father, or any reasonable expectation of profit or advantage which might be thwarted by his father's death, for the law will not enforce policies of insurance procured for mere gambling or wager purposes upon lives, on the continuance of which the assured can not be deemed to have an insurable interest; and the mere relation of father and son, where both parties are of mature years, and live apart, in independent pecuniary circumstances, and mutually entirely independent of each other, and having no business relations with each other, does not create an insurable interest in the son in the life of the father; and, in deciding whether, in this case, P. H. had such an interest in his father's life as will support the insurance procured, you will take into account all the evidence as to the respective ages and situations in life of the father and son, and their business and social relations and all other facts which tend to show whether, as above defined, the son had an in-

* *Baltimore Life Ins. Co. v. Floyd* (Del.) 91 A. 653, 5 *Boyce*, 201.

surable interest in his father's life, at the date of his application aforesaid.⁷

You are further instructed that, though a party may have some insurable interest in the life of another, as creditor or otherwise, yet, if the amount of insurance procured upon such life appears palpably to be very largely in excess of any possible loss the assured can suffer from the death of the insured, then the presumption of a gambling or wager insurance arises, which calls upon the assured to show that such insurance was not procured as a mere cover for gambling, or a wager upon the life of the insured; and in this case, if you believe, from the evidence, that the plaintiff had some interest of an insurable character, as already defined, in his father's life, at the date of his several applications for insurance, yet, if you find, from the evidence, that the amount procured was vastly disproportionate in its excess to any probable loss which P. might suffer from his father's death, such circumstance has a tendency to prove that the insurance was procured for mere purposes of speculation, and as a cover for gambling, and if, from the evidence, you shall find that such was the fact, then the plaintiff cannot recover in this action.⁸

§ 3444. Possession of sound health at time of application for insurance as condition precedent to inception of risk

§ 3444(1). Illinois

The court instructs the jury that the words "sound body, mind, and health, and free from disease or injury," as used in the application which forms part of said policy, does not import that the insured at the time of making said application is absolutely free from all infirmities, or from all tendency to disease, but that the person said to be of sound body, mind, and health, and free from disease or injury, is in a reasonably good or sound state of physical and mental health, and that he is free from any disease or illness that tends seriously or permanently to weaken or impair his constitution.⁹

§ 3444(2). Massachusetts

The jury are instructed that if, on ———, the insured, ———, had cystic disease of the kidneys, or had cystic degeneration of the kidneys, or had tumors of the kidneys, he was not in sound health on that day, and the defendant is entitled to a verdict in its favor.¹⁰

⁷ Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180.

⁸ Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180.

⁹ Clover v. Modern Woodmen of America, 142 Ill. App. 276.

¹⁰ Barker v. Metropolitan Life Ins. Co., 74 N. E. 945, 188 Mass. 542.

§ 3444(3). Michigan

You are instructed that "good health" means that the insured had no grave, important, or serious disease. It means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, and not a mere indisposition, which does not tend to weaken or undermine the constitution of the assured. A mere temporary ailment or indisposition, which does not tend to weaken or undermine the constitution at the time of taking membership, does not render a policy void.¹¹

§ 3444(4). Ohio

The jury are instructed that, if you find from the evidence that ——— was not in sound health on ———, and on ———, the respective dates of the two policies upon which this suit is brought, you must find in favor of the defendant company.¹²

The jury are instructed that, if you find from the evidence that ——— was not in sound health on the ———, the date of one of the policies, you must find for the defendant upon that particular policy.¹³

The jury are instructed that, if you find from the evidence that ——— was not in sound health on ———, and on the ———, or on either of said days, you must find for the defendant, and it makes no difference whether he knew or did not know that he was not in sound health.¹⁴

The jury are instructed that "sound health," as used with reference to life insurance, means that state of health, free from any disease or ailment, that affects the general soundness and healthfulness of the system seriously, and not a mere indisposition, which does not tend to weaken or undermine the constitution of the assured. The word "serious" is not generally used to signify a dangerous condition, but rather a grave or a weighty trouble.¹⁵

§ 3444(5). Texas

Upon the law of the case you are instructed that if, at the time the benefit certificate in question was delivered to ———, he was in good health, then plaintiff is entitled to recover. In this connection you are instructed that by being in good health is meant that at the time of the delivery of the benefit certificate ——— did not have any disease of a serious nature.¹⁶

¹¹ Hann v. National Union, 56 N. W. 834, 97 Mich. 513, 37 Am. St. Rep. 365.

¹² Metropolitan Life Ins. Co. v. Howle, 68 N. E. 4, 68 Ohio St. 614.

¹³ Metropolitan Life Ins. Co. v. Howle, 68 N. E. 4, 68 Ohio St. 614.

¹⁴ Metropolitan Life Ins. Co. v. Howle, 68 N. E. 4, 68 Ohio St. 614.

¹⁵ Metropolitan Life Ins. Co. v. Howle, 58 N. E. 908, 62 Ohio St. 204.

¹⁶ Woodmen of the World v. Locklin, 67 S. W. 331, 28 Tex. Civ. App. 486.

You are instructed that, if you believe from the evidence that at the time the beneficiary certificate was actually delivered the said ——— was unwell, but that the illness was not of a serious nature, and did not affect the risk or the probable duration of his life, then you are instructed that, within the meaning of the conditions of the certificate, said ——— was in good health.¹⁷

§ 3445. Payment of first premium and delivery of policy during good health as condition precedent

The jury are instructed that, if the jury believe from the evidence that said ——— made a written application to the defendant for a policy of insurance for the benefit of the plaintiff, and that said application contains a condition in which said ——— uses the following language: "I also agree that all the foregoing statements and answers, as well as those I make to the company's medical examiner in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept as issued by the company in conformity with this application, and which shall not take effect until the first premium shall have been paid, and the policy shall have been delivered during my continuance in good health,"—then the court instructs the jury that every part of said clause is material in this case, and that the words, "which I hereby agree to accept as issued by the company in conformity with this application, and which shall not take effect until the first premium shall have been paid, and the policy shall have been delivered during my continuance in good health," create a condition precedent, which must be performed before the plaintiff can recover in this action.¹⁸

§ 3446. Liability on note given for premium—Consideration

The court instructs the jury that, if you find and believe from the evidence in the case that there was no consideration given for said note, you will find the issue for the defendant. You are further instructed that by no consideration is meant that said company did not furnish the defendant the insurance policy contracted for.¹⁹

§ 3447. Same—Avoidance for fraud

You are instructed, as a matter of law, that if Mr. R. in answering the question as to what his occupation was, said to Mr. V. that

¹⁷ *Woodmen of the World v. Locklin*, 67 S. W. 331, 28 Tex. Civ. App. 496. The defendant did not request a definition of the phrase "disease of a serious nature."

¹⁸ *Oliver v. Mutual Life Ins. Co. of New York*, 33 S. E. 536, 97 Va. 134.

¹⁹ *Luna v. Williams*, 176 S. W. 550, 190 Mo. App. 266.

he was engaged in the yard there as a switchman, making up trains, and doing general work about the yards there in connection with trains, and Mr. V. put in his application, which was the foundation for the issuing of the policy, the statement that he did not go near the cars or do switching, then, I think, gentlemen of the jury, that that would be such a misstatement or fraud practiced upon the insured here as that he would be entitled to have these proceedings rescinded; that is, the policy and notes set aside and held for naught, from the time at least when such rescission should take place upon his part. You will take all these circumstances into consideration; and if he did know it, but afterwards acted on the policy as if it was in force, and he was bound by it, and the company was bound by it, then he could not assert the defense which he is seeking to assert here; or if the agent, Mr. V., put into this application the language as used by the defendant in stating what his occupation was, as he claims that he did, why then, of course, Mr. R. would not have the right to assert that by way of defense to this note, because, if there was any fraud then, it would be the fraud of the defendant, and not the fraud of the company or its agent.²⁰

B. AVOIDANCE OF POLICY FOR FRAUD, MISREPRESENTATION, OR CONCEALMENT OF FACTS

§ 3448. Effect of misrepresentations of insured in general

Avoidance of policy of mutual benefit insurance, see post, § 4017.

§ 3448(1). Iowa

You are instructed that, if it is shown by the fair preponderance of the evidence that, in his answer to any one or more of the interrogatories which are charged by the defendant as having been untruthfully answered the applicant, ———, answered them, knowing at the time that the answer so given by him was false and untrue, or if he in making such answers, or any one of them, knowingly concealed any fact which he was in good faith at the time required to state, then the plaintiff cannot recover.²¹

The jury are instructed that, if you find that A. made an untrue or fraudulent statement of a fact material to the risk, in the application for the policy, then you should find for the defendant, unless you further find that the defendant was informed of and knew the truth in regard to such fact, and, after knowing such fact fully, received the application, the premium money, and notes,

²⁰ Michigan Mut. Life Ins. Co. v. Reed, 47 N. W. 1106, 84 Mich. 524, 13 L. R. A. 349.

²¹ Ley v. Metropolitan Life Ins. Co. of New York, 94 N. W. 568, 120 Iowa, 203.

and issued the policy, in which case you should find for the plaintiff.²²

§ 3448(2). Oklahoma

You are instructed that if you find and believe from the evidence, as hereinbefore instructed, that the deceased, made certain false and fraudulent statements, and representations, and concealments, as alleged in defendant's answer, and if you find and believe from the evidence that the same were false and fraudulent, and that the said deceased knew at the time the said statements and concealments, or either, if any were made, were false and fraudulent, and that she made the same for the purpose of misleading the defendant and to induce it to enter into the contracts of insurance in question, and if you further find and believe from the evidence that the said insurance company was in fact misled thereby in particulars where it would not have entered into such insurance contracts, if the said deceased had given true statements with reference thereto, if you so find, then you will find for the defendant.²³

§ 3448(3). Virginia

The court instructs the jury that no answer to any interrogatories made by an applicant for a policy of life insurance shall bar the right to recover, upon any policy issued upon such application, by reason of any warranty in said application of policy contained, unless it be clearly proved that such answers are willfully false, or fraudulently made, or that they are material.²⁴

The court instructs the jury that, if they believe from a preponderance of the evidence, as hereinbefore defined, that the answers to questions ——— and ———, or either of them, in the report of the medical examiner, were clearly not true, and that said questions and the answers thereto are clearly shown to have been material, then they must find for the defendant company.²⁵

§ 3449. Materiality of misrepresentations

§ 3449(1). United States

The jury are instructed that, if they find that the plaintiffs are the executors of the late W. R. P., and that the defendant corporation executed the policy of insurance offered in evidence and delivered the same to said P. in his lifetime, and that said P. paid the defendant all premiums payable thereon at the time of said

²² *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122.

²³ *American Bankers' Ins. Co. v. Hopkins*, 169 P. 489. The court assumed the correctness of this instruction.

²⁴ *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

²⁵ *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

delivery, and paid all further premiums due thereon up to the time of his death, and complied with all the undertakings stipulated to be performed on his part in said policy, and that he died on ———, and that the plaintiffs exhibited and delivered to the defendant the proofs of death and justice of claim offered in evidence on or about ———, and more than ——— days before this suit was brought, then the plaintiffs are entitled to recover in this suit, unless the jury shall find from the evidence that the application for the policy on the part of the said W. R. P., deceased, contained some misrepresentation or untrue statement of fact made not in good faith by said applicant, or unless they shall find said application contained some misrepresentation or untrue statement on some material matter to the risk, or unless the jury find that said policy of insurance was obtained by said P. from the defendant by fraud of him, said P., or that the said P. destroyed himself. The law of ———, passed in ———, declares that a misrepresentation or untrue statement by an applicant for life insurance, made in good faith, shall not work a forfeiture, or be a ground of defense in a suit on a policy of life insurance, unless the misrepresentation or untrue statement relates to a matter material to the risk. This law renders it now impossible for the insurer and the insured any longer to agree that a statement shall be taken to be material to the risk, and to make it so, if in fact it is not really so, and prevents their contracting that a matter really irrelevant shall be taken to be material. However, there are statements required in nearly all applications for life insurance which it would be the duty of the court, if requested, to instruct the jury are material to the risk, and as to which it would be the duty of the jury to act upon the instruction of the court. In my judgment, it amounts to this: That now, under the act of ———, the untrue statement must relate to some matter material to the risk; and the materiality no longer depends upon the agreement of the parties that it shall be so considered, but upon the actual fact that it is so. If the materiality is obvious and legally indisputable, it is within the province of the court to instruct the jury that the statement is material; but if it is not obvious, or depends upon disputed facts, it is the duty of the court to have the jury decide whether it is material or not.²⁶

§ 3449(2). *Vermont*

I instruct you that if, when he consulted physicians—if you find he did—he was not suffering from any disease, or that he did not consult them for a disease, then his answers to the interrogatories

²⁶ *Fidelity Mut. Life Ass'n of Philadelphia, Pa., v. Miller* (C. C. A. Md.) 92 Fed. 63, 34 C. C. A. 211.

I have read (interrogatories ———, ———, and ———) would not render the policy void, and the plaintiff would be entitled to recover, notwithstanding he consulted these physicians, provided she has established her right of recovery in other respects.²⁷

§ 3450. Effect of good faith of insured in making false statements

§ 3450(1). Maryland

The court instructs the jury that if they shall find from the evidence in this case that ———, the insured, made false representations in his written application for insurance, and further find that such false representations were material to the risk assumed by the defendant in issuing the policy of insurance which is the cause of action in this case, then your verdict must be for the defendant, notwithstanding you believe the insured made such representations unintentionally or through mistake and in good faith.²⁸

The court instructs the jury that if they shall find from the evidence in this case that ———, the insured, was afflicted with Bright's disease at the time of his application, and that he affirmatively answered the question in said application "Are you now in good health?" then such answer constituted a false statement upon a matter material to the risk assumed by the defendant in issuing the policy of insurance which is the cause of action in this case, and their verdict must be for the defendant, notwithstanding they believe the insured was ignorant of the fact that he was so afflicted.²⁹

§ 3450(2). Missouri

The court further instructs the jury that if you find and believe from the evidence that the deceased, ———, at the time he applied for the policy in question was suffering from any of the diseases or ailments as defined in other instructions, and that such diseases or ailments actually contributed to his death, then it is wholly immaterial in this case whether the said ——— made false statements with reference to said diseases in good faith believing them to be true, and your finding will be for the defendant, notwithstanding you may believe that said ——— made said false statements believing in good faith that they were true.³⁰

§ 3450(3). Montana

You are instructed that, if you shall find from the evidence that prior to the ——— day of ———, the date of the policy here sued

²⁷ *Billings v. Metropolitan Life Ins. Co.*, 41 A. 518, 70 Vt. 477.

²⁸ *Mutual Life Ins. Co. v. Robinson*, 80 A. 1085, 115 Md. 408.

²⁹ *Mutual Life Ins. Co. v. Robinson*, 80 A. 1085, 115 Md. 408.

³⁰ *Burgess v. Pan-American Life Ins. Co. (App.)* 211 S. W. 114.

on, the said ———, deceased, the insured, had been attended by a physician for any serious disease or complaint, or had before said date been affected with pulmonary disease or chronic bronchitis, you must find a verdict for the defendant. It makes no difference whether the assured knew he was afflicted or not. He may have been entirely ignorant of the fact, or may have believed that the symptoms he had did not indicate a pulmonary disease or chronic bronchitis. Yet, if in fact he had pulmonary disease or chronic bronchitis prior to the ——— day of ———, and the existence of said afflictions had not been waived, you must find for the defendant, and you are instructed that any waiver of the conditions of the policy must be in writing.³¹

§ 3451. Effect of truthful verbal statements to agent of insurer as nullifying misstatements in application.

The jury are instructed that no verbal statement made by either ——— or the plaintiff prior to, or at the time of, making the application, can modify the application and policy as it now stands, and that defendant is not bound by any verbal statements made by ——— to ———, which do not appear in the application.³²

§ 3452. Effect of warranty of truth of statements by insured

§ 3452(1). United States

The jury are instructed that the policy was issued in consideration of the warranties contained in it. If there was any breach of any of these warranties, that voids the policy, and there can be no recovery thereon. Subparagraphs "j" and "k" in section 16 on the back of the policy, are these: "(j) I have never had fits or disorder of the brain, vertigo or hernia, or any bodily or mental infirmity or disorder. (k) My habits of life are correct and temperate, and I am in sound condition mentally and physically." These are warranties, and if previous to the time of the issuance of the policy, ———, the insured, ———, had any bodily infirmity or disorder which was of a serious character, then this statement would not be true; and that would be a breach of the policy, which would discharge the defendant. Again, if at the issuance of this policy the said ——— was not in a sound physical condition (that is, if he then had a serious disease which might have permanently impaired his health), that would also be a breach of the warranty, and defeat recovery for plaintiff.³³

³¹ *Sullivan v. Metropolitan Life Ins. Co.*, 88 P. 401, 35 Mont. 1.

³² *Hamilton v. Fidelity Mut. Life Ass'n*, 27 App. Div. 480, 50 N. Y. Supp. 526.

³³ *Standard Life & Accident Ins. Co. v. Sale* (C. C. A. Tenn.) 121 F. 664, 57 C. C. A. 418, 61 L. R. A. 337.

§ 3452(2). *Indiana*

The jury are instructed that by the terms of the policy in this case the application therein mentioned is made a part of it; the answers in the application are warranties, and if any answer is untrue the warranty is broken and the policy void.³⁴

The jury are instructed that the agreement of the parties that the statements in the application are true, and their falsity in any respect should avoid the policy, removes the question of their materiality from the consideration of the court or jury, or either of them.³⁵

§ 3452(3). *Texas*

You are instructed that K., in his statement on medical examination, which forms the basis of the contract, and in the certificate of membership, warranted his answers in said statement on medical examination to be true. You are therefore instructed that, if you should find from the evidence that said K. used morphine or other narcotics prior to the ——— day of ———, and prior to the ——— day of ———, the date of his acceptance of the certificate of membership, then you must find for the defendant, even though you should believe that said false statement (if it is false) was made unintentionally, or through mistake, or in good faith, or by inadvertence.³⁶

§ 3453. Same—Warranty of literal and exact truth of answers of insured

You are instructed that if you believe from the evidence that the deceased, had the la grippe, and was treated therefor by his father, within ——— years next preceding ———, then the plaintiff cannot recover, and your verdict must be for the defendant.³⁷

You are instructed that if you believe from the evidence that, in reply to the question in the application of ———, "Have you consulted a physician in the last ——— years?" he answered, "No," and you find that he had consulted a physician within that time, then the plaintiff cannot recover, and your verdict must be for the defendant.³⁸

§ 3454. Misrepresentations as to occupation

§ 3454(1). *Alabama*

You are instructed that an occupation, in a legal contemplation, means that which practically takes up one's time and energies,

³⁴ *Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

³⁵ *Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

³⁶ *National Fraternity v. Karnes*, 60 S. W. 576, 24 Tex. Civ. App. 607.

³⁷ *Modern Woodmen of America v. Van Wald*, 49 P. 782, 6 Kan. App. 231.

³⁸ *Modern Woodmen of America v. Van Wald*, 49 P. 782, 6 Kan. App. 231.

especially one's regular business or employment. The word "occupation" does not necessarily mean the present occupation, but it means that which principally takes up one's time, thought, and energy, especially one's regular business or employment. For illustration: A man might have a regular occupation, such as that of a painter, and be out of employment, and might temporarily engage in other business, yet, if he was questioned as to what was his occupation, he would give it in as a painter, that being his general occupation, whereas at that moment he might be engaged in other business as a general occupation.³⁹

The court charges the jury that if they believe from the evidence, when the assured was making his application, and was asked as to his occupation, he answered, "Foreman," and thereupon the agent of the company asked said —, "Foreman of what?" and he said, "Foreman of railroad yards," and that the same was written down in the application by said agent as "Foreman of railroad yards," and, afterwards, said application was handed to said — by the agent with the words "Foreman of railroad yards" as his answer to said question, and that said — was asked if it was correct, and he thereupon looked at the same, and said that it was correct, and signed it, and if the jury further believe from the evidence that the occupation of foreman of a switching crew or foreman of a switch engine was a more hazardous occupation than that of "foreman of railroad yards," if you believe from the evidence that there is such a position in railroad service as foreman of railroad yards, and that the said — was killed while engaged in the discharge of his duties as foreman of a switch engine or switching crew, the policy sued on was thereby avoided, even though the jury should believe from the evidence that the agent of the defendant company, —, knew at the time that said — had been the day before, and was on that day, engaged in discharging the duties of foreman of a switching crew or switch engine crew.⁴⁰

§ 3454(2). Vermont

The court instructs the jury that if he was employed in that house generally to do what he was called upon to do from day to day, and as a part of that general employment he sold alcoholic beverages to the guests as they called for them, he was engaged in the sale of alcoholic beverages, within the meaning of the contract; but, on the other hand, if this was no part of his general business or employment, even though he did occasionally, out of

³⁹ Supreme Lodge, Knights and Ladies of Honor, v. Baker, 50 So. 958, 163 Ala. 518.

⁴⁰ Triple Link Mut. Indemnity Ass'n v. Williams, 28 So. 19, 121 Ala. 138, 77 Am. St. Rep. 34.

his ordinary line of duties, by direction of his employer, or otherwise, furnish the guests with intoxicating liquors, and take pay for them, he was not engaged in such sale, within the meaning of the contract.⁴¹

§ 3455. Misrepresentations as to existing state of health

The court instructs the jury that if they shall find from the evidence in this case that ———, the insured, was afflicted with Bright's disease in ———, that a urinalysis of his urine made at intervals of two or three weeks thereafter by the physician who made the first urinalysis in ———, up to the summer of that year, showed that he was afflicted with that disease throughout all this period; that a medical examination of the insured by another physician in ———, disclosed the fact that he then had Bright's disease, diagnosed by the physician who made this last examination as a case of long standing, and that the said insured died of Bright's disease in ———, then they must find that the affirmative answer of the said insured in his application for insurance ———, to the question in said application, "Are you now in good health?" must have been false upon a matter material to the risk assumed by the defendant in issuing the policy of insurance which is the cause of action in this case, and their verdict must be for the defendant.⁴²

§ 3456. Misrepresentations in application with respect to prior ailments or diseases

Waiver by insurer of right to take advantage of misrepresentations, see post, § 3471.

The jury is instructed that the question they are to try is not whether at the time the insured made his said application to defendant for insurance he in good faith believed he was free from disease, but that the question is whether the answers above set out were substantially true, and, if they or any of them were untrue, whether according to the usual course of the business of insurance the policies or either of them would have been issued if the truth had been stated in said application.⁴³

The court instructs the jury: That ——— was asked the following questions, to wit: "How recently have you been associated with a person who had tuberculosis?" To which he answered, "Never." That said ——— was also asked, "How recently have you occupied apartments that had been occupied by one who had tuber-

⁴¹ *Guiltinan v. Metropolitan Life Ins. Co.*, 38 A. 315, 69 Vt. 469.

⁴² *Mutual Life Ins. Co. v. Robinson*, 80 A. 1085, 115 Md. 403.

⁴³ *National Protective Legion v. Allphin*, 133 S. W. 788, 141 Ky. 777.

culosis?" To which he answered, "Never." That said ——— was also asked the following question, to wit: "Are you now subject to or affected with any disease, malformation, or weakness, or have you had any severe disease (except the usual diseases of childhood) other than those stated in the foregoing answers, or have you any material defect of eyesight or hearing? If so, state the date and particulars of same fully." That said ——— answered said question as follows: "Had typhoid fever ———, lasted three weeks. Entire recovery." If the jury shall believe from the evidence that at the time said ——— answered the foregoing questions he had not occupied apartments that had been occupied by a person who had had tuberculosis, that he had not associated with one who had tuberculosis, during said association, that said ——— did not have tuberculosis, then the jury must find for the plaintiffs.⁴⁴

The jury is instructed: That by the application to defendant for insurance ——— was asked, "How recently have you been associated with a person who had tuberculosis?" That to the said question said appellant answered, "Never." That by said application said ——— was asked another question, as follows, to wit: "How recently have you occupied apartments that have been occupied by one who had tuberculosis?" That to said question said ——— answered, "Never." That by other questions in said application said ——— was asked if he had been afflicted with certain complaints at any time since childhood, and that said complaints were named in said application. That in answering as to said complaints said applicant states that he had not been afflicted with any of them. That said application contained the following questions, viz: "Are you now subject to or afflicted by any disease, malformation, or weakness, or have you had any severe disease (except the usual diseases of childhood) other than those stated in the foregoing answers, or have you any material defects of eyesight or hearing? If so, state the date and the particulars of same fully." That to the said last-mentioned question said applicant answered as follows, to wit, "Had typhoid fever ———, lasted three weeks. Entire recovery." If the jury believe from all the evidence that the first two above answers were or that either of them was substantially untrue, and that, according to the usual course of the life insurance business, said application would not have been accepted and policies issued if the truth had been stated in said first two answers, or that said ——— at the time said application was made had tuberculosis, they will find for the defendant, but, if they believe otherwise, they will find for the plaintiff.⁴⁵

⁴⁴ National Protective Legion v. Allphin, 133 S. W. 788 141 Ky. 777.

⁴⁵ National Protective Legion v. Allphin, 133 S. W. 788, 141 Ky. 777.

§ 3457. Misrepresentations as to absence of any serious illness

The court instructs the jury that mere temporary afflictions or ailments, not of a serious or dangerous character, which pass away, and are likely to be forgotten, because they leave no trace on the constitution, are not to be regarded as diseases, within the meaning of the application for the policy of insurance offered in evidence in this case. By the fifth clause of the application, P. declared that he had never been afflicted with any disease, sickness, ailment, or complaint, except as stated, and, qualifying the statement in writing: "Nothing serious; dyspepsia about 20 years ago; ankle broken in ———," gave the name of his doctor, and also qualifying it by stating that (in the sixth clause) about ——— Dr. ——— prescribed for him for being hurt from riding horseback; irritation of the bladder; slight colic several times. I instruct the jury that the substantial correctness of his statements about his diseases and sickness was material to the risk, and he was obliged to state, in good faith, the facts, as far as he knew them, but that he was not obliged to remember and state all his slight illnesses, or temporary derangement of the functions of his organs, from which he had recovered without impairment of his general health. The statement was, in substance, that he had had no serious illness, and the burden is upon the defendant to satisfy you that the statement was false to a material extent. If, however, upon considering the whole evidence on the subject, you are satisfied that P., when he signed the application, knew that he had had a serious disease, of such character as to affect his general health, and by his statement concealed the fact from the defendant company, then the policy would be void.⁴⁶

§ 3458. Misrepresentations as to consultations with physician**§ 3458(1). United States**

Now, then, I do not understand that the failure of an applicant, for insurance, to state that he had consulted a physician about some slight or immaterial ailment, would be necessarily a fraudulent statement within the meaning of this policy, but it must be something substantial, something of some import or serious character. It is the duty of an applicant to be honest, fair, conscientious, state the facts as he understands them, so that the company may determine for itself whether it will issue the policy or not. These are proper questions of fact for you to determine from the testimony in the case.⁴⁷

⁴⁶ *Fidelity Mut. Life Ass'n of Philadelphia, Pa., v. Miller* (C. C. A. Md.) 92 Fed. 63, 34 C. C. A. 211.

⁴⁷ *New York Life Ins. Co. v. Moats* (C. C. A. Or.) 207 Fed. 481, 125 C. C. A. 143.

• § 3458(2). *Michigan*

Now, as I have said to you, it is not the duty of an applicant for insurance to advise the insurance company of every time he consults a physician for some temporary indisposition; but it is his duty to advise them, in answer to that question, every time that he has consulted a physician relative to any serious ailment, such as I have spoken of; and, if you find that the disease with which ——— was then suffering was such a disease as would affect his general health, then it would be his duty to have advised the company that he had been attended by ———.⁴⁸

§ 3459. *Misrepresentations as to habit of using liquor*

Avoidance of policy of mutual benefit insurance, see post, § 4018.

§ 3459(1). *Arkansas*

The jury are instructed, on the question as to whether or not there has been a breach of the warranty by reason of the use by the insured of intoxicating liquors and of his use thereof to excess, that the word "use" in the questions relative to intoxicating liquors means habitual or customary use, and the answers thereto would not be false and untrue if the proof shows only an occasional or exceptional use, even though at several times the assured became visibly intoxicated.⁴⁹

§ 3459(2). *Washington*

The jury are instructed that the assured, ———, was not intemperate in the use of alcoholic liquors or beverages within the meaning of the word "intemperate" as used in the benefit certificate and by-laws of the defendant society, even though you believe, from the evidence in this case, that he drank alcoholic liquors or beverages to excess upon exceptional occasions, unless you further believe from a preponderance of the testimony in this case that said assured was addicted to periodical and excessive indulgences in the use of alcoholic liquors or beverages which became habitual.⁵⁰

§ 3460. *Misrepresentations as to habit of taking drugs*

The court instructs the jury that if you believe from the evidence that in her written application for the policy sued on in this case the said ———, in answer to the question, "Do you now use, or have you ever used, opium, chloral, cocaine, or any other narcotic drug?" answered "No," and if you further believe that said answer was knowingly false and untrue, then your verdict must be for the defendant.⁵¹

⁴⁸ *Blumenthal v. Berkshire Life Ins. Co.*, 96 N. W. 17, 134 Mich. 216, 104 Am. St. Rep. 604.

⁴⁹ *Metropolitan Life Ins. Co. v. Shane*, 135 S. W. 836, 98 Ark. 132.

⁵⁰ *Schon v. Modern Woodmen of America*, 99 P. 25, 51 Wash. 482.

⁵¹ *Elliott v. Des Moines Life Ass'n*, 63 S. W. 400, 163 Mo. 132.

§ 3461. Representations concerning previous applications for life insurance

The jury are instructed that, when ——— made application to the company for insurance, there were certain questions submitted to him by the company to be answered by him if the ——— named in the policy was the man who answered the questions submitted. The questions and answers were as follows: "(1) To what daily or other extent do you use alcoholic stimulants?" To which he answered: "Two whiskies a week." "(2) To what daily or other extent do you use wine or malt liquors?" To which he answered: "No." "(3) Have you ever applied to any life insurance company, order, or association for any insurance on your life without receiving exact kind and amount of insurance applied for? (If 'Yes,' give particulars.)" To which he answered: "No." "(4) State name of life insurance company, order, or association which has declined to issue a policy on your life, or after issuing has recalled it, or has postponed you, except as stated in the foregoing answer." To which he answered: "No." "(5) Have you ever undergone examination for life insurance upon which you did not receive the exact amount and kind of policy applied for? (If 'yes,' give particulars.)" To which he answered: "No." Now, if you shall believe from the evidence that the answers given by ——— to these questions or to either of them were not substantially true, and you shall further believe from the evidence that he drank materially more whisky or other intoxicants named in these questions than he stated in the answers he did drink, then the law is for the defendant, and you should so find. Or, if you shall believe from the evidence that he had applied to another insurance company, and had not received the exact amount of insurance that he had applied for, and that he had been informed of that fact by the company to which he had made application, or he had knowledge of the fact that his application for other insurance had been refused, then the law is for the defendant, and you should so find. But unless you shall believe from the evidence that the answers given by ——— to the questions named, or either of them, were not substantially untrue, or that some other person was substituted for ——— in the medical examination, then the law is for the plaintiff, and you should so find for the plaintiff to the extent that I have indicated to you in the beginning of these instructions.⁵²

§ 3462. Defense that person examined for insurance was one other than insured

Gentlemen of the jury, you should find for the plaintiff in the sum of \$——, with interest from ——, unless you shall believe

⁵² Metropolitan Life Ins. Co. v. Ford, 102 S. W. 876, 126 Ky. 49, 31 Ky. Law Rep. 513.

from the evidence that some other man than —— named in the policy of insurance issued by the defendant was examined by the medical director of the defendant for the —— named in the petition. If some other man was substituted for ——, and procured to be examined by the medical director in the place of the —— named in the petition and in the policy of insurance, then the law is for the defendant, and you should so find.⁵³

§ 3463. Contemplation of suicide by insured at time of seeking insurance

The court instructs the jury that if you believe from the evidence that, at the time ——, deceased, made application for the policy of insurance herein sued on, she (the said ——) contemplated suicide, the said application was fraudulent, and the policy of insurance issued thereon is null and void, and your verdict must be for the defendant; and in this connection the court instructs the jury that, in determining the question of such contemplated suicide, they should take into consideration all the facts and circumstances detailed in evidence.⁵⁴

C. FORFEITURE FOR BREACH OF PROMISSORY WARRANTY OR CONDITIONS SUBSEQUENT

§ 3464. Change of occupation to more hazardous one

The court instructs the jury, as a matter of law, in this case that in order for the defendant association to be entitled to a verdict in its behalf, it is not necessary that said defendant be required to prove that the deceased —— was, at the time of his death, engaged in any one special or particular line of duty connected with the mill where he was killed; but on the contrary, if the jury believe and find from the evidence that deceased had, after becoming a member of defendant's association, abandoned the occupation of a farmer previous to his death, and had engaged in a different line of occupation relating in any wise to the running, managing, and overseeing or operating of the sawmill described in evidence; and that such changed and different line of occupation was more hazardous than the occupation of a farmer; and that such changed occupation was engaged in by said deceased without the consent of said defendant association; and that said deceased met his death after having abandoned the occupation of a farmer and after having engaged in such new line of occupation, then the finding of the jury must be for the defendant, and the jury will so state.⁵⁵

⁵³ Metropolitan Life Ins. Co. v. Ford, 102 S. W. 876, 126 Ky. 49, 31 Ky. Law Rep. 513.

⁵⁴ Elliott v. Des Moines Life Ass'n, 63 S. W. 400, 163 Mo. 132.

⁵⁵ Hardister v. Supreme Order of Married Men's League, 96 S. W. 316, 118 Mo. App. 679.

The court instructs the jury that if, from the evidence, they find that after the issuance of the certificate sued on, and prior and up to the time of the injuries causing the death of said ———, he changed his occupation as a farmer to the occupation of running and conducting a sawmill; and that said change of occupation, if any, imposed on the life of said ——— a greater hazard than the hazard of his occupation as a farmer, the jury will find for the defendant.⁵⁶

§ 3465. Forfeiture for nonpayment of premiums or assessments

You are instructed that if, at the time of the alleged lapse or forfeiture of the policy in question, the defendant company had in its hands any funds of the insured, not reserve funds, or was indebted to the insured in any sum apart from the reserve fund, if there was any, it could not lawfully forfeit the policy of insurance without first applying such funds, if there were any, or moneys, if there were any, in payment of the premiums, if any were due.⁵⁷

The jury are instructed that, if you find from the evidence that after the issuance of the policy in question, and its assumption by the defendant company, said defendant promised the insured that he would receive timely notice of assessments and dues, then in such event the insured is entitled to a reasonable time after the receipt of such notice, if any, of assessments or dues, within which to pay the same and payment or tender of such payment, if there is such, within a reasonable time after receipt of such notice, if any, is in apt time, and valid and sufficient to keep in force the insurance in question.⁵⁸

§ 3466. Same—Duty of insurer with respect to application of moneys in safety or mortuary fund

The court instructs the jury that if you find from the evidence that at the time the defendant notified the deceased that his premium was due, and which defendant claims he failed to pay, there was a sum of money in excess of \$—— in the safety fund mentioned in the contract, and a surplus in the mortuary fund mentioned in the evidence, then it was the duty of defendant to have applied such excess to the payment of premiums of policy holders; and if you find from the evidence that said deceased's share in such excess, if any, was sufficient to pay the amount of premium due at the time said notice was given to him, then defendant could not declare said insurance forfeited for the failure to pay said premium.⁵⁹

⁵⁶ *Hardister v. Supreme Order of Married Men's League*, 96 S. W. 316, 118 Mo. App. 679.

⁵⁷ *Kern v. Western Life Indemnity Co.*, 192 Ill. App. 96.

⁵⁸ *Kern v. Western Life Indemnity Co.*, 192 Ill. App. 96.

⁵⁹ *Johnson v. Hartford Life Ins. Co.*, 197 S. W. 132, 271 Mo. 562.

The court instructs the jury that it devolves upon the defendant to prove that it was necessary, at the time it claims an assessment was made, for failure to pay which it claims the insurance was forfeited, to make an assessment, and that an assessment was made by the directors of defendant, and that said assessment was not for a larger amount than was necessary to pay the death losses which had accrued up to that time, after giving said deceased credit for his pro rata share of the excess in the safety fund over \$——, if you find there was such excess, and in the mortuary fund, if you find there was excess in that fund, and unless defendant has so proven, it cannot declare said insurance forfeited.⁶⁰

The court instructs the jury that if you find from the evidence there was on hand in said safety fund a sum in excess of \$——, and if you find also there was in the hands of defendant a mortuary fund, which had been collected from previous assessment, then it was the duty of defendant to have applied such excess in said safety fund and said mortuary fund to the payment of death claims which had matured prior to the time the notice was given to deceased that his premium was due, for failure to pay which defendant claims said insurance was forfeited, and if defendant failed to so apply said money, then it cannot claim that the insurance is forfeited.⁶¹

§ 3467. Same—Authority of agent of insurer to dispense with payment

§ 3467(1). Alabama

I will say, gentlemen, if the jury should find that an agent of an insurance company is duly authorized by the company to accept the payment of a premium, and if the payment is offered to him, then he has the power to bind the company so far as to prevent the forfeiture of the policy if he declines to receive it, or directs that the payment shall be made at a future time upon the return of the policies to be rewritten, as indicated by the proof in this case they were to be rewritten according to an agreement of the parties.⁶²

§ 3467(2). New York

The jury are instructed as a matter of law that, by virtue of the office of Mr. —— as general agent and superintendent of defendant, the plaintiff had a right to rely upon his promise and agreement, and that such promise would bind defendant.⁶³

⁶⁰ Johnson v. Hartford Life Ins. Co., 197 S. W. 132, 271 Mo. 562.

⁶¹ Johnson v. Hartford Life Ins. Co., 197 S. W. 132, 271 Mo. 562.

⁶² United States Life Ins. Co. v. Lesser, 28 So. 646, 126 Ala. 568.

⁶³ Carr v. Prudential Ins. Co., 101 N. Y. S. 158, 115 App. Div. 755.

D. ESTOPPEL TO ASSERT, OR WAIVER OF, RIGHT TO AVOID POLICY**§ 3468. Issuing policy with knowledge by insurer of facts set up as ground for forfeiture or avoidance thereof****§ 3468(1). Iowa**

The jury are instructed that, if an insurance company issue a policy upon a risk greater than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading such fact, for this would simply be allowing insurers to commit a deliberate fraud upon the insured.⁶⁴

§ 3468(2). Missouri

The jury are instructed that, if they find from the evidence that the insured or any one for her made known to an agent or superintendent or examining physician of defendant company the facts relative to her physical condition with reference to hemorrhages or pulmonary disease and of her confinement and treatment therefor, or if such agent, superintendent or examining physician knew such facts, then his knowledge is the knowledge of the defendant company and if said company with said knowledge issued and delivered the policy sued on in the first count of plaintiff's petition, it thereby waived the defense of said answer being untrue and your verdict should be for plaintiff on the first count of his petition.⁶⁵

§ 3469. Recognition of continued existence of policy with knowledge of facts giving right to avoid it

The jury are instructed that, if you believe from the evidence that the defendant had knowledge, prior to the acceptance by it of the premium of ———, of a change in the habits of the insured as to the use of liquor, then the acceptance of that premium would estop defendant to set up that the policy was forfeited for breach of the provision of the policy relating to the use of liquor.⁶⁶

§ 3470. Effect of knowledge of agent as knowledge of insurer**§ 3470(1). Iowa**

The jury are instructed that a full knowledge of the truth of the alleged misstatements of ——— in the application, communicated

⁶⁴ *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122.

⁶⁵ *Schuler v. Metropolitan Life Ins. Co.*, 176 S. W. 274, 191 Mo. App. 52. This instruction is correct under the facts, which were that the condition of the insured was made known to

the examining physician of the defendant, who was sent for the purpose of examination by the assistant superintendent of defendant.

⁶⁶ *Phoenix Mut. Life Ins. Co. v. Raddin*, 7 Sup. Ct. 500, 120 U. S. 183, 30 L. Ed. 644.

to ——— and ———, or either, was a communication to the company.⁶⁷

§ 3470(2). South Carolina

I charge you as a matter of law, if the agent of the company who took ———'s application for insurance, if he knew that ——— was making false statements at the time, and these statements were untrue and he had knowledge and notice of the fact that ——— was making untrue or false statements, then notice to the agent would be notice to the company, and in that event, if the company's agent knew that the statements made by ——— when he applied for the insurance policy were untrue, and then went on notwithstanding that and issued and received his premium for it, then they would be bound to pay the policy to the beneficiary after his death, when his death was proved to them.⁶⁸

§ 3471. Waiver of right to take advantage of misrepresentations in application with respect to prior ailments or diseases

I charge you that an examination of the deceased by a physician chosen by the insurance company is some evidence of one of two things, either that the disease did not exist, or that its existence was known and waived by the insurance company. If you find from the facts in this case that the disease did not exist or that its existence was known to the physician, or by reasonable examination on his part could have been known, he will be held in law to have known of the disease, and the company will be deemed to have waived it, and your verdict should be for the plaintiff. But if the physician did make a reasonable examination and failed to discover such disease, and such failure was due to the fraud of the applicant, as I have defined fraud to you, then the plaintiff could not recover. Now, right here I want to tell you that waiver in law is simply the voluntary relinquishment of a known right. If one has a right, knowing it, and voluntarily relinquishes it, fails or refuses to insist upon it, he is deemed in law to have waived that right, and therefore, if he leaves by that waiver some other person to act, he could not of course later, after another has acted, rely upon any such right, if so waived.⁶⁹

I charge you that the insurance company could waive the fact that the applicant for insurance had suffered from a disease of the lungs or any other statement required by it to be made in the application and examination papers. I further charge you that an examination of the deceased by a physician chosen by the insurer is

⁶⁷ *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa, 218, 7 Am. Rep. 122,

⁶⁸ *Rearden v. State Mut. Life Ins. Co.*, 60 S. E. 1106, 79 S. C. 526.

⁶⁹ *Wingo v. New York Life Ins. Co.* (S. C.) 101 S. E. 653.

some evidence either that the disease did not exist or that its existence was known and waived by the insurer, and if you believe the evidence to be true, your verdict should be for the plaintiff. Waiver is the relinquishment of a known right, and if you find that the insurance company, by the act of its agent, the medical examiner, waived the right to refuse an insurance policy by reason of the fact that the applicant had suffered from lung trouble, then your verdict should be for the plaintiff provided that was the only reason for refusal of an insurance policy.⁷⁰

§ 3472. Same—Effect of knowledge or negligence of examining physician

I charge you that the knowledge and also the errors and the negligence of the examining physician of the insurance company are those of the company itself, which it is estopped to take advantage of, unless, gentlemen of the jury, as I have already stated, that knowledge was perverted through the fraud of the assured, unless fraud was practiced to prevent such physician from acquiring knowledge of any previous disease.⁷¹

I charge you that an insurance company cannot take the money of an insured while he lived and when he was dead claim a forfeiture on account of what it knew at the time it made the contract of insurance, or should have known by reasonable examination of its physician, for that would be fraud.⁷²

§ 3473. Waiver of failure to pay premiums within time limited

You are instructed that, if you find that the language and actions of this company, through ———, the head of its executive management, clearly indicated on the part of the society that it would not take an advantage of the default of the member here situated as Mr. J. was, if he did not pay within the ——— days, but that it would accept his payment after that time, providing he were in good health, and if, after the expiration of this month of ———, he was in good health, and Mr. J. knew this, and relied upon it, and believed it, and was honest in it, the company is estopped from setting up the forfeiture. If the company's conduct was not such as to fairly indicate an intention so to do, but was merely the extension of favors here and there, then it would not be an estoppel. But if the conduct was such as to give people—give Mr. J.—to understand, as I said, that he might pay after the ——— days, and it would be accepted if he was in good health, then the company is estopped, if he honestly believed that, and acted upon it, pro-

⁷⁰ *Wingo v. New York Life Ins. Co.* (S. C.) 101 S. E. 653.

⁷¹ *Wingo v. New York Life Ins. Co.* (S. C.) 101 S. E. 653.

⁷² *Wingo v. New York Life Ins. Co.* (S. C.) 101 S. E. 653.

viding he was in good health at the expiration of ——— days, and during the time following, when the negotiations took place between the parties.⁷³

E. CAUSE OF DEATH AND RISKS INSURED AGAINST

§ 3474. Self-destruction

You are instructed that, if ———'s death was the result of a gunshot wound self-inflicted and intentionally so, that this is a bar to a recovery in this case, and you will find for the defendant. By the term "self-destruction," as used in this contract, is meant where the party intends to take his own life intentionally. It does not cover, in my opinion, a case where death may be caused by the hand of the insured party where the injury is accidental, and not intentionally inflicted. Therefore, in this case, you will determine the question between the parties as to this issue, and determine it from all the evidence offered both on the part of the plaintiff and on the part of the defendant. Was ———'s death the result of a gunshot wound intentionally inflicted with intent to take his own life? If you find as a matter of fact that it was so inflicted, and with such intent, you will find for the defendant. But if you find from the evidence that it was accidental killing, assassination, or that his death came about from any cause other than a self-inflicted wound, you will find for plaintiff.⁷⁴

§ 3475. Death by suicide

In action on policy of mutual benefit insurance, see post, § 4030.

§ 3475(1). Alabama

You are instructed that the words "die by his own hand or act," in a policy of life insurance, mean in general terms suicide.⁷⁵

§ 3475(2). Georgia

The jury are instructed that, if the insured destroyed his life by shooting himself, and at the time he shot himself did it voluntarily, and intended to kill himself, then it would be immaterial whether at the time he was sane or insane, or whether his mental faculties were so impaired as to destroy his moral responsibility, and the plaintiffs in this case could not recover.⁷⁶

⁷³ Jones v. Preferred Bankers' Life Assur. Co., 79 N. W. 204, 120 Mich. 211.

⁷⁴ Union Mut. Life Ins. Co. of Portland, Me., v. Payne (C. C. A. Tex.) 105 Fed. 172, 45 C. C. A. 193.

⁷⁵ Woodmen of the World v. Wright, 60 So. 1006, 7 Ala. App. 255.

⁷⁶ Jenkins v. National Union, 45 S. E. 449, 118 Ga. 587. The policy provided for forfeiture in case of suicide of the insured within a certain time, whether sane or insane.

§ 3475(3). Missouri

The court instructs the jury that, unless you find from the evidence in the cause that ——— did commit suicide while not in delirium resulting from illness, your finding should be for plaintiff.⁷⁷

The court instructs the jury that if you find from the evidence in the cause that the death of ———, which is admitted by defendant herein, was caused by a leaden ball or bullet fired from a revolver purposely discharged by the said ———, with the intent and purpose on the part of him, the said ———, to end his own life, and that at the time of firing the revolver, if so the jury find, the said ——— was not in delirium resulting from illness, then and in that event your verdict should be for plaintiff in the sum of \$——, and no more.⁷⁸

The jury are instructed that if you believe from the evidence that ———, deceased, did, within three years from the date of the policy herein sued upon, come to her death by her own hand or act by means of morphine or other opium poison by herself administered with suicidal intent, then your verdict must be for the defendant.⁷⁹

§ 3476. Use of liquor, in violation of policy, as proximate cause of death

The jury are instructed that the policy must be construed strictly against the defendant, and if you find that M.'s death was only contributed to by the intemperate use of liquor, then you must find for the plaintiff on this branch of the case. In order to avoid the policy, the defendant must satisfy you, by a preponderance of the evidence, that the sole or paramount cause of M.'s death was caused by the intemperate use of intoxicating liquors.⁸⁰

§ 3477. Death from injuries received in hostile encounter with another

You are further instructed that, unless you find that said insured acted in violation of law in making the assault on ——— if you find he made any such assault, or if you believe from the evidence in the case that said insured was acting in his necessary self-defense—that is, the necessary defense of his person against what appeared to him to be an unlawful assault by ——— upon his person—then you are instructed that if he died from a wound received in

⁷⁷ Wilcox v. Court of Honor, 114 S. W. 1155, 134 Mo. App. 547.

⁷⁸ Wilcox v. Court of Honor, 114 S. W. 1155, 134 Mo. App. 547. The only issue was whether deceased was delirious as result of illness. Under the policy sued on, if the insured committed suicide while not in delirium

resulting from illness, the amounts paid by the insured as assessments were to be returned to the beneficiary.

⁷⁹ Elliott v. Des Moines Life Ass'n, 63 S. W. 400, 163 Mo. 132.

⁸⁰ Miller v. Mutual Benefit Life Ins. Co., 31 Iowa, 216, 7 Am. Rep. 122.

a difficulty, this does not preclude the recovery as hereinbefore instructed; and, if you so find, you will find for the plaintiffs, as hereinbefore instructed.⁸¹

§ 3478. Death of insured while violating the law

Defense to action on policy of mutual benefit insurance, see post, § 4027.

§ 3478(1). Michigan

You are instructed that the one simple thing for you to determine is, who was the aggressor? Did —— intend to bring about this controversy—start an affray, an assault, which resulted, unfortunately, in his death? If he did; if he was doing something that was in violation of the criminal law of the land, of the state; that is, seeking to assault or commit an assault and battery upon the person of the man H.—and brought about the affray which resulted in his death, he was violating the law of the land, and the plaintiff cannot recover. * * * If you find that ——, the insured, went to the house of H., and that he then and there, by means of any words spoken, did maliciously threaten any injury to the person of the said H., with intent to extort money or any pecuniary advantage, or with intent to compel said H. to return his lumber, or pay him for the lumber against his will, or to compel the said H. to do or refrain from doing any act against his will, and as a result of such threats a fight was brought on, then I charge you that the insured met his death while violating the laws of the land, and your verdict must be for the defendant.⁸²

§ 3478(2). Texas

You are further instructed that, if you believe from a preponderance of the evidence in this case that the insured, M., unlawfully and without justification, and in violation of the law of the state of ——, made an assault to murder on ——, and that in the course of said difficulty, said —— shot said M. while he was so violating the law, and that said M. afterwards died from said wounds so received, then you will find for defendant.⁸³

§ 3479. Insured killed by beneficiary

The court instructs the jury that, if ——, at the time she killed the insured, knew right from wrong and knew that it was wrong to kill him, then she was sane unless at the time, even though she knew right from wrong, she acted from an irresistible impulse arising from a defect in will caused by the diseased condition of her mind, and not from mere anger or revenge.⁸⁴

⁸¹ Woodmen of the World v. McCoslin, 126 S. W. 894, 59 Tex. Civ. App. 574.

⁸² Payne v. Union Life Guards, 99 N. W. 376, 136 Mich. 416, 112 Am. St. Rep. 368.

⁸³ Woodmen of the World v. McCoslin, 126 S. W. 894, 59 Tex. Civ. App. 574.

⁸⁴ Metropolitan Life Ins. Co. v. Shane, 135 S. W. 836, 98 Ark. 132.

F. EVIDENCE

§ 3480. Presumptions and burden of proof

§ 3480(1). Alabama

You are instructed that the plaintiff, to make out her case *prima facie* and to carry the burden upon her under the general issue, has done so when she introduced in evidence the policies sued upon, and shows notice of proof of death has been supplied by her to the defendant, and that the policies have not been paid.⁸⁵

§ 3480(2). Virginia

The jury are instructed that the burden of proof is on the plaintiff to prove the death of E., that the company received proof of his death, and any other prerequisite required by the policy before payment of the insurance money, or that the same has been waived by the defendant; but the burden of proof is on the defendant to show that the policy is avoided by virtue of the failure of E. to answer the questions propounded to him by the medical examiner in accordance with the stipulations of his application.⁸⁶

§ 3481. Presumption of death of insured from absence

§ 3481(1). United States

You are instructed that, while death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead.⁸⁷

The jury are instructed that if, from the evidence in this case you should come to the conclusion that ——— has been continuously absent since ———, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict. Absence alone cannot establish the death of ———, for the law presumes an individual, shown to be alive and in health at the time of his disappearance, continues to live. While the death of ——— is not to be presumed from absence alone, yet it is

⁸⁵ Massachusetts Mut. Life Ins. Co. v. Crenshaw, 65 So. 85, 186 Ala. 460.
⁸⁶ Home Life Ins. Co. v. Sibert, 96 Va. 403, 31 S. E. 519.

⁸⁷ Fidelity Mutual Life Association v. Mettler, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence.⁸⁸

§ 3481(2). Illinois

The court instructs the jury, as a matter of law, that if you find from the preponderance of the evidence in this case that ———, the insured, left his residence and home, and has been continually absent therefrom for a period of over seven years, without any intelligence being received of his whereabouts by the members of his family, relations, neighbors, and acquaintances within said period or at any time thereafter, although diligent inquiry and search was made, then such continuous absence, together with such lack of intelligence, raises the presumption of death of the said ———, and the jury on such proof have a right to presume his death.⁸⁹

§ 3482. Presumption and burden of proof as to cause of death

§ 3482(1). United States

The jury are instructed that the plaintiff in this case has the burden on herself of showing the contract under the policies and the death of the deceased. That much has been shown, and as a matter of fact been admitted by the defendant. The case of the plaintiff would be made out by that showing and admission, but for the denials in the defenses set up by the defendant. The defendant, admitting the death and admitting the obligation under the contract, sets up as a special defense that the contract is not enforceable in this case, because the insured, ———, committed suicide in the city of ———. Under the terms of this policy, this defense is good, if sustained by the proof. On that defense the defendant has the burden of proof. The defendant is required to make out its case on that defense by a preponderance of proof; that is, to make you, by its proof, or the proof in the case, believe that its defense has been established with a reasonable degree of certainty.⁹⁰

§ 3482(2). Oklahoma

You are instructed that when a person dies the law presumes that he has died from natural causes, and presumes that he has not died from self-destruction. This presumption obtains unless it is overcome by evidence establishing the fact that such person committed suicide.⁹¹

⁸⁸ *Fidelity Mutual Life Association v. Mettler*, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

⁸⁹ *Policemen's Benev. Ass'n of Chicago v. Ryce*, 72 N. E. 764, 213 Ill. 9, 104 Am. St. Rep. 190.

⁹⁰ *Sharland v. Washington Life Ins. Co.* (C. C. A. La.) 101 Fed. 206, 41 C. C. A. 307.

⁹¹ *Modern Brotherhood of America v. White*, 168 F. 794, L. R. A. 1918B, 520.

§ 3482(3). **Texas**

At the request of plaintiffs, you are charged that the burden of proof is upon the defendant to show by a preponderance of the evidence that the deceased, ———, met his death in violation, or an attempted violation, of the law; and, unless you believe such fact is shown by such preponderance of all the evidence in the case, you will find for the plaintiffs.⁹²

§ 3482(4). **Virginia**

The court further instructs the jury that, if the defendant company seeks to avoid the payment of the policy on the ground that the accused came to his death by suicide, the defendant company must show that every reasonable hypothesis of accidental death is excluded by the evidence. Accidental death is presumed by the law, and this presumption cannot be overcome except by proof of facts which exclude every reasonable hypothesis of death except by suicide.⁹³

§ 3483. **Presumption against suicide**

In action on accident policy, see ante, § 617.

In action on policy of mutual benefit insurance, see post, § 4034.

§ 3483(1). **United States**

The jury are instructed that, plaintiff having introduced her policy and proof of the death of the deceased, ———, that would prima facie entitle the plaintiff to recover the amount of the policy. And, the defense of self-destruction being interposed by the defendant, it becomes an affirmative defense, and places the burden on defendant to establish by a preponderance of the evidence the defense thus asserted. In other words, the burden of proof rests upon defendant to establish by a preponderance of the evidence the fact that the exception in the policy applies; that is, that the death of the deceased was the result of a self-inflicted and intentional wound with intent to take his own life.⁹⁴

§ 3483(2). **Indiana**

The jury are instructed that, in determining whether the defense of suicide is proved or not, it is proper for them to consider the instinctive love of life which ordinarily exists in the human breast, and that men, as a rule, attempt to preserve their lives.⁹⁵

§ 3483(3). **Iowa**

The jury are instructed that a man's natural instinct is to preserve his life, and not to destroy it. Therefore the presumption is

⁹² *Woodmen of the World v. McCoslin*, 126 S. W. 894, 59 Tex. Civ. App. 574.

⁹³ *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

⁹⁴ *Union Mut. Life Ins. Co. of Portland, Me., v. Payne* (C. C. A. Tex.) 105 Fed. 172, 45 C. C. A. 193.

⁹⁵ *Supreme Lodge, Knights of Pythias v. Foster*, 59 N. E. 877, 26 Ind. App. 333.

that ——— did not commit suicide, and that presumption should be considered in deciding whether or not he did commit suicide.⁹⁶

§ 3483(4). Oregon

You are instructed that one of the defenses in this case is that the deceased, ———, committed suicide, and you are instructed that this is an affirmative defense set up by defendant, and the burden is upon the defendant to establish same to your satisfaction by a preponderance of the testimony. When a person is found dead from unexplainable causes, the presumption is that his death was natural or accidental, if nothing appears to the contrary. Self-destruction is contrary to the general conduct of mankind. The plaintiff is therefore entitled to recover, unless the evidence introduced has overcome this presumption, and satisfied you by a preponderance of the evidence that death was voluntary. The presumption of law is, in the absence of any evidence as to the cause of death, that it happened from natural causes, and that such death did not arise from self-destruction; and in this case, if there was no proof as to the cause or manner of death of ———, or if the evidence as to whether her death was caused by accident or natural causes, and not by her own hands, was evenly balanced, you would find in favor of this presumption. But this is only a disputable presumption, and if, from all the evidence in the case, you find by the preponderance thereof that she came to her death by her own hands, whether she was sane or insane, you must find for defendant.⁹⁷

§ 3484. Presumptions and burden of proof with respect to fraud or falsity of answers of insured

§ 3484(1). Indiana

The jury are instructed that one of the questions of fact which is submitted for your determination is, Was the answer, "Not at all," made by F. on the ——— day of ———, in his application for insurance, in answer to the question, "To what extent do you use intoxicating liquors?" a true or false answer? The burden of proof is on the defendant to establish by a fair preponderance of the evidence that the answer to the question was untrue. The evidence before you respecting the habits of F. in using intoxicating liquors prior to the date of the application is to be considered for the purpose of enabling you to determine whether at that date F. used intoxicating liquor, and it is for you to say what bearing such evidence may have in relation to that inquiry.⁹⁸

⁹⁶ *Tackman v. Brotherhood of American Yeomen*, 106 N. W. 350, 132 Iowa, 64, 8 L. R. A. (N. S.) 974.

⁹⁷ *Cox v. Royal Tribe of Joseph*, 71

P. 73, 42 Or. 377, 60 L. R. A. 620, 95 Am. St. Rep. 752.

⁹⁸ *Supreme Lodge, Knights of Pythias, v. Foster*, 69 N. E. 877, 26 Ind. App. 333.

§ 3484(2). **Oklahoma**

You are instructed that the law presumes that the acts of all men are honest until otherwise proven, and in this connection, you are instructed that the burden of proof on the issue of fraud is upon the defendant to show by a preponderance of the evidence that ——— was guilty of fraud in the procurement of the policies in question. And by a preponderance of the evidence is meant that evidence which is the more satisfactory and which carries with it the greater weight. You are further instructed that the burden of proof is upon the defendant upon every issue of fraud, to show by a preponderance of the evidence that the statements made by the said ———, which are alleged to be false, were in fact false, that she knew them to be false when she made them, that she made them for the purpose of misleading the defendant, and to induce it to enter into the contracts of insurance, and that the defendant was in fact misled thereby in particulars where it would not have entered into said insurance contracts, if the said ——— had given true statements with reference thereto.⁹⁹

§ 3484(3). **Virginia**

The court instructs the jury that, if the defendant company seeks to avoid the payment of said policy on the grounds that the deceased has been guilty of material misrepresentations and fraud, the burden of proving the misrepresentations and fraud is on the defendant company; that he who alleges fraud must clearly and distinctly prove it. It is not to be assumed on doubtful evidence or circumstances of mere suspicion. The law never presumes fraud, but the presumption is always in favor of innocence and honesty.¹

§ 3485. **Matters considered in determining question of fraud**

You are instructed that the defendant avers that there were certain untrue and fraudulent statements contained in the application by A., and insists that only his statements in regard to his health and habits should be inquired into. But, as the contract was based upon the statements of the insured's physician and friend as well as his own, the statements of all three should be considered in determining the question of fraud.²

§ 3486. **Evidence as to truth of answers as to prior diseases**

I charge you that the fact that the company doctor examined and passed the applicant, in view of the questions asked him in the application, was some evidence under all the circumstances in

⁹⁹ *American Bankers' Ins. Co. v. Hopkins*, 169 P. 489.

¹ *Life Ins. Co. of Virginia v. Hairs-*

ton, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

² *Miller v. Mutual Benefit Life Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122.

this case that he had never suffered from a disease of the lungs "or any other serious disease." It is some evidence, and you are to take that into consideration in passing upon the issue which you are to decide. By some evidence I mean this: It is evidence for you; it is not conclusive of the fact; it is evidence for you to take into consideration.³

§ 3487. Sufficiency of evidence

This, gentlemen, is a civil case, and it is distinguished in its mode of proof from criminal cases. In a case of this character the burden of proving the legality of the contract, the performance of the conditions precedent on the part of the plaintiff and the liability of the defendant therein, rest upon the plaintiff; and that he must prove, not as in criminal cases beyond a reasonable doubt, but by what is termed the preponderance of the evidence.⁴

§ 3488. Sufficiency of evidence of death of insured

§ 3488(1). Illinois

The jury are instructed that in determining whether the insured, ———, was dead at the commencement of this suit they must consider all the circumstances under which he left which are shown on this trial, together with the length of time he has been gone, if any, and from all these facts and circumstances the jury must determine whether the said ——— was in fact dead at the time of the commencement of this suit.⁵

§ 3488(2). Michigan

You are further instructed that you are carefully to weigh the proofs concerning the presence of A. in the city of ——— in ———. Of course, you will understand that if the witnesses for defendant saw A. alive in ——— as claimed, then the plaintiff cannot recover, whether his absence has been explained or unexplained. It is not the duty of the defendant to pay the amount of the certificate held by a member, unless it is shown that the member is dead, either actually or presumptively, as I have explained. If A. was alive and in ——— as claimed, then it is established that the payment of his assessments had made him a living member of the order, in good standing, and nothing more. His wife would have no more claim for the payment of this certificate than the beneficiary of any other living member of the order in good standing. There is no evidence that directly contradicts the evidence of the witness B. to the effect that he was acquainted with A., and that

³ Wingo v. New York Life Ins. Co. (S. C.) 101 S. E. 653.

⁴ Baltimore Life Ins. Co. v. Floyd (Del.) 91 A. 653, 5 Boyce, 201.

⁵ Policemen's Benev. Ass'n of Chicago v. Ryce, 72 N. E. 764, 213 Ill. 9, 104 Am. St. Rep. 190.

he saw him, recognized him, and talked with him ———. If you believe that either B. or the witness P. saw A. in ———, then that ends the case, and your verdict must be for the defendant. The evidence of B. can be overcome only upon the finding by you that he was either mistaken in his identification of A., or that he is falsifying. I shall leave it for you to determine whether he did see and know A. as he claims. This is to be considered by you in connection with all the other proofs of the plaintiff and defendant in the case respecting the disappearance, absence, and all other matters that will enable you to determine whether A. was seen alive in ——— in ———, as claimed. As I have explained, if the defendant has shown by proof that A. was alive in ———, then your verdict should be for the defendant.⁶

§ 3489. Sufficiency of evidence as to cause of death

§ 3489(1). United States

I charge you that the presumption of law against suicide may be overturned, not only by verbal testimony, but also the reasonable deductions from the facts established; that on this question you are to be governed by what is the reasonable probability; that the fact of suicide need not be shown beyond a reasonable doubt, but by a mere preponderance of the evidence.⁷

§ 3489(2). Virginia

The court instructs the jury that, in determining whether the deceased, ———, died from suicide or from natural or accidental causes, they shall consider, first, what facts are established by a preponderance of all the evidence on that subject, and, having ascertained what facts are thus established, they shall further consider whether there is any reasonable hypothesis, based upon those facts, and those facts alone, which is consistent with death from natural or accidental causes; and, if the jury believe that those facts, considered as a whole and taken together, are inconsistent with death from natural or accidental causes, then they must find for the defendant company.⁸

§ 3490. Same—Effect of statements in proofs of loss.

The jury are instructed, with respect to the proofs of loss introduced in this case, in which plaintiff stated or is purported to have stated that the death of the deceased was caused by suicide, or words to that effect, that you have heard all the evidence

⁶ *Samberg v. Knights of the Modern Maccabees*, 123 N. W. 25, 158 Mich. 568, 133 Am. St. Rep. 396.

⁷ *Supreme Tent, Knights of Maccabees of the World, v. King* (C. O.

A. Tenn.) 142 Fed. 678, 73 C. C. A. 663.

⁸ *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 959.

in this case. It does not appear that the defendant relied upon these statements, or parted with any right by reason of them, or was misled by them; and therefore it is a question of whether or not plaintiff is bound by these statements. You are instructed that she has the right to introduce proof to show whether or not she stated a fact she knew, or something that she was informed of. You have heard her statement that she saw her husband's dead body, and did not see any wound or pistol, and had seen none when the proofs of loss were filled out and signed by her, and that she has no personal knowledge of the manner of her husband's death. What I mean is that she only gives her information from other parties as to the death being caused by a gunshot wound. If you believe that explanation to be true, and that those were the circumstances under which she made the proof of loss, the fact that the proof of loss contains the statement that he came to his death by suicide would not conclude her in this case. You might consider it simply as a circumstance in the case, in connection with other evidence, in determining the main question of whether it was a self-inflicted and intentionally inflicted wound with the intent to take his life. That is the sole question for your determination, as I view this case. In determining that question you have the right to look at the conditions surrounding the party to ascertain a motive or want of motive. You have the right to consider in the course of human affairs whether a party who is in the enjoyment of wealth, whose business is good, whose marital relations are pleasant, and things of that kind, whether he would intentionally take his own life or not. You have also the right to look at the condition of the man to decide whether such condition did exist, or whether such a state of affairs existed, that he probably or likely took his own life. These are questions that you can consider in arriving at a solution of the question. No person saw the act committed. No one can speak from personal knowledge as to how it occurred, and you are to determine that from the evidence as gleaned from the witnesses by considering the motives that impel people to such an act, and from these matters determine the question of whether it was self-inflicted with intention to take his own life, or whether it was accidental, or the result of assassination. As already stated, if it was intentionally inflicted, it debars recovery, and your verdict will be for defendant. If it was not self-inflicted, and the proof fails to establish to your mind that it was self-inflicted with the intention of taking life, your verdict should be for the plaintiffs.*

* *Union Mut. Life Ins. Co. of Portland, Me., v. Payne* (C. C. A. Tex.) 105 Fed. 172, 45 C. C. A. 193.

§ 3491. Sufficiency of evidence that false statements were made with intent to deceive

I charge you that, should you find that a statement made by the deceased in an application for a policy was false, yet that raises no presumption that it was made with intent to deceive; it is the duty of the defendant, alleging fraud, to prove it by a preponderance of the testimony, and he must go further and prove that such statements were made with intent to deceive knowing at the time the statements to be false. And I charge you here also in this connection that the evidence to establish fraud must be clear and convincing and satisfactory, and such as to lead you, as I have stated before, to come to the conclusion that the greater weight of that evidence is in favor of the proposition of fraud.¹¹

G. AMOUNT OF RECOVERY

§ 3492. Damages for vexatious delay in payment of loss

The jury are instructed that, if you find from all the facts and circumstances shown by the evidence that this refusal to pay was vexatious, that is, without reasonable cause, then you may allow plaintiff, in addition to the amount of the policy referred to, interest and a reasonable attorney's fee.¹²

The court instructs the jury that if you shall find from the evidence that the defendant before the institution of this suit refused to pay plaintiff the amount of said policy, and shall further find from all the facts and circumstances shown by the evidence that its refusal to pay was vexatious—that is, without reasonable cause—then you may allow her, in addition to the amount of the policy and interest, a sum not exceeding ——— per cent. of the amount of the policy, and should return a verdict for that aggregate sum, if you find the issues for plaintiff.¹³

¹¹ *Wingo v. New York Life Ins. Co.* (S. C.) 101 S. E. 653.

¹² *Schuler v. Metropolitan Life*

Ins. Co., 176 S. W. 274, 191 Mo. App. 52.

¹³ *Keller v. Home Life Ins. Co.*, 95 S. W. 903, 198 Mo. 440.

CHAPTER CXCI

LIMITATION OF ACTIONS

- § 3493. Limitations applicable to particular actions—Suit for wages not based on written contract.
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3510. Same—Payment by another than debtor.
3511. Burden of proof with respect to issue of new promise.

§ 3493. Limitations applicable to particular actions—Suit for wages not based on written contract

The jury are instructed that by the law of this state suit on a contract not in writing, express or implied, for the payment of wages for services rendered, must be commenced within ——— years next after the cause of action accrued to the plaintiff, and if you believe from the evidence in this case that the plaintiff rendered services for the defendant more than ——— years before the beginning of this suit on ———, and that since that time there has been no new promise or express promise on the part of defendant to pay for such services, or any unqualified admission by him that the debt therefor was due and unpaid, the plaintiff cannot recover for such services rendered more than ——— years before the beginning of the suit.¹

¹ Miller v. Cinnamon, 48 N. E. 45, 168 Ill. 447.

§ 3494. Same—Action to recover possession of bounty land warrant

The jury are instructed that, if you believe from the evidence before you that for more than ——— years before the institution of this suit the defendant obtained possession of the ——— and held the possession of the same as his own adversely to the right of the plaintiff, then plaintiff's right of recovery is barred by the statute of limitations, and the jury will return a verdict for defendant.³

§ 3495. Accrual of cause of action—Action for services

The jury are instructed that, where services have been rendered under an agreement which does not fix any specified time for payment, or when the contract shall end, it would amount to one continuous contract, and the statute of limitation would not begin to run against any cause of action arising out of such agreement until the service had ceased.³

§ 3496. Same—Accrual of action on open or mutual account

§ 3496(1). Missouri

The court instructs the jury that an indebtedness by open account is a valid and legal debt, although of more than ——— years' existence.⁴

§ 3496(2). Wisconsin

You are instructed that an open, that is, unsettled, and mutual account current, is an account consisting of credits, as well as debits, charges and credits, between the parties. An account in which A. charges B. with a number of items extending through a considerable time, but in which B. has no credits, is not a mutual account current between the parties.⁵

You are instructed that upon the issue thus presented the burden is upon the plaintiff to convince you that there was such open, mutual account, and if there was, then to satisfy you of the balance due him to entitle him to recover thereon. If you shall be satisfied that such open, mutual account existed, then the plaintiff can recover, if at all, such sum only as the evidence satisfies you was due him at the time of ———'s death on account of transactions between the parties had within ——— years immediately preceding that event.⁶

³ *Smithwick v. Andrews*, 24 Tex. 488.

³ *Story v. Story*, 27 N. E. 573, 1 Ind. App. 284.

⁴ *State v. Armstrong*, 16 S. W. 604,

106 Mo. 395, 13 L. R. A. 419, 27 Am. St. Rep. 361.

⁵ *Dunn v. Howard*, 41 N. W. 707, 73 Wis. 545.

⁶ *Dunn v. Howard*, 41 N. W. 707, 73 Wis. 545.

§ 3497. Same—Breach of promise to marry**§ 3497(1). Indiana**

The jury are instructed that if there was an agreement to marry between plaintiff and defendant, and the time for its consummation was postponed from time to time up to within a period of less than ——— years next prior to the beginning of this suit, when defendant refused to marry plaintiff and she was ready and willing to marry him, she would have a right of action not barred by limitation.⁷

§ 3497(2). Missouri

You are instructed that an action for the breach of promise of marriage is barred in ——— years from the time a breach of the contract takes place; and a breach only takes place where defendant refuses to carry out, or disables himself from carrying out, his promise. If, therefore, you find and believe from the evidence that defendant requested plaintiff to marry him at such time as he should make satisfactory business arrangements, and should request plaintiff to carry out the agreement to marry, and plaintiff assented to such arrangement, then the court instructs you that the statute of limitations did not begin to operate against plaintiff until such request was made by defendant, unless you find that defendant married another woman prior to making such request; and plaintiff has ——— years within which to bring her action from the date of such marriage to another woman or refusal of defendant.⁸

§ 3498. Same—Recovery of damages caused by permanent nuisance

The court instructs the jury that, if the jury believe from the evidence that the structures designated as the "coal chute" and "power plant" were put in operation prior to ——— years before the institution of this action, and that the firing and coaling of defendant's engines at said coal chute commenced more than ——— years before the institution of this action, that said structures are of a permanent character, that they have been operated since first used, and its engines fired and coaled at said coal chute since it was first used in the same manner to the time of the institution of the suit, and that the operation of said coal chute and power plant, and firing and coaling of said engines have injured the property of the plaintiffs, and that the nuisance caused by said operations is of such a character that its continuance necessarily constituted a permanent injury to plaintiffs' property, then the jury are instructed that the plaintiffs' cause of action accrued when said power house

⁷ Chamness v. Cox, 30 N. E. 901,
131 Ind. 118.

⁸ Schreder v. Michel, 11 S. W. 314,
98 Mo. 43.

and chute were first operated, and said engines were first coaled, or their draught increased by the use of blowers at said chute; that the claim of the plaintiffs is barred by the statute of limitations, and their verdict shall be for the defendant.⁹

§ 3499. Same—Action for wrongfully ponding water on plaintiff's land

Is the plaintiff's action barred by the statute of limitations? Your inquiry would be this: When did the substantial injury start, if the lot was injured? This action began in ———, and if this injury began more than five years before that, it makes no difference who resided there, the plaintiff or some one else, and this injury has existed for that length of time, that is, if the substantial injury to this property began prior to ———, then you would answer the first issue "Yes." If you should find that it was commenced after that time, you would answer "No"—that it was not barred.¹⁰

§ 3500. Knowledge of cause of action—Action for damages for violation of anti-trust act

When you have gotten that far, if you first decide the case on the question of conspiracy and approach the question of damages, and have determined that the petitioner is entitled to damages, then there is another question of fact for you to determine, and that relates to the defense of prescription. It is the law of ——— that acts, such as these, are prescribed in one year after they occur. But it is also the law that this prescription is suspended, has no effect or operation, during such period as the party injured does not know that he has been injured and is unable to bring a suit. That means, gentlemen, that it begins to run from the moment or the day that the petitioner knows that he has suffered an actionable injury. That does not mean that it would begin to run if he merely knew his profits were falling off, or he knew they were falling off from the competition of the ——— Company; but it would begin to run if he knew that the falling off or damage was caused by the competition to effect, and in pursuance of, an illegal combination in restraint of trade. In other words, from the moment he knew he could bring an action against somebody to recover his damages, although he might not have known who the person was, or he might not have known how he was going to prove his action, prescription would run, and after the lapse of one year his right of action would be barred. Therefore it is a question of fact for you to determine, in connection with this case,

⁹ Southern Ry. Co. v. McMenamin,
73 S. E. 980, 113 Va. 121.

¹⁰ Stack v. Seaboard Air Line Ry.
Co., 51 S. E. 1024, 139 N. C. 368.

whether or not the plaintiff knew, or ought to have known, more than a year before this petition was filed, that he had suffered an actionable injury. The petition was filed on ———, the citation was served the same day on all the defendants, and the allegation in the petition is that he did not know of this combination or its operation against him until ———, which is within one year. So, if you find the allegation in his petition is correct, and is not offset by the evidence, or not disproved by the evidence, you will pay no further attention to the question of prescription.¹¹

§ 3501. Same—Discovery of fraud

Gentlemen of the jury, you are instructed that an action to recover damages arising by reason of fraudulent conduct of the defendant must be instituted within ——— from the perpetration of the fraud, or within two years after the fraud was discovered by the plaintiff, or after the time in which by the exercise of reasonable diligence he might have discovered it.¹²

§ 3502. Same—Concealment of cause of action

The jury are instructed that if the evidence shows that a relation of trust and confidence existed between the claimant and the said B., and that B., as claimant's agent, collected from the ——— Insurance Company the full amount of a policy in said company for \$——, held by claimant, and that when the said B. accounted with claimant for the amount collected he concealed from the knowledge of the claimant that he had collected said sum of \$——, but, on the contrary, stated to claimant that said company disputed the justness of his claim, and refused to pay the same in full, and that he, the said B., had not and could not collect from said company the full amount of said policy, and could only collect, and had only collected, in a compromise with said company, the sum of \$——, and then and there advised the claimant to ratify and approve said compromise, and accept said sum of \$—— in full of claimant's said claim for \$——, which statements the claimant relied on, believing the same to be true; and that the claimant, so relying on said statements, and believing the same to be true, made no examination to discover whether said statements were true or false, but acted upon said advice and statements, and did then and there accept said sum of \$—— in full of claimant's said claim for \$——, then you are instructed that said B. fraudulently concealed from the knowledge of the claimant the cause of action which existed in favor of claimant against said B.

¹¹ American Tobacco Co. v. People's Tobacco Co. (C. C. A. La.) 204 Fed. 58, 122 O. C. A. 372.

¹² Anderson v. Kennedy (Ok!) 152 P. 123.

to recover said \$——, and the statute of limitations did not commence running against said cause of action so concealed as aforesaid until the claimant discovered, or might, by reasonable diligence on his part, have discovered, that such cause of action existed in his favor.¹³

The jury are instructed that if the evidence shows that a relation of trust and confidence existed between the claimant and the said B., and that the said B., as claimant's agent, went to —— to settle claimant's claim for a loss against the —— Insurance Company, and that when the said B. returned from —— he reported to claimant that said insurance company disputed the justness of claimant's claim, and refused to pay the same in full, and that he, the said B., had been able, by compromising said claim, to collect from said company the sum of \$—— in full of claimant's claim for \$——, but could not collect more; and then and there advised claimant to accept said sum of \$—— in full of his said claim, and if the evidence shows that the claimant, relying on said statements and representations, and believing the same to be true, and by reason thereof, made no examination to discover whether said statements were true or false, but acted upon the same as true, and ratified the compromise so reported by the said B. to have been by him effected, and there and then accepted said sum of \$—— in full of his claim against said company for \$——, and if the evidence further shows that the said B., either before or after making said statements and representations, collected from said company on said claim an additional sum of \$——, and concealed such fact from the knowledge of the claimant, then you are instructed that it was not laches for the claimant to rely on the representations and statements of the said B., and accept and act upon them as true, and make no examination to discover whether they were true or false.¹⁴

§ 3503. Suspension of running of statute—Nonresidence

§ 3503(1). Missouri

You are instructed that plaintiff is a single and unmarried woman and that as such the matter of residence is a question of intention upon her part, and although a resident of —— may work and be employed in —— or any other state, that fact alone does not destroy the residence of such person in this state.¹⁵

§ 3503(2). Ohio

The jury are instructed that the facts in the case show that the plaintiff M. is the only one of the plaintiffs, who was within the

¹³ Vigus v. O'Bannon, 8 N. E. 778, 118 Ill. 334.

¹⁴ Vigus v. O'Bannon, 8 N. E. 778, 118 Ill. 334.

¹⁵ Lipperd v. Lipperd's Estate, 163 S. W. 934, 181 Mo. App. 106.

protection of the disability statute; that, at the time the cause of action accrued, she was under the protection of two disabilities—one of infancy, which long ago terminated, and absence from the state. It is a conceded fact that while still an infant, a nonresident, and absent from the state, and after the death of said ———, and after said will was probated, she, in control of a person standing in loco parentis to her, came within the state of ——— for the purpose of passing through it to acquire a new residence in another state; that she remained in this state the period of ——— days, and then went from it, and continued absent therefrom continuously up to the time named in the petition, but a greater period than the period of ——— years. The court, therefore, directs you, as a matter of law, that upon her coming bodily within this state, although an infant, and coming involuntarily, that the disability provided in the statute as to absence from the state was taken away from her; and, a greater period having elapsed from the beginning of the running of the statute than ——— years, that she is not entitled under the law to maintain this action. It is your duty, under the direction of the court, to find affirmatively that the will is the will of ———. You will appoint one of your number foreman, and so sign the verdict.¹⁶

§ 3504. Same—Concurrence of absence and death

The court further instructs the jury that, if they believe from the evidence that said ——— signed the note sued on herein as surety and not as principal, they should find for the defendant, unless they shall further believe from the evidence that, excluding such time as said ——— was absent by removal from the state, if he was absent therefrom, and such further time as elapsed between his death and the appointment of the administrator of said ———, and further excluding the ——— months immediately following the appointment of said administrator in which an action under the law could not be brought against said administrator, the time remaining between the ——— day of ———, when said note became due, and ———, when this suit was filed, did not amount to as much as ——— years, in which event the jury should find for plaintiff.¹⁷

§ 3505. Same—Action against convict

You are instructed that the ——— year statute of limitations on an open account does not begin to run until the accrual of the cause of action, and if you believe from the evidence in this case

¹⁶ *Powell v. Koehler*, 39 N. E. 195, 52 Ohio St. 103, 26 L. R. A. 480, 49 Am. St. Rep. 705.

¹⁷ *Beavers' Adm'r v. Ashlock*, 160 S. W. 785, 156 Ky. 93.

that the account of plaintiffs now sued on was not to be payable until the defendant should serve his time, or sentence, in the penitentiary, then, under the evidence in this case, the statute would not begin to run until the date he secured a pardon from said sentence and the plaintiff would have three years from the date of said pardon to bring this action.¹⁸

The court instructs the jury that the only way a convict sentenced to the penitentiary can be served is by serving a summons and copy of the complaint upon the keeper of the penitentiary, which must be delivered to the convict served, and if you find that the defendant was a convict and escaped from the penitentiary, thereby preventing a copy of summons and complaint being delivered to him by said keeper, then this would be such an improper act of his own as would prevent the statute running while he was at large and unpardoned.¹⁹

The court instructs the jury that if you believe from a preponderance of the evidence that the contract between ——— and defendant was that the debt sued on was not to become due until the defendant was returned from the penitentiary, and if you further find that defendant escaped and was not released, but was subsequently pardoned, then the statute would not begin to run until said pardon was granted.²⁰

§ 3506. Same—Effect of insanity

The court charges the jury that, if the jury should believe from the evidence that, at the time of the purported execution of the deed offered in evidence by the plaintiffs as having been made by ———, the latter was then insane—that is to say, of unsound mind to such an extent or degree as to incapacitate him from knowing and understanding the ordinary affairs of life or of transacting any business—and if he continued in that condition until his death, then the possession of the grantee during such incapacity of ——— could not be adverse to ———, and he could not claim adversely to ——— during the time of his incapacity by reason of his mental condition.²¹

The court charges the jury that if the jury should believe from the evidence that, at the time of the making of the purported deed offered in evidence, ——— was insane—that is, of unsound mind to such an extent as not to know and comprehend at the time that he was signing a deed conveying his house and lot—then said deed would be absolutely void; and, if the grantee, ———, en-

¹⁸ Reeder v. Cargill, 145 S. W. 223, 102 Ark. 518.

¹⁹ Reeder v. Cargill, 145 S. W. 223, 102 Ark. 518.

²⁰ Reeder v. Cargill, 145 S. W. 223, 102 Ark. 518.

²¹ Fowler v. Prichard, 41 So. 667, 148 Ala. 261.

tered into possession of the land under that deed, he could not claim the benefits of the statute of limitations or of adverse possession under that deed as color of title during the time ——— may have continued insane, and the statute of limitations or adverse possession would not begin to run in favor of the grantee, ———, or of his heirs, until the death of ———.²²

§ 3507. New promise

You are instructed that if you find from the evidence in this case that the note in suit was executed by the defendant on ———, and you further find that since the execution of said note, and within the ——— years prior to the bringing of this suit, the defendant, in writing, acknowledged indebtedness due from him to the plaintiff, then and in that event your verdict should be for the full amount due upon said note, after allowing the credit indorsed upon the back thereof.²³

§ 3508. Same—Sufficiency of acknowledgment of debt to remove bar of statute

§ 3508(1). Delaware

The court instructs the jury that our statute of limitations provides that no action of this character shall be brought after the expiration of three years from the accruing of such cause of action, subject, however, to certain exceptions specified in the statute, to which we need not now refer. If, however, the debtor, within three years next before the bringing of the action, acknowledges the debt to be a subsisting demand or makes any recognition of it as an existing debt, this will be sufficient to take the case out of the statute of limitations. The naked acknowledgment of a subsisting demand without an express promise to pay it is sufficient to take the case out of the limitation of the statute. We leave it to the jury to say whether it is proved in this case that the said ———, in his lifetime, made an acknowledgment of a subsisting demand against him for that part of the work and labor of the plaintiff which he alleges to have been performed more than three years before the commencement of the action, and if the jury so find, the bar of the statute as to that part of the claim would be removed. But if no such acknowledgment was made by the said ———, there can be no recovery for that part of said claim.²⁴

§ 3508(2). Illinois

You are instructed that an acknowledgment within ——— years of the debt, that would remove the bar of the statute of limitation,

²² *Fowler v. Prichard*, 41 So. 667, 148 Ala. 261.

²³ *Parks v. Woods*, 56 N. W. 442, 89 Iowa, 743.

²⁴ *Joseph v. Johnson*, 82 A. 30, 7 Pennewill, 468.

cannot be inferred from any language or expressions used by — which are equivocal, vague, or indeterminate, and which led to no certain conclusion, but the acknowledgment and promise to pay the debt, in order to bar the statute, must arise out of such facts as identify the debt with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it.²⁵

§ 3508(3). Pennsylvania

You are instructed that, if you find from the evidence that the defendant, within — years after the debt became due, acknowledged or admitted the same, and within — years after the first acknowledgment again acknowledged and admitted the debt, and that the two acknowledgments occurred within — years of each other, and the last acknowledgment within — years before the bringing of the suit in this case, then the debt sued on in this case was never barred, and the verdict must be for the plaintiffs for the full amount of the debt, with interest to date, if there was no uncertainty about the debt and the amount, and the acknowledgment and admission were clear, distinct, and unequivocal, and consistent with an intention or promise to pay it.²⁶

§ 3509. Part payment as removing debt from bar of statute

You are instructed that, if you find that there was no understanding or agreement in regard to the credit of the — dollars, then it does not avail as a payment to take this claim out of the statute of limitations, to prevent its being barred, because the parties must agree upon the payment. The plaintiff cannot, by giving credit upon an account—upon an outlawed bill, or a bill that may be outlawed—for the purpose of preventing the running of the statute, make a credit, of his own volition, on that account, and save the running of the statute. He cannot do it unless it is agreed between the parties that there is to be an application upon the account; and that is a question for you to determine, whether or not it was understood between the parties that such a credit was to be made to —, and that it was to be credited upon that account, and properly applied upon it. If it was so understood between them, it would be a proper application, and the plaintiff might maintain this action; otherwise, it cannot—and that is the question for you to determine.²⁷

§ 3510. Same—Payment by another than debtor

You are instructed that the next defense set up is the statute of limitations, and, if there has been no payment made by her within

²⁵ Walker v. Alexander, 27 N. E. 41, 128 Ill. 550. This is substantially accurate.

²⁶ Detzel v. Schomaker, 11 A. 637.

²⁷ Bay City Iron Co. v. Emery, 87 N. W. 652, 128 Mich. 506.

—— years, she could not be recovered against. It would be barred. If a payment has been made within —— years, while the original note would be barred, a recovery could be had upon the new promise. It is important for you to determine who made the payment. If she made the payment, or furnished the money, although the old debt may be barred, she would be liable on the new promise. If, however, a payment was made without her knowledge, and she did not afterwards ratify it by a promise, she would not be liable on the note. If upon her acquiescence, or if she had any part in the payment, she would be liable.²⁸

§ 3511. Burden of proof with respect to issue of new promise

You are instructed that there is but one question for you to determine in this cause; that is, did the defendant in this cause, within —— years prior to ——, promise positively and unconditionally to pay the note sued on in this action? As to this issue the burden is on the plaintiff, and, if he fails to make out said issue by a preponderance of the evidence, then you should find for the defendant. If the plaintiff so establishes this issue by a preponderance of the evidence, then you should find for the plaintiff. It is not a question whether the note was originally a just one, or whether it has been paid either by money or by other transactions between the parties. The law presumes that it is paid, unless there is a new promise to pay, of the character set forth in the preceding instruction.²⁹

²⁸ *Jacobs v. Gilreath*, 22 S. E. 757, 45 S. C. 46.

²⁹ *Sears v. Hicklin*, 83 P. 137, 3 Colo. App. 331.

CHAPTER CXCI

LIS PENDENS

§ 3512. Effect of filing lis pendens as against purchaser—Condemnation proceedings.

§ 3512. Effect of filing lis pendens as against purchaser—Condemnation proceedings

You are instructed that, if the petitioner commenced a suit to appropriate a right of way across the ———, donation land claim, and filed its lis pendens thereof in the auditor's office in ———, and subsequent thereto claimants obtained an option or agreement to purchase a part of said donation land claim, through which said proposed road extends and subsequent thereto said case came on to be heard and the damages were assessed and paid and the right of way appropriated by the petitioner, then the petitioner is the owner of said right of way and claimants' said right to purchase is subsequent and subordinate thereto.¹

¹Portland & Seattle Ry. Co. v. Ladd, 91 P. 573, 47 Wash. 88.

CHAPTER CXCIH

LIVERY STABLE KEEPERS

- § 3513. Care required in keeping horse—Duty to furnish medical aid.
- 3514. Same—Injuries to horses by fire.
- 3515. Liability to customer for injuries caused by horse becoming frightened.
- 3516. Right to recover from hirer of horse for injuries thereto.
 - 3516(1). Delaware.
 - 3516(2). Massachusetts.
 - 3516(3). Texas.
- 3517. Duty of customer not to overdrive.
- 3518. Liability of customer under contract not specifying time of use of horse or distance to be driven.
 - 3518(1). Delaware.
 - 3518(2). Massachusetts.
- 3519. Liability for injuries occurring while driving horse beyond itinerary specified in contract of hiring.
 - 3519(1). Delaware.
 - 3519(2). Massachusetts.
- 3520. Presumptions and burden of proof.
- 3521. Sufficiency of evidence of overdriving.

§ 3513. Care required in keeping horse—Duty to furnish medical aid

You are instructed that if you find that the defendants' failure, if any, to employ a veterinary surgeon to treat the wound of said horse within a reasonable time after they learned of said injury, and their conduct in attempting to themselves treat the wound was negligence and was the natural and probable cause of said horse contracting the disease known as lockjaw, and that its death was the natural and probable consequence of said disease, then you should find for plaintiff. In this connection, you are further instructed that it was the duty of the defendants, as caretakers of this horse, to see that the wound on the horse was properly treated, and that if defendants were unwilling to render such medical aid, it was their duty to notify plaintiff accordingly, and a failure to perform this duty would be negligence.¹

You are instructed that it was the duty of defendants to use ordinary care and prudence in taking care of the horse of plaintiff while in their custody, at their stable, and also to render proper medical aid to said horse after it was injured, adopting such means and using such methods in so taking care of the horse as are least likely to cause damage. In this connection you are further instructed that by the term "ordinary care," as used in this charge is meant

¹ Attaway v. Schmidt & Madigan Grocery Co. (Tex. Civ. App.) 188 S. W. 1010.

that degree of care, skill, and diligence which an ordinarily prudent person would use in the transaction of his own business under like or similar circumstances.²

§ 3514. Same—Injuries to horses by fire

You are instructed that the defendant in this case could not be held liable unless the loss of the horses was caused by the failure of the defendant company to exercise the ordinary care which I have said the law requires it to exercise, and if you should find from the evidence that the horses in this case were destroyed in consequence of fire which was not started by the defendant through any act of negligence on its part, or through any act of negligence on the part of any of the servants of the defendant intrusted with the care of this stable—I say, if you should find the horses were destroyed by a fire for the starting of which the defendant was not responsible, then the plaintiff cannot recover, unless you are satisfied by the evidence that by the exercise of ordinary care on the part of the defendant company the horses would have been saved, notwithstanding the fire.³

§ 3515. Liability to customer for injuries caused by horse becoming frightened

The court instructs the jury that if they find that the horse was easily frightened by proximity to automobiles, and the plaintiffs had knowledge of this fact, and that the plaintiffs drove on a road not contemplated in the hiring, and which was more traveled by automobiles than was contemplated, and if the jury further find that the plaintiffs, by driving on such road, not contemplated in the contract of hiring, came in proximity to an automobile, and that such proximity so brought about contributed to the accident, then the verdict should be for the defendants.⁴

§ 3516. Right to recover from hirer of horse for injuries thereto

§ 3516(1). Delaware

You are instructed that one who hires a horse from another owes a duty to the owner, without a special contract to that end, to use and treat the horse with such care and consideration as a reasonably prudent man would use and treat his own horse under like circumstances, regard being given to the known or apparent condition of the animal, the character of the weather and the condition of the roads, and the distance traveled and to be traveled. The maximum of care in the use and treatment of a hired horse is not

² *Attaway v. Schmidt & Madigan Grocery Co.* (Tex. Civ. App.) 188 S. W. 1010,

³ *Weaver v. Montana Stables*, 89 P. 154, 46 Wash. 65.

⁴ *Deming v. Johnson*, 69 A. 347, 80 Conn. 553,

demanding of one hiring a horse, as the law requires a man to take only such care, and just such care, of a thing hired, as he would take of a thing he owned, there being upon him the legal duty simply to treat and use it in such manner, as a man of ordinary prudence and discretion would treat and use his own property. If in this case it appears by the evidence, that the driver of the mare, who is admitted to be the defendant's agent and whose acts therefore become the acts of the defendant himself, abused, misused or neglected the mare in all or in any one of the several ways alleged, whereby and by reason whereof, the mare suffered the injuries from which she died, whether such injuries resulted while she was traveling a distance agreed upon or while traveling a distance greater than that agreed upon, your verdict should be for the plaintiff.⁵

§ 3516(2). Massachusetts

You are instructed that, after the horse went into the possession of the defendant, he was bound to take ordinary care, or such care of him as a prudent man takes of his own horse under the same circumstances.⁶

§ 3516(3). Texas

You are instructed that if you believe from the evidence that, at the time plaintiff hired the said horse to defendant, plaintiff knew that said horse had previously run away, was shyful and vicious and would jump when driven, and not gentle, and said facts were unknown to defendant, and you further believe from the evidence that said horse did shy and jump and run away, without any fault or negligence on the part of the defendant, then you will return a verdict in favor of the defendant.⁷

§ 3517. Duty of customer not to overdrive

You are instructed that it is the duty of the defendants' employé in driving the plaintiff's team to exercise such care and watchfulness for them and their condition as a man of ordinary prudence would exercise while driving them, and if such employé failed to exercise such watchful care over the horses, and in fact did not notice their condition, and that they were becoming exhausted, when he might have observed that fact by the exercise of such care, and continued to drive them until they were exhausted, such lack of oversight and watchfulness was negligence, and defendants are responsible for it, and the injury shown by the evidence to have resulted therefrom.⁸

⁵ Conaway v. Dukes, 90 A. 413, 5 Boyce, 74.

⁶ Edwards v. Carr, 13 Gray, 234.

⁷ Johnson v. Hyltin, 133 S. W. 296.

⁸ Wisecarver v. Long & Camp, 94 N. W. 467, 120 Iowa, 59.

§ 3518. Liability of customer under contract not specifying time of use of horse or distance to be driven

§ 3518(1). Delaware

You are instructed that, on the other hand, one who hires to another a horse to travel a given distance, or to make a trip with a general destination, without the precise distance being known, is presumed to know the condition of the horse to travel and withstand the fatigue of such a trip, and he assumes the risk of injury to and loss of his horse from natural and normal causes occurring or arising during the time the distance is being traveled; and if injury to his horse occurs from such causes, and not from abuse, misuse or neglect by the one who drives the horse, the owner cannot recover his loss, in an action at law, from the one to whom the horse is hired. Therefore, in this case, if the mare died from any ailment, or because of any treatment for any ailment, or from any cause other than from an ailment, or a cause arising from the alleged neglect and misuse of her by the defendant's agent, the plaintiff cannot recover, and your verdict should be for the defendant.⁹

§ 3518(2). Massachusetts

You are instructed that, if the plaintiff and the defendant made a contract by which the defendant hired the plaintiff's horse and carriage for use in driving for pleasure for a time and distance not fixed or agreed upon by them, the defendant rightfully drove the horse to L. and thence to P., and was responsible to the plaintiff for any injury to such horse or carriage, which was caused by the defendant's want of ordinary care and skill in driving or managing such horse and carriage in P. to be determined in view of the fact known by the plaintiffs, and presumed to have been considered by them in letting the horse, that the defendant was a one armed man, but was not responsible for any injury to such horse and carriage caused by the insufficiency of the plaintiff's harness for driving or tying the horse, or by reason of any disease, or physical infirmity, or want of docility of the horse, or by any peculiar habits or dispositions of the horse when tied, unless the defendant was notified of such peculiar habits and dispositions.¹⁰

§ 3519. Liability for injuries occurring while driving horse beyond itinerary specified in contract of hiring

§ 3519(1). Delaware

With regard to the controversy between the parties to this action respecting the distance for which the mare was hired to travel,

⁹ Conaway v. Dukes, 90 A. 413, 5 Boyce, 74.

¹⁰ Perham v. Coney, 117 Mass. 102.

we say to you, that if you find that the defendant contracted with the plaintiff to hire the mare for a trip limited from G. to S., and in fact the defendant's agent drove the mare a further distance, and if you also find that the extra driving of the mare for the extra distance was the cause of the alleged injury to and subsequent death of the mare, your verdict should be for the plaintiff.¹¹

§ 3519(2). Massachusetts

You are instructed that if the plaintiffs and defendant made a contract, by which the defendant hired the plaintiffs' horse and carriage for use in driving to and from L. only, and in violation of that contract the defendant drove the plaintiffs' horse and carriage to L. and from thence several miles to P., he became thereby responsible to the plaintiff for any injury to such horse and buggy in P., or while driving from L. to P. Whether or not such injury was caused by any want of ordinary care or skill of the defendant in driving the horse and carriage from L. to P., or in tying or managing the horse and carriage in P., or by any insufficiency of the harness of said horse, or any physical infirmity, or want of docility of the horse, would be immaterial, as the defendant's use of the horse and carriage, in driving beyond L. in violation of his contract, was a conversion of such horse and carriage, in the nature of an original unlawful taking of such horse and carriage, at the time of the defendant's leaving L., and such conversion caused the defendant to be liable in damages to the plaintiff therefor, equal to the difference between the value of such horse and carriage at the time it was taken by the defendant from L., and the value of the same when restored by the defendant to the plaintiff. Accepting pay for the use of the horse under such a contract was a waiver of the conversion.¹²

§ 3520. Presumptions and burden of proof

You are instructed that negligence is never presumed, it must always be proved; and when it be the basis of recovery, it must be proved by the one seeking to recover therefor. If in this case you find that the plaintiff lost his mare through the negligence of any one, the plaintiff can recover only when he proves to you by a preponderance of the evidence, that such negligence was the negligence of the defendant, through his agent, and that such negligence was the proximate cause of the death of the mare, without negligence on the part of the plaintiff or of his agent, entering into or contributing to it.¹³

¹¹ Conaway v. Dukes, 90 A. 413, 5 Boyce, 74.

¹² Conaway v. Dukes (Del.) 90 A. 413, 5 Boyce, 74.

¹³ Perham v. Coney, 117 Mass. 102.

§ 3521. Sufficiency of evidence of overdriving

You are instructed that if you find from the evidence that the plaintiff's horses, which were hired to the defendants, were injured while in the possession of the defendants by the lack of such care as an ordinarily prudent man would give under like circumstances, then the defendants are liable for the injuries so done to said horses, though the evidence may not have shown to you when or where the overdriving or other want of care took place. It is sufficient if the evidence shows that the horses were actually injured by the lack of proper care in the management and driving, if such lack of care is shown by their condition when returned by the defendants, though the proofs may not point out the exact spot at which, or the time when, the horses suffered by such mismanagement or want of care.¹⁴

¹⁴ Wisecarver v. Long & Camp, 94 N. W. 467, 120 Iowa, 59.

CHAPTER CXCIV

LOGS AND LOGGING

- § 3522. Contracts for sale of standing timber—Construction of contract.
 3523. Same—Duty of purchaser to remove timber within reasonable time.
 3524. Same—Necessity that purchaser remove timber within specified period.
 3525. Same—Effect of cutting timber within specified period.
 3526. Same—Conditions precedent to obtaining extension of time for removal.
 3527. Same—Damages for taking away timber to which purchaser not entitled.
 3528. Contract to sell trees of certain dimensions on certain lands—What trees within contract.
 3529. Same—Liability of purchaser for errors in cutting.
 3530. Same—Measure of damages for wrongful cutting by purchaser.
 3531. Same—Sufficiency of proof of damages from breach by purchaser.
 3532. Measure of damages for breach of contract to furnish logs to saw-mill.
 3533. Damages for breach of contract to purchase timber—Avoidable consequences.
 3534. Contract to cut and haul timber—Recovery by contractor who was prevented from performing.
 3534(1). Kentucky.
 3534(2). Michigan.
 3535. Measure of damages for breach of log-hauling contract.
 3535(1). Kentucky.
 3535(2). Michigan.
 3535(3). Texas.
 3536. Presumptions and burden of proof in actions for breach of contract.
 Right to use stream for floating logs, see post, § 5206.

§ 3522. Contracts for sale of standing timber—Construction of contract

The court instructs the jury that its duty is to determine all questions of fact, but that it is the exclusive duty of the court to construe the legal effect of instruments in writing; and that the court construes the deed offered in evidence in this case and made by and between the plaintiff and defendant, as follows: (a) That said instrument is a conditional sale of such standing timber on the tract of land described in said instrument as is cut and removed before the expiration of ——— years from the date of said instrument. (b) That the foregoing section of this instruction is subject to the qualification as to whether or not the defendant obtained an extension beyond the period aforesaid in said instrument.¹

§ 3523. Same—Duty of purchaser to remove timber within reasonable time

The court instructs you that the evidence in this case shows that ———, on the ——— day of ———, conveyed by his timber deed,

¹ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

all the pine timber over ——— inches in diameter on the lands described in this controversy, and all the pine and oak timber of the northwest fractional quarter of section ———, in township ——— south of range ——— west, to the ——— Lumber Company, defendant in this suit; and the court instructs you that by deed of conveyance, the timber described in the said deed became the property of the said lumber company with the right to enter upon said lands and to cut and remove the said timber described in said deed, unless the defendant, ——— Lumber Company, has forfeited its right to said timber by a failure to comply with the terms of the timber deed, and the court instructs you that while it was the duty of the defendant to cut and remove the timber from the land in question as expeditiously as possible, yet, in arriving at what is an expeditious removal, you must take into consideration the distance this timber was from the mill plant of defendant, the facilities which the company had at the date of the deed, with which to remove the timber, the method of removal in contemplation of the parties at that time, and the amount of timber the company had to cut before it should reach this timber, and all other circumstances favoring, and all other obstacles opposing the removal, and if you believe from the evidence in this case that the defendant was proceeding with reasonable dispatch to cut and remove the timber, according to reasonable and customary methods, taking into consideration all the circumstances in the case, then it was proceeding as expeditiously as possible, and your verdict will be for the defendant.²

You are instructed that under the timber deed executed by ——— to the defendant on the ——— day of ———, and under which the defendant company claims title to the timber in question, the defendant was not allowed a period of ——— years, or any other definite length of period of time in which to cut and remove the timber in controversy from the land on which it was situated, but that it was its duty to begin to cut and remove the timber from the land as expeditiously as possible, after the contract was made, and that it should continue to cut and remove the same as expeditiously as possible from that date until it was all cut and removed. In order to determine whether or not the defendant thus proceeded in cutting and removing said timber from the land, it will be your duty to take into consideration the location of the land, its accessibility, the character and quantity of timber thereon, the facilities which were reasonably obtainable by the defendant for the cutting and removing of the timber, and all other conditions and circum-

² Rowland v. Arkansas Lumber Co., 186 S. W. 821, 124 Ark. 180.

stances as detailed by the evidence, which might affect the cutting and removing of said timber.³

You are instructed that, if you believe from the evidence in this case that the defendant, by beginning to cut and remove the timber expeditiously after the contract was made on the — day of —, acting with reasonable dispatch under all the circumstances, and by continuing to cut and remove the same as expeditiously as possible from that date until it was all cut and removed, could have cut and removed all of the timber prior to the time same was cut, then you are told that the defendant forfeited its right to the timber, and that plaintiffs are entitled to recover of the defendant the reasonable cash market value of said timber cut in the latter part of —, together with interest thereon at — per cent. per annum from said date.⁴

§ 3524. Same—Necessity that purchaser remove timber within specified period

The court instructs the jury that if they believe from the evidence that there was any standing timber, remaining on the tract of land in question at the expiration of the — years period mentioned, and the extension period had not been acquired, such standing timber was on the — day of —, and thereafter, the property of the plaintiff.⁵

The court instructs the jury that such timber as was cut down and either lying in place or hauled to the mill on the same premises, but remained in the form of logs, prior to —, was and remained the property of the plaintiff.⁶

The court instructs the jury that as to such timber as was cut after —, it is immaterial whether it was hauled to the mill, whether it was sawed into lumber, or whether it was removed from the premises; for in either event the court instructs the jury that said timber was and remained the property of the plaintiff.⁷

The court instructs the jury that it was the duty of the defendant to have cut and removed the timber from the premises described in the deed here in question, before acquiring absolute title thereto; and if the jury believe from the evidence in this case that the defendant cut down, sawed, or manufactured timber into lumber, which lumber, although cut prior to —, remained on the premises on —, then in that event the defendant acquired no absolute title to such lumber, but that the same was the property of the plaintiff.⁸

³ Rowland v. Arkansas Lumber Co., 186 S. W. 821, 124 Ark. 180.

⁴ Rowland v. Arkansas Lumber Co., 186 S. W. 821, 124 Ark. 180.

⁵ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

⁶ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

⁷ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

⁸ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

The court instructs the jury that if they find from the evidence in this case that any timber was standing on the said premises on or after ———, as hereinbefore instructed the said standing timber was and remained the property of the plaintiff, and that the cutting, hauling, manufacturing, or sawing of such timber will not affect the ownership of said timber, and will not put title thereto into the defendant.⁹

§ 3525. Same—Effect of cutting timber within specified period

The court instructs the jury that under its construction of the deed in question it construes, and so determines, that the defendant acquired title to only such timber as was cut and removed from the premises prior to ———; that the conditions "cut and removed" are imperative, and that manufacturing or sawing the said timber into lumber "fore" ———, will not comply with, and cannot be substituted for, the condition of removal found in said deed, if the jury believe from the evidence that said sawed lumber remained upon the premises until after ———.¹⁰

§ 3526. Same—Conditions precedent to obtaining extension of time for removal

The court instructs the jury that it construes the said instrument with respect to the extension to be in the nature of a condition precedent, and that it was the duty of the defendant in order to avail itself of the said extension period, or any part thereof, to have tendered to the plaintiff the yearly interest provided for in said instrument, on or before the ——— day of ———.¹¹

The court instructs the jury that the plaintiff in this case may, if he so wishes, waive the payment of said yearly interest, both as to time and amount, but that said waiver must be established by the evidence in this case, and the only evidence submitted in this case with respect thereto upon which the court must pass consists of certain written letters which passed between the plaintiff and the defendant, and the court construes those letters as insufficient to establish a waiver either of the time of the payment of said yearly interest or of the amount thereof.¹²

§ 3527. Same—Damages for taking away timber to which purchaser not entitled

The court instructs the jury that if they believe from the evidence that there was any manufactured lumber lying upon the premises in question on ———, and if any timber was sawed or

⁹ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

¹⁰ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

¹¹ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

¹² Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

manufactured thereafter, the jury are reminded of instructions Nos. ———, ———, ———, and ———, to the effect that the said lumber was and remained the property of the plaintiff; and if the jury find from the evidence that the sawed lumber was taken and carried away by the defendant, its agents or employés, they, the jury, are instructed that the measure of damages in the event of such taking and carrying away shall be the value at the time of the said taking and carrying away.¹³

The court instructs the jury that there is a count in the declaration of the plaintiff alleging damage to the realty caused by the cutting and hauling of the timber uncut on ———; that the only evidence in the record concerning the amount of this damage is that it was \$—— or \$——, and this evidence is undisputed; and if the jury believe from the evidence that this statement is true they shall find for the plaintiff on this count.¹⁴

**§ 3528. Contract to sell trees of certain dimensions on certain lands
—What trees within contract**

The court instructs the jury that, in determining the ——— inch diameter referred to in the contract between the parties to this suit, the defendants had a right and were entitled to all trees measuring ——— inches, wood measurement, at the longest point of diameter through the tree, ——— inches above the general level of the land, and to no other trees.¹⁵

§ 3529. Same—Liability of purchaser for errors in cutting

The court instructs the jury that under the terms of the contract in issue the defendants, in cutting, had a right to honestly and fairly approximate the size of the tree, and that they are not responsible for reasonable slight errors or mistakes, if they have cut the timber in a manner consistent with what men of ordinary prudence would have honestly done.¹⁶

§ 3530. Same—Measure of damages for wrongful cutting by purchaser

The court instructs the jury that, if the trees cut were not merchantable timber, the measure of damages is the difference between the value of the plaintiff's premises before the injury happened and the value immediately after the injury, taking into account only the damages which have resulted from the defendant's acts, or, if the jury believe that the timber cut was merchantable timber, and you further believe that the defendants cut such merchantable timber

¹³ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

¹⁴ Blackstone Mfg. Co. v. Allen, 85 S. E. 568, 117 Va. 452.

¹⁵ Craddock Lumber Co. v. Jenkins, 97 S. E. 817, 124 Va. 187.

¹⁶ Craddock Lumber Co. v. Jenkins, 97 S. E. 817, 124 Va. 187.

under the size specified in the contract between the parties, then the measure of damages would be the market value of the timber so cut.¹⁷

§ 3531. Same—Sufficiency of proof of damages from breach by purchaser

The court instructs the jury that, in order to find a verdict against the defendants, the jury must be satisfied from affirmative proof that the plaintiff has been damaged, and proof of the amount and extent of such damage must be sufficiently clear and convincing as to enable the jury to reach a conclusion from the facts proved. If the jury should believe that the plaintiff has been damaged to some extent, yet, if the jury should further believe that the facts proved are not sufficiently certain upon which to found an intelligent verdict, they should find for the defendants. The jury, in arriving at a verdict, cannot resort to guesswork and conjecture, nor are they justified in asserting their own estimates or judgment, independent of the facts proved, and if in the judgment of the jury these have been insufficiently proved, the defendants cannot be held liable.¹⁸

§ 3532. Measure of damages for breach of contract to furnish logs to sawmill

You are instructed that, if you determine there has been a breach of the contract on the part of the defendants, the plaintiff is entitled to recover the difference between what these logs would cost him, if the defendants had carried out their contract to deliver the logs in the pond at the mill at ———, and what he would have had to pay for logs at the time he wanted them during the continuance of this contract, at ———, the reasonable price at ———. And, if these logs could not be obtained at ———, then the price he would have had to pay at the nearest available point, with the addition of the cost of transportation to ———, should be taken in estimating damages. That is the measure of damages in the case—the difference between what he would have gotten them for, during the life of this contract, and what he would have had to pay for them, if he had gone out into the market and purchased them at ———.¹⁹

§ 3533. Damages for breach of contract to purchase timber—Avoidable consequences

The court further instructs the jury that, even if they should believe from the evidence that the defendants did not pay plaintiffs for all the logs and trees which they contracted to pay for, but left

¹⁷ Craddock Lumber Co. v. Jenkins, 97 S. E. 817, 124 Va. 187.

¹⁸ Craddock Lumber Co. v. Jenkins, 97 S. E. 817, 124 Va. 187.

¹⁹ Williams v. Pacific Surety Co., 149 P. 524, 77 Or. 210.

some trees and some logs on the lands covered by the contract in question for which they did not pay, but should have paid, yet if they further believe from the evidence that the plaintiffs utilized the trees and logs so left, or any part of them, and realized anything therefor, or by the use of reasonable diligence could have utilized the same and realized therefor, or can yet do so, then such sums as the plaintiffs realized, or by the use of reasonable diligence should have realized, or can yet realize, therefor, or for the use thereof, must be credited to the defendants against any damages which the jury may find for the plaintiffs, but not so as to exceed the same.²⁰

§ 3534. Contract to cut and haul timber—Recovery by contractor who was prevented from performing

§ 3534(1). Kentucky

You are instructed that it is admitted that the defendant purchased a certain lot of cypress logs from one ———, and that it contracted with plaintiff to cut and deliver the logs on board cars at ———, in ——— county, at the agreed price of \$——— a thousand. Now, if you believe from the evidence that, under the terms of the contract between plaintiff and defendant, plaintiff was to cut the trees into logs ——— and ——— feet in length, if this could be done, and, if this could not be done, he was to cut the trees into logs of shorter lengths, and that plaintiff did so haul, cut, and load the timber that was actually shipped to defendant, and was ready, willing, and able to comply with his contract with reference to the remainder of the timber, and defendant refused to permit him to comply with his contract, then you will find for plaintiff.²¹

You are instructed, on the other hand, that if you believe from the terms of the contract plaintiff had agreed to deliver whole or entire trees after cutting out the hollow butts and all pecky tops, where this could be done, but if the trees could not be delivered whole they were to be cut in lengths of not less than ——— or ——— feet, and that plaintiff failed or refused to so cut and deliver the timber in question, then you will find for the defendant.²²

§ 3534(2). Michigan

If you find from the evidence, gentlemen, in this case, by a fair weight and preponderance, that if plaintiff had not been stopped by the defendant, he could have hauled out his sleigh haul logs, and also could have cut and put in this quantity of dead hemlock which he was using for his dray haul; that if he had not been stopped he

²⁰ M. C. McCorkle & Son v. Kincaid, 93 S. E. 642, 121 Va. 546.

²¹ Langstaff-Orm Mfg. Co. v. Wilford, 170 S. W. 1, 160 Ky. 733.

²² Langstaff-Orm Mfg. Co. v. Wilford, 170 S. W. 1, 160 Ky. 733.

could have completed the job on both kinds of timber—then I charge you that he would be entitled to such damages as I shall instruct you in a few moments. But, on the other hand, gentlemen, and from a different standpoint, I charge you expressly that if an honest fair-minded lumberman, of ordinary intelligence, experience, and prudence, would not have believed that the plaintiff, under the circumstances then existing, could put his sleigh haul logs then on skids to the river before ———, and also put in the remaining dray haul timber, and that the defendant did not so believe, then the defendant had the right to instruct the plaintiff to stop cutting dray haul logs and use his force to get all the logs ready cut to the river before cutting any more logs of either kind.²³

§ 3535. Measure of damages for breach of log-hauling contract

§ 3535(1). Kentucky

You are instructed that, if you find for plaintiff, you will award him the contract price on the timber actually cut and shipped to defendant, less any sum defendant may have paid thereon. On the remainder of the timber you will award him the difference between the contract price and what it would have reasonably cost plaintiff to carry out the contract.²⁴

§ 3535(2). Michigan

Now, gentlemen, if under these instructions you find that the plaintiff would be entitled to recover damages for being prevented from continuing his operation in cutting and hauling the dray haul logs, I must tell you what you might award him. It is the claim of the plaintiff, and he has given evidence tending to show that state of facts, that before this time he had constructed all necessary or useful roads for the purpose of taking out the remaining standing, dead hemlock timber, standing and lying dead hemlock timber on section ———; that there was a quantity of that of about ——— feet; that he had built all necessary roads and landings; and that he could have done that work for \$——— per thousand feet. The contract price was \$——— a thousand, and he claims to recover, as the measure of damage, the difference between the cost of putting in the logs and the contract price; and I charge you, gentlemen of the jury, that if you believe he is entitled to recover under these instructions which I have just stated to you and repeated, that that would be the measure of his damage. It is for you to say, first, how much timber there was there that he could have put in before the ———. Not just ———, because he says

²³ *Martindale v. Lobdell-Emery Mfg. Co.*, 155 N. W. 559, 189 Mich. 477, L. R. A. 1918F, 1.

²⁴ *Langstaff-Orm Mfg. Co. v. Willford*, 170 S. W. 1, 160 Ky. 733.

so, unless you are convinced from the evidence that that is true—but he could recover the difference between the cost of putting in such timber as he could and would have put in and the contract price. That would be the measure of damages.²⁵

§ 3535(3). Texas

You are charged that, if by a preponderance of the evidence you find that the plaintiff was ready, willing, and able to haul the quantity of logs as stipulated in the contract before you, but that he was prevented from hauling same on account of the defendant's failure to furnish sufficient logs for him to haul and failure to furnish ample skidways as alleged by plaintiff, then the defendant would be liable to plaintiff for such amount of damages as he has sustained by reason of such failure (if there was any) on the part of defendant, and the measure of damages in such case is the difference between the quantity of logs in feet actually hauled and the quantity of logs which the plaintiff could and would have hauled had the defendant on its part complied with the terms of the contract, computing at the rate for hauling for the first quarter \$—— per —— feet, price for the next quarter making not to exceed half a mile —— cents extra. And if you find the defendant liable under the evidence, applying the foregoing instructions, then return a verdict for plaintiff for such amount as you find him entitled to. If you do not find the defendant liable, then return a verdict for the defendant.²⁶

§ 3536. Presumptions and burden of proof in actions for breach of contract

The court instructs the jury that the plaintiff sues the defendant to recover damages for an alleged breach of contract, the same contract now in evidence before you, commonly called a logging contract. The plaintiff's charge in substance succinctly stated being that the defendant breached said contract in failing to furnish sufficient logs to keep the plaintiff's teams busy and failed to provide ample skidway. The defendant denies the allegations of plaintiff's petition charging breach of contract as alleged, and this places the burden of proof upon the plaintiff to establish by a preponderance of the evidence, by which is meant the greater weight of credible testimony, the material allegations of his petition.²⁷

²⁵ *Martindale v. Lobdell-Emery Mfg. Co.*, 155 N. W. 559, 189 Mich. 477, L. R. A. 1918F, 1.

²⁶ *Liberty Hardwood Lumber Co. v. Stevens* (Civ. App.) 199 S. W. 869.

²⁷ *Liberty Hardwood Lumber Co. v. Stevens* (Tex. Civ. App.) 199 S. W. 869.

CHAPTER CXCIV

LOST INSTRUMENTS

§ 3537. Sufficiency of evidence to establish.

§ 3537. Sufficiency of evidence to establish

You are instructed that parol evidence is admissible to show the execution and contents of a lost deed, but such evidence to establish the contents should be clear and certain. It should show, by the preponderance of the evidence, that the deed was properly executed with the formalities required by law, and should show the contents of the deed not literally but substantially.¹

¹ *Hitchens v. Ellingsworth* (Del.) 94 A. 903, 5 Boyce, 497.

CHAPTER CXCVI.

LOTTERIES

- § 3538. Elements of offense.
3538(1). Delaware.
3538(2). Missouri.

§ 3538. Elements of offense

§ 3538(1). Delaware

The court instructs the jury that the defendant stands indicted under a statute which prohibits any person by himself, his servant or agent, or as the servant or agent of another, to sell or dispose of, or have in his possession with intent to sell or dispose of, "any lottery policy, certificate, or anything by which such person or any other person promises or guarantees that any particular number, character, ticket, or certificate, shall in the event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt." etc. The statute applies equally to an agent as to a principal.¹

The court instructs the jury that the first count in the indictment charges the accused with disposing of "a certain thing, to wit, a paper slip with certain words and figures thereon, to one ———, by which he, the accused, then and there promised that said paper slip should on the happening of a certain contingency in the nature of a lottery, entitle him, the said ———, then and there the holder thereof, to receive money and certain goods, chattels of the value * * * against the form of the act of the General Assembly," etc. The third count is like the first, except it charges the accused with disposing of "certain numbers." The second count is like the first, except that instead of the words "by which he the said ——— then and there promised that said paper slip should on the happening of a certain contingency in the nature of a lottery entitle him," etc., it is averred "by which the ——— Company of," etc., "then and there promised," etc. And the fourth count is like the second, in that it charges him with disposing of "certain numbers," instead of "certain things." There is no proof in this case that the accused himself promised to deliver the selected article, but whatever promise there was in respect thereto, was made by the ——— Company.²

The court instructs the jury that a lottery has been defined to be a scheme for the distribution of money or property by chance, and that the scheme is not limited to the sale of tickets nor to the terms

¹ State v. Gilbert, 100 A. 410, 6 Boyce, 374.

² State v. Gilbert, 100 A. 410, 6 Boyce, 374.

or promises printed or written upon them. The meaning of a contingency in the nature of a lottery, within the contemplation of the statute, as applied to the facts of this case, is: "One [article] will be given without extra charge to the holder of certificate bearing number corresponding to the last three figures of the ——— bank clearings as published," etc. The element of lottery in this scheme lies in the chance to get one of the list of articles named on the card without the full payment of twenty-five dollars by the holder of this certificate. What the ——— bank clearings will be at the end of every week is the merest guess, and that any number on the certificate will correspond to the last three figures of such clearings is nothing less than chance.³

§ 3538(2). Missouri

The jury are instructed that, if you believe and find from the evidence and under these instructions beyond a reasonable doubt that at the city of ——— and state of ———, at any time within ——— years next before the ———, the defendant willfully and unlawfully did aid and assist in making and establishing as a business and avocation in the city of ——— and state of ——— a lottery or scheme of drawing in the nature of a lottery, and that the same was known as the "——— Lottery," and whereby any money of any amount and value whatever might be acquired of said lottery by lot or chance, you will find the defendant guilty as charged in the second count of the indictment; and unless you so find the facts you will acquit the defendant. If you find the defendant guilty, you will assess his punishment in the penitentiary for a term of not less than ——— years nor more than ——— years, or at imprisonment in the city jail or workhouse for not less than ——— months nor more than ——— months.⁴

You are instructed, further, that the mere fact that the defendant sold lottery tickets is not of itself sufficient to prove the charge made in the indictment herein, unless you further find from the evidence that within ——— years next before the filing of the indictment the defendant aided and assisted in making and establishing a lottery or scheme of drawing in the nature of a lottery as a business and avocation in the city of ——— and state of ———.⁵

³ State v. Gilbert, 100 A. 410, 6 Boyce, 374.

⁴ State v. Miller, 89 S. W. 377, 190 Mo. 449.

⁵ State v. Miller, 89 S. W. 377, 190 Mo. 449.

CHAPTER CXCVII

MALICIOUS MISCHIEF

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§ 3539. Elements of offense

You are instructed that this indictment is for the common-law offense of malicious mischief, which is defined to be "any malicious or mischievous injury, either to the rights of another, or to those of the public in general." It may be defined in general terms as including all malicious physical injuries to the rights of another, which impair utility or materially diminish value.¹

§ 3540. Malice as essential element of offense

§ 3540(1). Delaware

You are instructed that malice is a necessary ingredient of the offense charged against the defendants, and it must appear from the evidence, either express or implied, in order to sustain the indictment.²

§ 3540(2). Oklahoma

You are instructed that, this being an information for malicious mischief, malice is a necessary ingredient to be proved, or made to appear from the facts or circumstances proved. Without this ingredient, the crime is not complete, and the act complained of would be only a trespass, for which the party or parties injured would be compelled to resort to a civil action for redress, and not a

¹ State v. McCallister, 76 A. 226, 7 Pennewill, 301.

² State v. McCallister, 76 A. 226, 7 Pennewill, 301.

criminal prosecution, and, unless you believe from the evidence beyond a reasonable doubt that such malice has been proved, it is your duty to acquit the defendant.³

§ 3541. What constitutes malice

The court instructs the jury that such acts or conduct toward or in relation to the property of another as evinces a disposition of wanton deviltry and reckless disregard of the rights and property of another is, in law, malice, the same as if he had a well-formed design in his mind to annoy or injure the owner of the property.⁴

§ 3542. Necessity of showing malice against owners of property injured

§ 3542(1). Delaware

You are instructed that this court has never confined malice, necessary to support the offense charged, specifically to the owner of the property destroyed or injured. Willful or wanton cruelty, or injury to or destruction of property, committed under such circumstances as to indicate a malignant spirit of mischief, is sufficient to constitute the offense of malicious mischief. Malice may be shown by proof of willful and wanton acts, or it may be inferred from attendant facts and circumstances.⁵

§ 3542(2). Oklahoma

You are instructed that the malice necessary to constitute this offense must exist against the owner or owners of the property as charged in the information. Malice against the property, if proved, will not warrant a conviction. In order to convict the defendant upon this information, the prosecution must prove, to the satisfaction of the jury beyond a reasonable doubt, that the defendant knew the property in question belonged to the parties as charged in said information, and so knowing, willfully and deliberately injured the same through malice toward the said owners as charged in said information, and, unless this is done, it is your duty to acquit the defendant.⁶

§ 3543. Liability for maliciously pulling up and taking away fruit trees

The jury are instructed that if certain trees of the kind described in the indictment were severed and removed from the land of A. wrongfully and without the consent of the owner, and some of them were within a short time planted upon land occupied by the defendant, and if by the admission of the defendant the jury find

³ *Colbert v. State*, 124 P. 78, 7 Okl. Cr. 401.

⁴ *State v. Tarlton*, 118 N. W. 706, 22 S. D. 496.

⁵ *State v. McCallister*, 76 A. 226, 7 Pennewill, 301.

⁶ *Colbert v. State*, 124 Pac. 78, 7 Okl. Cr. 401.

it to be a fact that he placed such trees where they were found, such facts would warrant the jury in finding the defendant guilty of the crime charged, unless the possession of said trees has been explained, or unless the explanation offered on behalf of the defendant creates in the minds of the jury a reasonable doubt as to whether the trees had been wrongfully taken from A.'s land.⁷

§ 3544. Reckless driving of vehicle of another

You are instructed that, if the proof in this case satisfies you beyond a reasonable doubt that these defendants on the occasion referred to drove that automobile down that public road in such a furious manner, so regardless of the rights of the owner of it, as not to know and not to care whether they smashed it up, and while so recklessly driving it was wrecked and broken up, the law says they are presumed as intending to smash it up, because that is the reasonable consequence of their act, and if you are satisfied beyond a reasonable doubt that these facts existed, then they are guilty of the crime of malicious mischief.⁸

§ 3545. Acts done pursuant to permission of another

The jury are instructed that, if you believe that the defendants honestly were of the belief that the house was the property of K., and he had the right to give it to them, they were not guilty; but if they did the acts complained of, willing to run the risk of a suit, or careless whether they had a right or not, that would not protect them, and they would be guilty, or if they did such acts, relying solely upon the promise of K. to protect them, they would be guilty.⁹

§ 3546. Liability for acts done in belief in right to do them in removing menace to peaceable possession of land

You are further instructed that if you believe from the evidence that the defendant in cutting down the three telephone posts alleged in the information to have been cut down by defendant did cut down the said posts acting under a reasonable claim of right and the honest belief that the said posts were on his land and a menace to his quiet and peaceable possession of the same, then, whether the posts were actually on his land or not, if the defendant did have the honest belief in good faith that they were, you will find that he did the acts charged without malice toward the owners of the said telephone posts, and since malice must be present to constitute the crime of malicious mischief, it will be your duty to acquit the defendant.¹⁰

⁷ State v. Roscum, 104 N. W. 800, 128 Iowa, 509.

⁸ State v. Davis, 70 S. E. 811, 88 S. C. 229, 34 L. R. A. (N. S.) 295.

⁹ State v. Roseman, 70 N. C. 235.

¹⁰ Colbert v. State, 124 P. 78, 7 Okl. Cr. 401.

§ 3547. Acts done in abating a nuisance

You are further instructed that if you believe from the evidence that the three telephone posts alleged in the information to have been cut down by defendant had been erected upon defendant's land over his objection, and after he had refused his consent to their erection upon his land, and if you further believe from the evidence that defendant gave due and reasonable notice to the owners of the said telephone posts to remove the same from defendant's land, and if you further believe from the evidence that the defendant in cutting down said poles did not do so in a wanton spirit of destruction of property, but did use only the force and means necessary to remove said poles from his land, then you will find that the defendant lawfully abated a nuisance menacing his property rights and interfering with his quiet and peaceable possession of the said property, and it will then be your duty to acquit the defendant.¹¹

§ 3548. Right of abutting owner to cut down telegraph poles in highway

You are instructed that a landowner whose property abuts the highway on which there is erected telegraph poles bearing arms or crosspieces which project beyond the limits of the highway and over his land, carrying wires, may not willfully cut down or destroy such poles. His redress is in the courts.¹²

§ 3549. Liability of tree warden for injuring tree

The court instructs the jury that, if you find from the evidence that, if the defendant, acting as a reasonable man, was justified in believing and honestly believed that he had the authority that he exercised, as tree warden in injuring the tree of the prosecuting witness, he was not guilty; but if you find that, if he had taken any proper precaution to learn of his rights and duties as tree warden, he would not have acted as he did, and find that he was grossly negligent in the performance of his duties as tree warden, you may find that he acted wantonly.¹³

The court instructs the jury that an act done heedlessly, without regard to the propriety demanded by the circumstances of the case, and in reckless disregard of the rights of others, with a total absence of care, amounting in this case to gross negligence by the defendant in the discharge of his duties as tree warden, would be an act done wantonly.¹⁴

¹¹ *Colbert v. State*, 124 P. 78, 7 Okl. Cr. 401.

¹² *State v. McCallister* (Del.) 76 A. 226, 7 Pennewill, 301.

¹³ *Commonwealth v. Byard*, 86 N.

E. 285, 200 Mass. 175, 20 L. R. A. (N. S.) 814.

¹⁴ *Commonwealth v. Byard*, 86 N. E. 285, 200 Mass. 175, 20 L. R. A. (N. S.) 814.

§ 3550. Character or extent of injury to property**§ 3550(1). Oklahoma**

The jury are instructed that the injury to the property must be of such character as to impair the utility of the property, and negligence or even injury caused in the heat of passion, upon dispute, will not constitute the offense, but only willfulness and malice will constitute the offense, and the question of malice and willfulness is for the jury, which is to convict only upon a finding that the injury was done maliciously and willfully, and, unless you do so find from the testimony beyond a reasonable doubt, it is your duty to acquit the defendant.¹⁵

§ 3550(2). South Dakota

The court instructs the jury that the good order and welfare of the community is at stake. No matter whether a man breaks up a lot of property or a little, if he does it in that spirit of wanton "cussedness," as we sometimes term it, or with a wish to annoy, vex, or injure some other person, why, of course, he should be punished.¹⁶

§ 3551. Matters considered in determining issues

You are instructed that the defendants admit the proof of the existence of interference in the erection of the poles in the place of the four poles, which, it is conceded, were cut, but they claim that the resistance was made because the arms on the poles when erected would extend beyond the limits of the highway and over the defendant's farm. Such resistance, as an independent act, if made in good faith, as claimed, would not in itself warrant an inference that the defendants, or either of them, committed the offense charged, nor would it evince a spirit of maliciousness, but such resistance and interference may and should be considered by you in connection with the other evidence before you, in determining the question of the innocence or guilt of the accused.¹⁷

§ 3552. Sufficiency of evidence

We say to you that proof to your satisfaction of the sawing down of the poles by the defendants themselves, or by some unknown person through their procurement or by their command, would sustain the charges of the indictment; but if you find that they, or either of them, as principal or accomplice, did not destroy or injure the poles or wires of the company, any acts of resistance or interference which they may have committed would not be sufficient alone to sustain the indictment.¹⁸

¹⁵ Colbert v. State, 124 P. 78, 7 Okl. Cr. 401.

¹⁶ State v. Tarlton, 118 N. W. 706, 22 S. D. 495.

¹⁷ State v. McCallister (Del.) 76 A. 226, 7 Pennewill, 801.

¹⁸ State v. McCallister (Del.) 76 A. 226, 7 Pennewill, 301.

CHAPTER CXCVIII

MALICIOUS PROSECUTION

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§ 3553. Elements of cause of action**§ 3553(1). Arkansas**

The jury are instructed that, if you find from a preponderance of the evidence that defendant, while acting without probable cause and with malice, instigated, procured, and caused the arrest of the plaintiff by procuring or causing a warrant to be issued by ———, a justice of the peace, for the arrest of the plaintiff on the charge of arson, and that plaintiff was arrested and placed under bond for her appearance at the preliminary hearing, and that she was acquitted and discharged of the crime of arson by the trial justice, then your verdict will be for the plaintiff.¹

§ 3553(2). Delaware

You are instructed that, in an action of this character, it is incumbent upon the plaintiff to prove to the satisfaction of the jury: (1) That there was a prosecution instituted against him by the defendant, as alleged in the declaration; (2) that the prosecution was malicious; (3) that the prosecution was without probable cause; (4) that the prosecution terminated in favor of the plaintiff; and (5) that by reason of the prosecution he sustained damages. And if the plaintiff fails to establish any one of these essential elements necessary to constitute a malicious prosecution, he will not be entitled to a recovery.²

§ 3553(3). Illinois

The jury are instructed that, in order to sustain this action for malicious prosecution, it must be proved by the greater weight of all the evidence that the prosecution complained of was instituted or instigated by the defendant, and that such prosecution was made with malice, and it must further also appear from the greater weight of all the evidence that such prosecution was without probable cause; if each of these requisites are not so proved, you should find for the defendant.³

§ 3553(4). Indiana

You are instructed that, before the plaintiff will be entitled to recover anything, he must prove, by a preponderance of the evidence, (1) that the plaintiff was charged with the crime of ———; (2) that he was arrested upon said charge; (3) that he was tried and acquitted upon said charge; (4) that the defendants caused the arrest of the plaintiff, or were instrumental therein, or in some way voluntarily aided or abetted in the prosecution of the plain-

¹ McNeal v. Millar, 220 S. W. 62, 143 Ark. 253.

² Plummer v. Collins, 77 A. 750, 1 Boyce, 281.

³ Brunk v. Huthmacher, 165 Ill. App. 295.

tiff; (5) that such prosecution was malicious and without probable cause.⁴

§ 3553(5). *Kentucky*

The court further instructs you that plaintiff does not sue in this case for false imprisonment or for an unlawful arrest, but for maliciously, and without probable cause, causing said warrant to be issued and said indictment to be returned against her, and the court now instructs you that, although you may believe from the evidence in this case that defendant did arrest the plaintiff and carry her to ———, or, that she was arrested at his instance, and turned loose, yet you cannot find damages for her against defendant on account of said arrest or on account of said imprisonment, or for any expense incurred by her in going to ——— or in defending herself against said prosecution, unless you shall further believe from the evidence that said defendant maliciously, and without probable cause, procured, or aided or assisted in procuring, the issuance of said warrant or the return of said indictment against plaintiff as defined to you in instruction No. ——— herein.⁵

§ 3553(6). *Michigan*

You are instructed that there are two questions of fact to be determined, in order to ascertain whether the plaintiff can maintain this action, viz. that the motive which the defendants in this suit had in commencing the attachment suit was malicious, and, second, that they caused it to be issued without probable cause for so doing, and that, if the jury find that the attachment proceedings were commenced and prosecuted without probable cause, they are at liberty to infer malice.⁶

§ 3553(7). *Missouri*

The court instructs the jury that if you believe, from the evidence in the case, that the defendants herein, or either of them, by their servants or agents, willfully, maliciously, and without probable cause did aid, advise, or procure an information to be filed in the circuit court of ———, on or about the ——— day of ———, or did willfully, maliciously, and without probable cause aid, abet, and advise the continuance of said prosecution after the filing of said information by their servants or agents for the crime of ——— in the ——— degree and on said information a state warrant was issued, and the plaintiff was arrested upon said warrant, and thereby required and compelled to give bond for his appearance to answer said alleged offense, and that plaintiff was

⁴ *Evansville & T. H. R. Co. v. Talbot*, 29 N. E. 1134, 131 Ind. 221.

⁵ *Keiner v. Collins*, 171 S. W. 399, 161 Ky. 696.

⁶ *Le Clear v. Perkins*, 61 N. W. 357, 103 Mich. 131, 26 L. R. A. 627.

in accordance with the conditions of said bond compelled to appear in said court, and that he did appear and was discharged, then the jury should find the issue for the plaintiff.⁷

§ 3553(8). Tennessee

You are instructed that this action is only intended to apply to cases where a criminal accusation is made against an innocent man with malice, and in the absence of even a fair, reasonable probability that it is true.⁸

§ 3553(9). Texas

You are instructed that if, under the foregoing instructions, you are satisfied from a preponderance of the evidence that the defendant was actuated by malice in making the complaint of theft and prosecuting the same, as alleged, and the same was without probable cause, the plaintiff is entitled to recover, and you will award him damages in accordance with the rules laid down in other instructions.⁹

§ 3554. Necessity of showing malice

Inference of malice from want of probable cause, see post, § 3575.

The jury are instructed that the question of the guilt or innocence of the plaintiff of burning the mining plant is not involved in the case. Although you may believe she is absolutely innocent, still if the defendant had no malice against her in instituting the prosecution your verdict will be for the defendant.¹⁰

The jury are instructed that, if you find from the evidence that the defendant simply told the officers truthfully what he knew about the fire, and that at the request of the officers he signed the statement upon which the warrant was issued, and without malice, your verdict will be for the defendant.¹¹

§ 3555. What constitutes malice

§ 3555(1). Alabama

The court instructs the jury that malice in law is not necessarily hate or ill will towards the person prosecuted, or towards any one else, but it may consist in any motive for bringing the prosecution other than a bona fide purpose to punish guilty parties.¹²

The court charges the jury that whatever is wrongfully, vexatiously, and purposely done is in law maliciously done.¹³

⁷ *Carp v. Queen Ins. Co.*, 101 S. W. 78, 203 Mo. 295.

⁸ *Graham v. Fidelity Mut. Life Ass'n*, 37 S. W. 995, 98 Tenn. 48.

⁹ *Ralney v. Old (Civ. App.)* 180 S. W. 923.

¹⁰ *McNeal v. Millar*, 220 S. W. 62.

¹¹ *McNeal v. Millar*, 220 S. W. 62, 143 Ark. 253.

¹² *Fowlkes v. Lewis*, 65 So. 724, 10 Ala. App. 543.

¹³ *Rutherford v. Dyer*, 40 So. 974, 146 Ala. 665.

§ 3555(2). Delaware

You are instructed that any unlawful act done willfully and purposely, to the injury of another, is as against that person, in a legal sense, malicious. Malice, as applied to a malicious prosecution, this court has held, means ill will against a person, and is indicated by the disposition or temper of mind with which the party did a particular act, as where he did it with the view to injure a particular individual generally, or in some specific manner, or that he acted from personal animosity or revenge. And, further, if it be shown that there was a want of probable cause for the prosecution, the law implies malice from that circumstance.¹⁴

§ 3555(3). Indiana

The court instructs the jury that in the complaint it is charged that the defendant instituted and prosecuted a criminal prosecution against the plaintiff maliciously. In the legal sense, any wrongful act done willfully and purposely, and without just cause or excuse, to the injury of another, is, as against that person, malicious; and malice, in the sense of the law, does not presuppose personal hatred or revenge, but may be implied under certain circumstances from a total want of probable cause, or from gross or culpable omission to make suitable and reasonable inquiry, and both want of probable cause and malice must be shown to exist to entitle plaintiff to recover. Malice is a question of fact for the jury, who may infer it from a want of probable cause, though they are not bound to do so.¹⁵

§ 3555(4). Kansas

You are instructed that the prosecution of a person with any other motive than to bring the guilty person to justice is, in the law, a malicious prosecution.¹⁶

§ 3555(5). Missouri

The court instructs the jury that by the term "malice," as used in these instructions, is not meant mere spite or ill will, but a wrongful act, intentionally done, without just cause or excuse.¹⁷

§ 3556. Necessity of showing want of probable cause**§ 3556(1). Alabama**

You are instructed that although you may believe that the defendant caused the arrest of the plaintiff from malice, yet you cannot find for the plaintiff, unless you are also reasonably satisfied

¹⁴ *Plummer v. Collins*, 77 A. 750, 1 Boyce, 281.

¹⁵ *Pontius v. Kimble*, 104 N. E. 981, 56 Ind. App. 144.

¹⁶ *Foltz v. Buck*, 131 P. 587, 89 Kan. 381.

¹⁷ *Bowers v. Walker*, 182 S. W. 116, 192 Mo. App. 230.

that he had no reasonable cause to believe the plaintiff guilty of larceny.¹⁸

§ 3556(2). *Arkansas*

The jury are instructed that, if you find from the evidence that the facts and circumstances known to the defendant were such as to induce in the mind of a reasonable man the belief that the plaintiff was guilty of the offense charged, and did induce such belief in defendant's mind, your verdict will be for the defendant.¹⁹

§ 3556(3). *Michigan*

You are instructed that, this being a prosecution for damages arising out of the suing out of a writ of replevin proper in form, it is incumbent upon plaintiff to show that the defendants in this case acted without probable cause, before she can recover any damages.²⁰

§ 3557. What constitutes probable cause

Sufficiency of evidence of want of probable cause, see post, § 3579.

§ 3557(1). *Alabama*

I charge you that the desire of plaintiff to go to the house of ——— to collect a bill would not be either legal cause or good excuse, within the meaning of the law, to justify him in either going on the premises of defendant after being warned not to do so, or his failure to leave said premises after being requested not to do so.²¹

The court charges the jury that, if there was no contract in existence between the defendant water supply company and plaintiff by which the company was to furnish water to any fixed time in the future, then the company had the right, in ———, to cut off the water at stopcock at the curb; and if the jury believe, from the evidence, that the plaintiff illegally interfered with defendant's employes when they attempted to so cut off said water, then he was guilty of disorderly conduct, and they must find for the defendant.²²

§ 3557(2). *California*

The jury are instructed that if, from the evidence in this case, you believe that prior to the ——— day of ——— the plaintiff had done acts or had so conducted himself as to lead a reasonable man to believe that he would be in danger in resisting the acts of

¹⁸ *Sanders v. Davis*, 44 So. 979, 153 Ala. 375.

¹⁹ *McNeal v. Millar*, 220 S. W. 62, 143 Ark. 253.

²⁰ *Harris v. Thomas*, 103 N. W. 863, 140 Mich. 462.

²¹ *Tutwiler Coal, Coke & Iron Co. v. Tuvlin*, 48 So. 79, 158 Ala. 657.

²² *Sweeny v. Bienville Water Supply Co.*, 25 So. 575, 121 Ala. 454.

said plaintiff under the circumstances disclosed by the evidence to have existed on the said date of ———, and if you further believe from the evidence that the defendant on such date had reason to believe and did believe that he was the owner of certain property in the possession of him, the said defendant, and that said property was taken away from said defendant by the said plaintiff, and that the said defendant was then and there in fear of said plaintiff, which fear prevented him from resisting the acts of the said plaintiff, and if you further believe from the evidence that said defendant fairly presented the foregoing facts to the district attorney of ——— county, and acted upon the advice of such district attorney in filing the criminal complaint of robbery set forth in count ——— of plaintiff's declaration, or in filing the complaint of larceny set forth in count ——— of plaintiff's declaration, then I instruct you as a matter of law that the defendant had, under such circumstances, probable cause for the filing of such complaint or complaints, as the case may be, and your verdict must be for defendant, whether there be proof of malice or not.*

§ 3557(3). Delaware

You are instructed that, in considering the question of probable cause, to which we have last directed your attention, you should not concern yourselves with, or consider, whether the plaintiff was, at the time the complaint was made against him by the defendant, guilty or innocent; nor should you in this connection consider whether the defendant made the complaint from malicious motives. The single question for you to consider at this point is whether the defendant had, at the time of making the complaint and causing the arrest of the plaintiff, reasonable and probable cause for doing so. Whether there was or was not probable cause depends upon the defendant's personal knowledge or information communicated to him of facts and circumstances, at the time the prosecution was begun, sufficient to excite in the mind of a reasonably cautious and prudent person a reasonable belief in the plaintiff's guilt. It is immaterial whether the defendant acted on facts of his own knowledge or upon information from sources which he in good faith regarded as reliable, if you find that they were such facts and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty as charged in said complaint.²³

You are to determine whether the evidence before you was or was not sufficient to induce in the mind of the defendant a candid belief in the charge which he made against the plaintiff. If you should believe there was sufficient evidence to induce such a belief,

*Franklin v. Irvine (App.) 198 P. 647.

²³ Plummer v. Collins, 77 A. 750, 1 Boyce, 281.

then there was probable cause for the defendant's action, and the plaintiff would not be entitled to recover.²⁴

§ 3557(4). Georgia

You are instructed that "probable cause" is defined to be the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which she was prosecuted.²⁵

§ 3557(5). Illinois

The court instructs the jury that if they believe, from the evidence, that the plaintiff willfully and maliciously set fire to and burned about ——— shocks of corn belonging to the defendant, as stated in the complaint under oath of the defendant, read in evidence to the jury on behalf of the plaintiff, then, and in such case, the defendant had probable cause for the procuring of the plaintiff to be arrested on a charge of malicious mischief, and the jury should find the defendant not guilty.²⁶

The court instructs the jury, for defendant, that if they believe, from the evidence, that the defendant had probable cause to institute the criminal proceedings against the plaintiff, then the plaintiff cannot recover. Probable cause is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense of which he is charged.²⁷

§ 3557(6). Kentucky

The court further instructs you that, if you shall believe from the evidence in this case that defendant, at the time complained of by plaintiff, had received information to the effect that a person of plaintiff's description had stolen a watch in the city of ———, and that said information was such as a reasonably prudent person would act upon, and that defendant, from such information, had reasonable grounds to believe, and in good faith did believe, that she was the person wanted in ——— upon said charge, then defendant had probable cause for procuring the issuance of said warrant or the procuring of the return of said indictment or in aiding or assisting in so doing, if you believe from the evidence that he did so, or did aid or assist in doing either of these things, and the law in this case is for the defendant, and you will so find.²⁸

The court instructs the jury that there was probable cause for

²⁴ *Plummer v. Collins*, 77 A. 750, 1 Boyce, 281.

²⁵ *Stewart v. Mulligan*, 75 S. E. 991, 11 Ga. App. 660.

²⁶ *Calef v. Thomas*, 81 Ill. 478.

²⁷ *Calef v. Thomas*, 81 Ill. 478.

²⁸ *Keiner v. Collins*, 171 S. W. 399, 161 Ky. 696.

the prosecution referred to, if defendant, when the prosecution was instituted, believed, and had such grounds as would induce a man of ordinary prudence to believe, that plaintiff, by himself or in conjunction with others, had taken defendant's hog and converted it to his or their own use.²⁹

§ 3557(7). *Maryland*

The court instructs the jury that if they find from the evidence that on or about the ——— day of ———, the plaintiff was arrested on a warrant and brought to the office of ———, a justice of the peace, and that he was thereafter released on bail, after having prayed a jury trial, if the jury shall so find, and was held to await the action of the next term of the circuit court for ——— county, and further find that ———, the attorney for the said defendant, and her legal adviser in connection with her action in procuring the warrant for the arrest of the plaintiff, offered in evidence, with authority from the said defendant, or acting at her instance, informed the state's attorney for ——— county that she did not desire any further prosecution of said case, and that by reason thereof, if the jury so find, the said state's attorney did not prosecute said case in the circuit court for ——— county (and that by the action of the state's attorney for ——— the prosecution of the plaintiff on said warrant was at an end), if the jury shall so find, and shall further find that said warrant was issued at the instance of, and on the oath of, the defendant, and that said defendant procured the arrest and prosecution of the plaintiff before the said justice of the peace under such circumstances as would not have induced a reasonable and cautious person to have undertaken a prosecution from public motives, then there was no probable cause for said prosecution, and the jury may infer, in the absence of sufficient proof to satisfy them to the contrary, that said prosecution was malicious in law, and their verdict may be for the plaintiff, unless the jury find the facts set forth in the defendant's ——— or ——— prayer. And, if the jury find the facts set forth in either said ——— or ——— prayer of the defendant, then the plaintiff is not entitled to recover, and their verdict must be for the defendant, even though the jury may find the facts first above set forth.³⁰

§ 3557(8). *Missouri*

The court instructs the jury that by the phrase "probable cause," as used in these instructions, is meant belief in the guilt of the accused, based upon circumstances sufficiently strong in themselves

²⁹ *Davis v. Calvin*, 136 S. W. 219, 143 Ky. 270.

³⁰ *Bishop v. Frantz*, 93 A. 412, 125 Md. 183.

to induce such belief in the mind of a reasonable and cautious man.³¹

§ 3557(9). *Nebraska*

You are instructed that, if you believe from the evidence that the defendant's hay was stolen, as alleged, by some person, and that upon inquiry he found a reputable witness who told him that he saw the plaintiff take the said hay, and that he, said witness, would so swear upon a trial, and that defendant had an honest belief in the truth of such information, this would constitute probable cause.³²

§ 3557(10). *New Jersey*

You are instructed that, if you shall conclude that defendant saw what a reasonably prudent and cautious man would have been led to believe was a revolver in the woman's satchel at the time and place when he says he saw a revolver there, and, relying upon what he believed to be knowledge that this woman did possess this revolver in violation of the statute concerning concealed weapons, he made his complaint, it would excuse him, because the presence of reasonable and probable cause is a defense and would absolve him from any liability on that account.³³

§ 3557(11). *South Dakota*

You are instructed that, if you find from the evidence that at said county of ———, on the ——— day of ———, the plaintiff held in her hands a loaded shotgun, which she pointed at the defendant, intending to shoot and hit the defendant, and that such action on her part was as claimed by the defendant in his answer, and as by him testified to, then her acts were wrongful and unlawful, and the defendant was justified in causing her arrest and her prosecution in this court, and your verdict should be for the defendant.³⁴

You are instructed that if, on the other hand, you find that the defendant was upon lands owned or leased by the husband of the plaintiff against his will, then the defendant was a trespasser thereon, and if you further find that the defendant was attempting to take away therefrom the cattle of plaintiff's husband, and was using vile language toward and threatening to injure him, and that defendant had others with him whom he had told and instructed to take said cattle, and also told and instructed to club the plaintiff's husband, and that defendant was angry and made threats which plaintiff might reasonably believe would be carried out, and which

³¹ *Bowers v. Walker*, 182 S. W. 116, 192 Mo. App. 230.

³² *Maynard v. Sigman*, 91 N. W. 576, 65 Neb. 590.

³³ *Livesey v. Helbig*, 94 A. 47, 87 N. J. Law, 303.

³⁴ *Wren v. Rehfeld*, 157 N. W. 323, 37 S. D. 201.

he and those he had with him would carry out, and you further find that the plaintiff did not shoot at the defendant, but shot in the air, not intending to hit or shoot him, then her acts were justified, and no probable cause for the arrest or prosecution existed, and, if you further find that the defendant prosecuted the plaintiff through malicious motives, and the plaintiff was acquitted of said charge, then your verdict should be for the plaintiff.³⁵

§ 3557(12). Texas

You are instructed that it is immaterial whether plaintiff was guilty or innocent of the charge of embezzlement. If you believe the plaintiff innocent of the crime, but believe that the defendants had reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty of the offense, you will find for defendants.³⁶

§ 3557(13). Wisconsin

You are instructed that, if one in possession of cattle, as he supposes rightfully, is accosted in the highway, and the cattle wrested from his possession by strong hands, with tumult and violence, he has a right to suppose that a criminal offense has been committed, and has a right to complain of it.³⁷

§ 3558. Question of probable cause as dependent upon the facts as they appeared to defendant

§ 3558(1). Iowa

You are instructed that the question of probable cause does not depend upon the question whether or not the person so prosecuted was actually guilty of the crime, but whether or not an ordinarily prudent and careful man, under the facts as they appeared to him, in the exercise of reasonable care to ascertain the facts, and from the knowledge or honest belief of the facts then had, would be justified in the honest belief that a crime had been committed, and the person accused was guilty of such crime.³⁸

§ 3558(2). Texas

You are instructed that, in determining whether or not defendant had probable cause for making the complaint against plaintiff, you can take into consideration only such facts as were known to defendant at the time he made the complaint, and cannot take into consideration any facts not then known to said defendant which tended to exonerate, or which do exonerate, the plaintiff

³⁵ Wren v. Rehfeld, 157 N. W. 323, 37 S. D. 201.

³⁶ Hurlbut v. Boaz, 23 S. W. 446, 4 Tex. Civ. App. 371.

³⁷ Murphy v. Martin, 16 N. W. 603, 58 Wis. 276.

³⁸ Flam v. Lee, 90 N. W. 70, 116 Iowa, 289, 93 Am. St. Rep. 242.

from the charge that he committed theft in hauling the bale of cotton to market and selling the same.³⁹

§ 3559. Duty of defendant to exercise reasonable care to ascertain the facts

You are instructed that if defendant, in beginning the prosecution, did not use the means which an ordinarily careful and prudent man would exercise, under like conditions, to ascertain the facts connecting the plaintiff with the crime alleged to have been committed, and if you find from the facts and circumstances as they at the time were known or appeared to the defendant that he was not justified in honestly believing that the plaintiff had committed the crime for which he was afterwards arrested, then such proceedings would have been commenced without probable cause.⁴⁰

§ 3560. Same—Effect of honest belief of defendant in guilt of plaintiff

The court charges the jury that unless ———, the agent of the defendant, was at the time of making the affidavit complained of in possession of sufficient facts to justify a reasonable and cautious man to believe that the plaintiff had broken open a car and taken the goods alleged to have been stolen, then it makes no difference if he did suspect and believe that plaintiff was guilty, however honestly and earnestly he may have entertained such suspicion and belief; and you must find the defendant guilty if you also find that ——— was acting within the general scope of his employment in making said affidavit and procuring the issuance of said warrant, or if you find that the defendant authorized the act, or has since ratified his said act.⁴¹

§ 3561. Probable cause for attachment proceedings

You are instructed that, to constitute probable cause for the prosecution of attachment proceedings upon the claim that the debtor has done or is about to do some act or acts with intent to defraud his creditors, it is necessary that the person or persons instituting such proceedings should actually believe, and should also have good reason to believe, that the debtor had done or was about to do such act or acts with the fraudulent intent alleged against him. Mere belief that he has done or is about to do such fraudulent act is not sufficient to justify an attachment. The attachment will be unlawful and illegal unless the belief is found-

³⁹ *Rainey v. Old* (Civ. App.) 180 S. W. 923.

⁴⁰ *Flam v. Lee*, 90 N. W. 70, 116 Iowa, 289, 93 Am. St. Rep. 242.

⁴¹ *Gulsby v. Louisville & N. R. Co.*, 52 So. 392, 167 Ala. 122.

ed upon knowledge, or what is believed to be reliable information, as to facts which, if true, would justify the belief.⁴²

§ 3562. Maliciously suing out garnishment

You are instructed that, if the jury shall believe and find from the evidence that defendant caused and directed the ——— Railroad Company to be summoned as garnishee of the plaintiff at the time of the several garnishments in evidence on the original execution in evidence, and that at the time of the service of said garnishments the plaintiff was an employé of the said railroad company, working for wages, and that he resided in ———, and was the head of a family, as explained in instruction No. ———, and that at the time of the service of said garnishments the said railroad company did not have in its possession or under its control any property, money, or effects of the plaintiff, and did not owe plaintiff any money except such as was exempt from seizure or garnishment as explained in instruction No. ———, or such as was subject to be selected and held by plaintiff as exempt as explained in instruction No. ———, and if the jury shall believe and find from the evidence that the defendant at the time of causing or directing such garnishment to be served had no reasonable or probable cause for believing that said railroad company had in its possession or under its control property, money, or effects of plaintiff, or owed plaintiff money which might be lawfully held on such garnishments and taken in satisfaction of said execution, yet, nevertheless, that defendant caused and directed said railroad company to be so summoned as garnishee of plaintiff maliciously, and for the purpose of compelling payment of his judgment out of plaintiff's wages, at the same time knowing plaintiff's rights of exemption herein, or that defendant caused or directed said garnishments to be served on said railroad company maliciously and for the purpose of harassing and annoying said company and causing it to discharge plaintiff from his employment unless he paid defendant's judgment, then it will be the duty of the jury to find their verdict for the plaintiff on the first count of the petition in this cause.⁴³

§ 3563. Action against several defendants on theory of a conspiracy

The court instructs the jury, that, if you believe and find from the evidence that the defendants willfully, maliciously, and without probable cause, acting together, did cause the warrant intro-

⁴² *Le Clear v. Perkins*, 61 N. W. 357, 103 Mich. 131, 26 L. R. A. 627.

⁴³ *Cooper v. Scyoc*, 79 S. W. 751, 104 Mo. App. 414. This was an action for malicious abuse of process.

duced in evidence to be issued out of the justice court of ———, who was then and there a justice of the peace of ——— township, ——— county, state of ———, and in pursuance of such common purpose, if you believe and find from the evidence that the defendants did act with a common purpose, to cause said warrant to be issued, the defendant ——— made an affidavit before ———, the aforementioned justice of the peace, and that pursuant to such common purpose between said defendants, the said defendant ——— did maliciously and falsely and without probable cause charge in such affidavit the plaintiff with having fraudulently omitted to mention a certain deed of trust for \$——— to ———, as trustee, with ——— as beneficiary named therein, which said deed of trust was of date the ——— day of ———, and which said last-mentioned deed was offered in evidence by the defendants, and which said affidavit further charged that said omission was made with the purpose of defrauding one ———, mentioned in evidence, and that further, said defendants, acting together with a common purpose, did willfully, falsely, and maliciously and without probable cause procure and cause thereon the arrest of the plaintiff herein upon said affidavit and complaint and the warrant issuing upon such affidavit and complaint, and did by reason thereof cause plaintiff to be taken by the constable of said ——— township, ——— county, state of ———, before the aforesaid justice of the peace, ———, and did by reason thereof and as a consequence thereof cause plaintiff to be arrested and deprived of his liberty and committed to the common jail of such county, and therein locked; if you so find from the evidence that he was so deprived of his liberty and locked in said county jail, and that, further, and thereafter, the plaintiff gave bond for his appearance at such time and times as should be required of him by the said justice of the peace, to be and appear before said justice of the peace in answer to the charge so made against him by said affidavit and complaint and warrant, and that the plaintiff did appear at such time as was required of him by said justice of the peace, and on said date the justice of the peace discharged the plaintiff from and on account of said charge so brought against him—then your verdict will be for the plaintiff.⁴⁴

The court instructs the jury that, if you believe and find from the evidence that one of the defendants, acting for himself, caused the arrest and prosecution of the plaintiff, then your verdict will be against such defendant alone. If you find, however, that both of the defendants, acting with a common purpose, caused the arrest and prosecution of the plaintiff, then your verdict should

⁴⁴ Bowers v. Walker, 182 S. W. 116, 192 Mo. App. 230.

be against both defendants, provided you find that the arrest was malicious and without probable cause as defined in the other instructions.⁴⁵

§ 3564. Liability of defendant on account of prosecution initiated by others

§ 3564(1). Iowa

You are instructed that, if it was agreed and understood between E. and defendant that E. should file the information and cause the arrest of the plaintiff, and that they would both jointly encourage and assist in the prosecution of the charge, the jury would be justified in finding that defendant with E. instigated or procured the prosecution.⁴⁶

§ 3564(2). Wisconsin

You are instructed that there is evidence tending to show that a ——— acted as attorney for the defendant in the proceedings before ———. Of course, the defendant is liable if he either commenced these prosecutions himself or authorized and directed his attorney to do so, if in other respects the cause of action stated in the complaint is proved.⁴⁷

You are instructed that, even if the signature to this complaint is not defendant's, yet if the defendant was there counseling and advising the prosecution of the plaintiff, and taking part in maintaining the prosecution, he would be just as liable as if he signed the complaint. However, you may consider the question whether he signed the complaint, and what he supposed as to the nature of the proceedings, whether they were tort or criminal in their nature, as bearing on the question of malice.⁴⁸

§ 3565. Liability of persons ratifying and continuing prosecution begun by others

You are further instructed that, though you may believe from the evidence that the defendant company did not at first set on foot the arrest and prosecution of the plaintiff, and that the person who set same on foot transcended his authority, yet if you further believe that the said defendant company, through its superintendent and agent, did not disavow the act at once, when it came to its knowledge, but ratified the act and continued the arrest and prosecution, without probable cause, then such continued arrest and prosecution is equivalent to precedent authority and is chargeable to the said defendant.⁴⁹

⁴⁵ Bowers v. Walker, 182 S. W. 116, 192 Mo. App. 230.

⁴⁶ Wilson v. Thurlow, 137 N. W. 956, 156 Iowa, 656.

⁴⁷ Eggett v. Allen, 96 N. W. 803, 119 Wis. 625,

⁴⁸ Eggett v. Allen, 96 N. W. 803, 119 Wis. 625.

⁴⁹ Clinchfield Coal Corporation v. Redd, 96 S. E. 836, 123 Va. 420.

§ 3566. Advice of counsel as defense**§ 3566(1). Alabama**

I charge you that if you believe that before the institution of said prosecution the prosecutor sought advice of learned counsel and made a full and fair statement of all the facts within his knowledge, or which by reasonable effort he could have known in reference to the alleged guilt of plaintiff of a violation of the law as charged, and that said counsel advised the prosecutor that he had probable cause to swear out the warrant, or institute prosecution as alleged, and that the prosecutor acted on said advice in good faith, then as a matter of law, this would be a complete defense to plaintiff's cause of action in this case for malicious prosecution, and you cannot find a verdict against defendant for a malicious prosecution.⁵⁰

§ 3566(2). Delaware

You are instructed that, if a person consults a regular attorney about a matter affecting a third person, he ought to use that care in acquiring the facts and presenting them to counsel which men of ordinary prudence would ordinarily use in matters of like importance. If he does this, and in good faith lays such facts before his counsel, and then acts upon the advice of his counsel, it would constitute probable cause, and a complete defense to an action of this character.⁵¹

§ 3566(3). Iowa

You are instructed that it is a general rule that, where a person seeks the advice of an attorney before commencing a suit at law and states fully and fairly and completely all the facts relative to his case, and after making this statement the attorney advises him that he has a good cause of action, and a good right to sue out a writ of attachment in aid of his suit, and that he proceeded in accordance with this advice, and brought the suit, and caused the writ of attachment to issue and be served, the advice of counsel, if established by the evidence, will be a good defense. But to make it a good defense, everything that relates to the facts in the case must be stated fully and truly to the attorney, and nothing that has any material bearing on the case must be withheld from him. In this connection you are charged that, if defendant knew or had reason to believe that he had no cause of action, and instituted the action in bad faith, advice of counsel would be no defense.⁵²

⁵⁰ *Birmingham Bottling Co. v. Morris*, 69 So. 85, 193 Ala. 627.

⁵¹ *Plummer v. Collins*, 77 A. 750, 1 Boyce, 281.

⁵² *Connelly v. White*, 98 N. W. 144, 122 Iowa, 391.

§ 3566(4). *Maryland*

The court instructs the jury that, if they shall find that the defendant, in reference to the institution and prosecution of the charge complained of, acted bona fide and without malice, under the professional advice and direction of her counsel, ———, that she then and there stated to her counsel all the material facts that she knew at the time were capable of proof, or which by the exercise of reasonable diligence she could have ascertained, and concealed nothing material, that she then believed said advice to be sound, then she is not liable, and the plaintiff cannot recover in this action, even though ———'s advice may not have been sound, and although, but for such advice, the defendant would have had no probable cause for her action.⁵³

§ 3566(5). *Michigan*

You are instructed that, if you find that defendant laid all the facts before the prosecuting attorney, and the prosecuting attorney drew up the warrant which he did, and the defendant had no knowledge of the law, but relied upon the prosecuting attorney to frame the charge, then the plaintiff cannot recover.⁵⁴

You are instructed that there is another question for you to consider, which, in my opinion, bears upon this question of malice and upon the question of probable cause, and that is the question of advice of counsel. And upon that question I charge you that advice of counsel can only be considered when the party seeking advice has fully, fairly, and honestly stated all the facts and circumstances within his knowledge to the counsel of which he seeks advice. If the party seeking such advice, instead of fully and fairly stating the facts, stated as a matter of fact that which he did not know to be true, and had no good reason to believe to be true, based upon the information which he possessed, and acting in good faith, then the advice of counsel would be no protection. Neither would it be any protection if it were resorted to merely for the purpose of showing a lack of malice or previous intent to do wrong; but the advice of counsel, when sought, must be sought in good faith, and all of the facts and circumstances within the knowledge of the party seeking it, and the information upon which he acts after receiving the advice of counsel, must be fully and fairly stated to the counsel in good faith, and the party seeking the advice must believe the facts and circumstances, as he narrates them, to be true. Upon this question of the advice of counsel, Judge ———, in his work on ———, says: "It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of

⁵³ Bishop v. Frantz, 93 A. 412, 125 Md. 183.

⁵⁴ Slater v. Walter, 112 N. W. 682, 148 Mich. 650.

counsel learned in the law, and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearing. A prudent man is therefore expected to take such advice, and when he does it, and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts." And the Supreme Court, in ———, has said that "a person seeking and receiving such advice is in law, as well as in morals, justified in acting upon it, provided that he fully and fairly stated the facts to the attorney." And I charge you, gentlemen, that these extracts which I have just read state the law correctly, and you will apply that in your consideration of this case.⁵⁵

§ 3566(6). *Missouri*

The court instructs the jury that, if they believe from the evidence in this cause that defendant, before he made the affidavit and procured the warrant for the search of plaintiff, consulted in good faith an attorney at law and communicated to such attorney in good faith all the facts within his knowledge or which he might have learned by reasonable diligence, bearing upon his right and liability in procuring such search warrant; that said consultation and communication was had and made by defendant in good faith, with a view to the advice of counsel learned in the law; that said attorney, upon such submission of facts, advised defendant that he had the legal right to procure a warrant for the purpose of searching plaintiff without incurring liability; and if the jury further find that the defendant made the affidavit and procured the search warrant in good faith, in consequence of such advice, and not in pursuance of a previous fixed determination so to do—then the prosecution was not malicious, and your verdict must be for defendant.⁵⁶

§ 3566(7). *Nebraska*

The court instructs the jury that, before the defendant could shield himself by the advice of counsel, it must appear from the evidence that he made, in good faith, a full, fair, and honest statement of all of the material circumstances bearing upon the supposed guilt of the plaintiff which were within the knowledge of the defendant (or which the defendant could, by the exercise of ordinary care, have obtained), to a respectable, unbiased, impartial attorney,

⁵⁵ *Le Clear v. Perkins*, 61 N. W. 357, 103 Mich. 131, 28 L. R. A. 627.

⁵⁶ *Webb v. Byrd*, 219 S. W. 683, 203 Mo. App. 589.

in good standing, and that the defendant in good faith acted upon the advice of said attorney in instituting and carrying on the prosecution against the plaintiff.⁵⁷

§ 3566(8). North Dakota

I leave it for you to say from all the evidence in the case whether the defendant acted in good faith in consulting his own attorney employed by him in the civil action, and, if you find that he did not act in good faith in consulting with said attorney, then he cannot plead such advice as a defense to said action.⁵⁸

You are instructed that it is not enough for defendant to prove generally that all the facts were laid before the attorney, but it must be shown what facts were submitted.⁵⁹

§ 3566(9). Oklahoma

You are further instructed that it may be stated as a general rule, where a party has communicated to his attorney all the facts bearing on the case of which he has knowledge, or could have obtained by reasonable diligence and inquiry, and has acted upon the advice received with honesty and good faith, the absence of malice is established, and the want of probable cause is negatived, and the action for malicious prosecution will not lie.⁶⁰

§ 3566(10). Wisconsin

You are instructed that, if the jury believe from all the testimony in the case that the defendant, before the institution of the criminal proceedings in which and by virtue of which this plaintiff was arrested, taken before the justice of the peace, and was committed to jail in default of bail, in good faith made a statement to the district attorney of the facts of which he had knowledge or information, relating to the connection of the plaintiff with the burning of the buildings, fully and fairly; and that defendant believed such facts as stated to the district attorney to be true and that plaintiff was guilty of the crime with which he was charged and thereafter the district attorney, acting in his official capacity, caused the warrant to be issued, and the plaintiff arrested, and the subsequent proceedings to be had that were had in that action, then, in such case, the defendant is not liable in this action.⁶¹

§ 3567. Same—Good faith of defendant in seeking advice

§ 3567(1). Michigan

You are instructed that, in order that advice of counsel should be a protection to the defendant, he must have acted honestly, and,

⁵⁷ *Perrenoud v. Helm*, 90 N. W. 980, 65 Neb. 77. Parenthetical clause is disapproved in *Gillisple v. Stafford*, 96 N. W. 1039, 4 Neb. (Unof.) 873.

⁵⁸ *Merchant v. Pielke*, 84 N. W. 574, 10 N. D. 48.

⁵⁹ *Merchant v. Pielke*, 84 N. W. 574, 10 N. D. 48.

⁶⁰ *Sims v. Jay*, 155 P. 615, 53 Okl. 183.

⁶¹ *Spear v. Hiles*, 36 N. W. 506, 67 Wis. 350.

where the facts given are all consistent with the reasonable theory of the innocence of the party, and the prosecutor knows or has good reason to believe that the person is not guilty whom he is prosecuting, and does not believe him to be guilty, he cannot have a reasonable cause for the prosecution, and he would still be responsible for his actions no matter what some attorney may have told him.⁶³

You are instructed that the advice of counsel is no protection for a party who acts maliciously and knows that the party whom he is prosecuting is not guilty, and further knows that all of the acts which the party against whom he complains has been guilty of are all consistent with the natural innocence of the accused, and if he proceeds under such circumstances, advice of counsel is no protection, and he would be liable for the damages done.⁶³

§ 3567(2). Missouri

You are instructed that, even if the jury should find that the defendants prior to such prosecutions, communicated to counsel learned in the law, all the facts as defined in instruction No. ———, yet, nevertheless, if they should further find that such prosecutions were without probable cause, and that such counsel were not consulted by them in good faith, but that defendants were actuated, in consulting such counsel and in commencing said prosecutions, with angry passions and a hostile desire to injure and wrong him, then the opinion and advice of such counsel is of no avail as a defense in the cause.⁶⁴

§ 3568. Same—Duty to communicate all the facts to counsel

§ 3568(1). Alabama

The court charges the jury that, unless the jury believe from the evidence that all the facts known to defendant or which he could have ascertained by due diligence were fully and truly laid before a reputable, practicing attorney, the advice of such an attorney is no protection to defendant.⁶⁵

The court charges the jury that, while it is a defense to a suit in malicious prosecution that the prosecutor had secured advice from a practicing attorney learned in the law, yet the court charges the jury that, in order for such advice to be a complete defense, the law requires that the prosecutor shall have made a full and fair statement of the facts, and unless such full and fair statement was made it is no protection to him in a suit for malicious prosecution.⁶⁶

⁶³ Gurden v. Stevens, 109 N. W. 856, 146 Mich. 489.

⁶³ Gurden v. Stevens, 109 N. W. 856, 146 Mich. 489.

⁶⁴ Sharpe v. Johnston, 59 Mo. 557.

⁶⁵ Fowlkes v. Lewis, 65 So. 724, 10 Ala. App. 543.

⁶⁶ Sloss-Sheffield Steel & Iron Co. v. O'Neal, 52 So. 953, 169 Ala. 83.

§ 3568(2). California

The court instructs the jury that the defendant, in order to justify the acts complained of by the plaintiff on the ground that he acted under the advice of counsel, must not only show that he disclosed to his counsel all the material facts bearing on the guilt or innocence of the plaintiff known to him, but also, if he had reasonable grounds to believe that other facts existed tending to exculpate the plaintiff, that he either himself made inquiry as to such other facts or disclosed his belief in such other facts to said counsel, so that the latter might have an opportunity to make inquiry as to their existence.⁶⁷

§ 3568(3). Illinois

The jury are instructed that before the defendant can shield himself by the advice of counsel, it must appear from the evidence that he made in good faith a full, fair, and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff which were within the knowledge of the defendant, or which the defendant could, by the exercise of ordinary care, have obtained, to a respectable attorney in good standing, and that the defendant in good faith acted upon the advice of said attorney in instituting and carrying on the prosecution against the plaintiff.⁶⁸

§ 3568(4). Missouri

You are instructed that the defendants cannot shield themselves under the advice of counsel, unless the jury find and believe from the evidence that the defendants communicated to such counsel all the facts bearing upon the guilt or innocence of the accused in the criminal case which they knew or by reasonable diligence could have ascertained; and you are therefore instructed that if you believe from the evidence, that the defendants or their agents intentionally concealed or falsely represented or neglected to ascertain and advise said counsel of all the facts which they knew, or by the exercise of reasonable diligence could have ascertained, bearing on the innocence or guilt of the accused in said criminal case, then the advice of counsel is of no avail as a defense in this case.⁶⁹

You are instructed that the defendants cannot shield themselves under the advice of counsel, unless they show that they communicated to such counsel all the facts bearing upon the guilt or innocence of the accused, which they knew, or by reasonable diligence could have ascertained.⁷⁰

⁶⁷ *Murphy v. Davids*, 186 P. 143, 181 Cal. 700.

⁶⁸ *Roy v. Goings*, 112 Ill. 656.

⁶⁹ *Carp v. Queen Ins. Co.*, 101 S. W. 78, 203 Mo. 295.

⁷⁰ *Sharpe v. Johnston*, 50 Mo. 557.

§ 3568(5). South Dakota

The court further instructs the jury that the burden is upon the defendant to prove that he sought counsel with an honest purpose to be informed as to the law, and that he was in good faith guided by such advice in causing the arrest of the plaintiff, and that whether or not the defendant did before instituting the criminal proceedings make a full, correct, and honest disclosure to the state's attorney of this county of all the material facts bearing upon the guilt of the plaintiff, of which he had knowledge, and whether, in commencing such proceedings, the defendant was acting in good faith upon the advice of his counsel, are questions of fact to be determined by the jury from all the evidence and circumstances proved in the case; and, if the jury believe from the evidence that the defendant did not make a full, correct, and honest disclosure, of all of such facts to his counsel and the state's attorney, but that he instituted the criminal prosecution from a fixed determination of his own, rather than from the opinion of counsel, then such advice can avail nothing in this suit.⁷¹

§ 3568(6). Virginia

The court instructs the jury that if they believe, from the evidence, that the defendant did not make a full, correct, and honest disclosure of all such facts to his counsel, but that he instituted the criminal prosecution from a fixed determination of his own, rather than from the opinion of counsel, then such advice can avail nothing in this suit.⁷²

§ 3568(7). Wyoming

You are instructed that the defendant in this case alleges in his answer that he made a full, true, and correct statement of all the facts in his knowledge bearing upon the question of the guilt and innocence of the plaintiff of the crime alleged in the criminal complaint made and filed by the defendant against the plaintiff. I charge you that, under the law, if you find that the defendant did not state all of the facts within his knowledge, or that he could have ascertained upon reasonable inquiry, or that he made any incorrect statement to said attorney, or withheld any material fact that he knew or by reasonable inquiry could have ascertained, then, and under such circumstances, the advice of counsel is no defense. You are further instructed upon this question that the defendant is required by law to state all the facts within his knowledge that tend to show the innocence of the plaintiff of the crime charged, as well as all the other facts in his knowledge that tend to show the guilt of the plaintiff, and if you believe from the evidence that said

⁷¹ *Wren v. Rehfeld*, 157 N. W. 323,
37 S. D. 201.

⁷² *Jones v. Morris*, 33 S. E. 377, 97
Va. 43.

defendant did not state to the prosecuting attorney all the facts within his knowledge, or that he could have learned by a fair and reasonable inquiry, that tended to show the innocence of the plaintiff of said alleged crime, then I charge you that the advice of said attorney is no defense.⁷³

§ 3569. Same—Duty to communicate belief as to existence of other facts than those disclosed

You are instructed that defendant is required to make, and to prove to your satisfaction by preponderance of testimony that he did make, to his counsel, a full, fair, and true statement of all the material facts known to him, of which he had and knew the means of ascertaining. If defendant had reasonable grounds for believing that other facts existed which would tend to exculpate plaintiff from the assault with intent to murder, good faith requires that he should have either made further inquiry with reference to those facts and circumstances, and communicated the information obtained to the counsel, or that he should inform the counsel of his belief in their existence, in order that the counsel might investigate with reference to them, and take into account in forming his opinion the information obtained with reference to them.⁷⁴

§ 3570. Presumptions and burden of proof

§ 3570(1). Arkansas

You are instructed that the burden is upon the plaintiff to show that the defendant instituted the prosecution in this case without probable cause, and with malice toward the plaintiff, and if you find that there was probable cause or that there was no malice, your verdict will be for the defendant.⁷⁵

§ 3570(2). Illinois

The court instructs the jury, for the defendant, that the burden of proof in this case is upon the plaintiff to show that the defendant, in instituting the prosecution before ———, a justice of the peace, for malicious mischief, acted without probable cause, and if they believe, from the evidence, that the plaintiff has failed to show a want of such probable cause by a preponderance of testimony, then the jury will find for the defendant.⁷⁶

§ 3570(3). Michigan

You are instructed that the burden of showing the existence of the want of probable cause is upon the plaintiff.⁷⁷

⁷³ Boyer v. Bugher, 120 P. 171, 19 Wyo. 463.

⁷⁴ Scrivani v. Dondero, 60 P. 463, 128 Cal. 31.

⁷⁵ McNeal v. Millar, 220 S. W. 62, 143 Ark. 253.

⁷⁶ Calef v. Thomas, 81 Ill. 478.

⁷⁷ Harris v. Thomas, 103 N. W. 863, 140 Mich. 462.

§ 3571. Same—Duty of plaintiff to show both malice and want of probable cause

You are further charged as the law applicable to this case that, before the plaintiff can recover, the burden is upon him to show, by a preponderance of the evidence, that there was not a probable cause for the making of the said complaint by the defendant charging the plaintiff with theft, and that the said defendant was actuated by malice when he made said complaint against plaintiff, charging him with the theft of the cotton, and prosecuted him therefor, if he did so.⁷⁸

§ 3572. Matters considered on question of probable cause

You are instructed that, if the jury believe, from the evidence, that the defendant had given to plaintiff a bond for the conveyance of land, which was to be void upon the failure of plaintiff to comply with certain conditions therein named, and those conditions were not complied with by plaintiff, and that therefore the bond had become forfeited and void, and had been delivered up to defendant by plaintiff or his agent, and that, previous to such delivery, plaintiff had copied said bond, or written one of similar import, signing the defendant's name thereto, or caused the same to be done, with intent to assert rights under said bond, to the damage or prejudice of the rights of defendant, such conduct on the part of plaintiff may be considered by you in passing on the question whether defendant had reasonable and probable cause to procure the arrest of the plaintiff on a charge of forgery.⁷⁹

§ 3573. Same—Matters considered along with good faith of defendant in seeking advice of counsel

You are instructed that, in determining this question of probable cause, you can consider all the facts and circumstances as shown by the evidence, so far as they throw any light upon that question—the dispute between the parties as to the right to the use of this land, the circumstances under which the threat was made, whether it had before been made to ———, the language used by plaintiff in making the threat, whether the defendant fully and fairly stated all the facts, and what defendant said to his attorneys, whether he acted in good faith on ———'s advice, and whether he willfully withheld any material fact from the justice in making the complaint.⁸⁰

§ 3574. Evidence of malice—Exercise of legal right

The court instructs the jury that if the plaintiff remained in the house after his term of renting expired, the defendant had the

⁷⁸ *Rainey v. Old* (Civ. App.) 180 S. W. 923.

⁷⁹ *Davie v. Wisher*, 72 Ill. 262.

⁸⁰ *Thurkettle v. Frost*, 100 N. W. 283, 137 Mich. 115, 4 Ann. Cas. 830. Plaintiff was arrested to keep the peace.

right to bring suit for the recovery of the house, and the fact of bringing a suit for this purpose is not evidence of malice against the plaintiff.⁸¹

§ 3575. Inference of malice from want of probable cause

§ 3575(1). Alabama

The court instructs the jury that, while the court has charged you that malice is a necessary ingredient of malicious prosecution, the court further charges you that in order to constitute malice it is not necessary that there should be any actual hate or ill will towards the party prosecuted, nor towards any one else, but a malicious motive in law is any motive other than a bona fide purpose to enforce the criminal law, and malice may be inferred by the jury from a want of probable cause to believe that the person prosecuted was guilty of the offense for which he was prosecuted, if the jury are reasonably satisfied from the evidence that there was such want of probable cause.⁸⁴

The court charges the jury that, if they believe from the evidence in this case that there was not probable cause for the suing out of the prosecution against ———, then the jury may infer malice from the want of probable cause on the part of the defendant.⁸⁵

§ 3575(2). Indiana

You are instructed that malice may be inferred from want of probable cause for the institution of such proceedings; yet such inference does not necessarily follow from a want of probable cause, but it is for you to determine as a question of fact from the evidence in this case whether such proceedings were or were not instituted by the grand jury of ——— county on the false testimony or evidence of defendant.⁸⁶

§ 3575(3). Missouri

You are instructed that, if the jury believe from the evidence that the prosecutions in the court of ——— and the ——— court were without probable cause on the part of the parties prosecuting the same, then they may infer that said prosecution was malicious, and, if they so find, they ought to return a verdict for the plaintiff.⁸⁷

§ 3575(4). Virginia

The court instructs the jury that, in order for the plaintiff to recover for malicious prosecution in this case, you must believe, from a preponderance of the evidence, that the defendant set on

⁸¹ *Emerson v. Lowe Mfg. Co.*, 49 So. 69, 159 Ala. 350.

⁸⁴ *Fowlkes v. Lewis*, 65 So. 724, 10 Ala. App. 543.

⁸⁵ *Rutherford v. Dyer*, 40 So. 974, 146 Ala. 665.

⁸⁶ *Krauss v. Weaver* (App.) 126 N. El. 248.

⁸⁷ *Sharpe v. Johnston*, 59 Mo. 557.

foot or instigated the prosecution of the plaintiff, that the said prosecution has ended favorably to the plaintiff, that it was without probable cause, and that it was malicious. Malice, as used in this instruction, means any unlawful act which is done willfully and purposely to the injury of another, and may be inferred from the want of probable cause, if the circumstances will warrant the implication; but the existence of malice may be repelled by the circumstances, though there was not good ground for the prosecution, and in such cases the action will not lie.⁸⁸

§ 3576. Inferences from production of false testimony against plaintiff

The court instructs the jury that, notwithstanding you may believe from the evidence that there was sufficient evidence produced at the trial of the criminal case against plaintiff to constitute probable cause as defined to you in the other instructions, yet if you further believe from the evidence that any material part of the evidence introduced against the plaintiff in said criminal case was false, and was known to be false, by the defendants, or either of them, or their agents or servants, and that said false testimony was procured or connived in by the defendants or either of them or their agents, then the jury would be warranted, against such defendant or defendants, in finding that there was no probable cause for said prosecution, and that the same was malicious.⁸⁹

§ 3577. Limiting effect of evidence

The jury are instructed that the testimony of the previous relations of the parties prior to the birth of the child in question is admitted in this case for their consideration in determining the parentage of the child, and to throw whatever light it may upon the question of whether the prosecution was instituted maliciously and in determining the injury to the plaintiff, if any, and in determining the amount of damages, and for no other purposes.⁹⁰

§ 3578. Sufficiency of evidence

In this connection the jury are charged that malice cannot be inferred from the fact that a complaint was made by the said defendant against the said plaintiff, nor can the want of probable cause be inferred from the discharge of the plaintiff on the charge of theft, because both the want of probable cause and malice, as

⁸⁸ *Clinchfield Coal Corporation v. Redd*, 96 S. E. 836, 123 Va. 420.

⁸⁹ *Carp v. Queen Ins. Co.*, 101 S. W. 78, 208 Mo. 285.

⁹⁰ *Allison v. Bryan*, 151 P. 610, 50 Okl. 677. This was an action for a prosecution based on a charge of kid-

napping a child born of an illicit intercourse between plaintiff and defendant. The above instruction is not intended to be a direction as to what should be considered as an element of damage.

above defined, must be established by the plaintiff by a preponderance of the evidence before he can recover.⁹¹

§ 3579. Sufficiency of evidence of want of probable cause

§ 3579(1). Delaware

You are instructed that if you should find from the evidence, under this instruction respecting the law of malice, that the prosecution complained of was not malicious, then the plaintiff would not be entitled to recover. If, however, you should find that the said prosecution was malicious, then another question arises, Was the prosecution instituted without probable cause? For, as we have already said, if the prosecution was malicious, it is still further incumbent upon the plaintiff to show that the prosecution was without probable cause. Neither proof of malice on the part of the defendant, as we have defined it, nor a determination of the prosecution in favor of the plaintiff, is sufficient evidence of want of probable cause. It is necessary to negative the existence of probable cause at the time of the institution of the prosecution, by some affirmative evidence. The plaintiff must make some proof that there was no reasonable ground for the complaint made by the defendant before the justice, and that it was made without any probable cause to support or sustain it, or to induce a candid belief in it. For, as this court has held, however malicious may have been the motives of the defendant towards the plaintiff, he is protected by the law, if, at the time he prosecuted the plaintiff, he had probable cause for so doing. This rule of law, which protects a party for instituting a criminal proceeding when there is probable cause for it, proceeds upon principles of policy, convenience, and justice.⁹²

§ 3579(2). Michigan

You are instructed that want of probable cause is an essential ground in this action, or one of the essential grounds. Other things may be inferred from this, but this cannot be inferred from anything else. It must be established by positive and express proof.⁹³

§ 3579(3). Minnesota

The jury are instructed that, if you believe from the evidence that plaintiff acted in good faith and without malicious intent to injure the owner of the land in severing the crop in question, under a belief that ——— had an interest in the crop under the chattel mortgage, and that defendant knew, or by reasonable inquiry

⁹¹ *Rainey v. Old* (Tex. Civ. App.) 180 S. W. 923.

⁹² *Plummer v. Collins*, 77 A. 750, 1 Boyce, 281.

⁹³ *Le Clear v. Perkins*, 61 N. W. 357, 103 Mich. 181, 26 L. R. A. 627.

could have ascertained, his good faith in this respect, you will be justified in finding want of probable cause for arrest of plaintiff for malicious trespass.⁹⁴

§ 3580. Effect of dismissal or abandonment of prosecution as evidence of malice or want of probable cause

The question of whether the arrest was malicious and without probable cause does not depend upon whether the plaintiff was in fact guilty as charged, but whether the prosecutor acted in good faith, and on a reasonable appearance of cause he entertained a reasonable belief that the plaintiff was guilty. The mere fact that the prosecution was abandoned, or nol. pros'd, if you believe it was abandoned or nol. pros'd, is not prima facie evidence of want of probable cause.⁹⁵

The court charges the jury that, although the case against plaintiff was dismissed in the city court, it does not necessarily follow that the prosecution was malicious, nor that it was instituted without probable cause for believing that plaintiff was guilty of disorderly conduct.⁹⁶

§ 3581. Sufficiency of evidence of connection of defendant with prosecution

The court instructs the jury that the defendants' connection with the prosecution does not have to be proved by direct and positive evidence, but may be established by facts and circumstances in evidence in the case from which such connection with said prosecution may be reasonably inferred.⁹⁷

§ 3582. Damages

§ 3582(1). Alabama

The court charges the jury that, if you believe from the evidence that defendant in this case did maliciously, and without probable cause therefor, cause plaintiff to be arrested and imprisoned on a charge of trespass after warning, then you must find for the plaintiff, and assess such damages as in your sound judgment and discretion, you think shall be a just compensation for all the damages he suffered by reason and as a proximate consequence of plaintiff having been so arrested and imprisoned.⁹⁸

The court charges the jury that the malice required for the recovery of punitive damages in this case need not amount to ill will,

⁹⁴ Price v. Denison, 103 N. W. 728, 96 Minn. 106.

⁹⁵ Sanders v. Davis, 44 So. 979, 153 Ala. 375.

⁹⁶ Sweeney v. Bienville Water Supply Co., 25 So. 575, 121 Ala. 454.

⁹⁷ Carp v. Queen Ins. Co., 101 S. W. 78, 203 Mo. 295.

⁹⁸ Fowlkes v. Lewis, 65 So. 724, 10 Ala. App. 543.

hatred, or vindictiveness of purpose. It is sufficient, if the defendant is guilty of a wanton disregard of the rights of the plaintiff.⁹⁹

§ 3582(2). **Kentucky**

You are instructed that, if you find for the plaintiff, you shall find in such sum as will reasonably and fairly compensate him for any mortification or humiliation caused him by the arrest and prosecution upon the charge of disorderly conduct, or for any damage done his reputation or character in the community in which he resides, not exceeding the sum of \$——, the amount claimed in the petition.¹

§ 3582(3). **Missouri**

You are instructed that, if the jury find for the plaintiff on the first count of the petition, they should allow and assess in his favor, first, such actual damages, not exceeding —— dollars, as under the evidence they may believe he has sustained, and which will reasonably compensate him for any reasonable expenses, if any, incurred by him, directly occasioned by and resulting from the defendant's acts and conduct as shown by the evidence; and, second, and in addition thereto, the jury may also allow and assess against the defendant such further sum by way of exemplary or punitive damages, not exceeding —— dollars, as will, in their opinion, sufficiently punish the defendant for the wrong and injury done the plaintiff. If the jury allow exemplary damages, the amount thereof must be separately stated in their verdict.²

§ 3582(4). **North Dakota**

You are instructed that the elements of damage to be considered by the jury, if you find for the plaintiff, are the expenses plaintiff was put to in the prosecution to protect herself, including reasonable attorney's fees, her loss of time, her deprivation of liberty, the loss of society of her family, injury to her good name, her personal mortification at being placed under arrest, her wounded pride, her mental suffering, and the smart and injury of the malicious acts and acts of oppression of the defendant, if you find any such were committed. These are what are known in law as direct damages, actual damages.³

§ 3582(5). **Oklahoma**

The jury are instructed that, if you find from the evidence in this case that the plaintiff is entitled to recover, then in estimating the plaintiff's damages, if any, you may take into consideration the fact of the imprisonment of the plaintiff, if you find she was im-

⁹⁹ *Sloss-Sheffield Steel & Iron Co. v. O'Neal*, 52 So. 953, 169 Ala. 83.

¹ *Schwartz v. Boswell*, 160 S. W. 748, 156 Ky. 103.

² *Cooper v. Seyoc*, 79 S. W. 751, 104 Mo. App. 414.

³ *Merchant v. Pielke*, 84 N. W. 574, 10 N. D. 48.

prisoned, and you may also consider what amount, if any, the plaintiff was compelled to pay as counsel fee in defense of the prosecution, not to exceed the sum of \$——, and you may take into consideration the effect of such prosecution and imprisonment upon the plaintiff as to humiliation and mental suffering, if any, directly caused thereby, and you should allow her as damages such a sum as in the exercise of a sound discretion you may believe from all the facts and circumstances given in evidence will be a fair and just cash compensation to her for the injuries so sustained, if any, not to exceed the sum of \$——.⁴

§ 3582(6). Texas

The court instructs the jury that, if you find for the plaintiff, the measure of actual damages will be such a sum, not to exceed the amount sued for as actual damages, as you may find from the evidence to be a just and reasonable compensation to plaintiff for the injury, if any, sustained by him as the direct and proximate result of said criminal prosecution, taking into consideration the loss of time and the reasonable expense, if any, necessarily incurred by plaintiff in the defense of said prosecution, and the injury, if any, to plaintiff's feeling, credit, or reputation.⁵

§ 3583. Same—Expenses of litigation

You are instructed that, if you find for the plaintiff, it will be your duty to award him such damages as will adequately compensate him for such loss and injury, which from the evidence you shall find he suffered. The plaintiff should be made whole for his loss of time, his anxiety and suffering, and any injury to his reputation, caused by his being arrested and imprisoned, and if you allow anything on account of vindictive or punitive damages, you may in your discretion in assessing the amount of such damages take into consideration the proper and reasonable expenses of defending the criminal prosecution against him.⁶

§ 3584. Special damages

The court instructs the jury that, if your verdict is for the plaintiff, you may, in addition to such damages, if any, as you may award him under instruction No. ——, find for him the reasonable value, if any, not to exceed \$——, of the two suit cases and their contents, if you believe from the evidence they were lost and plaintiff deprived of them by reason of the conduct of the defendant company complained of, and not by any fault of the plaintiff,

⁴ Allison v. Bryan, 151 P. 610, 50 Okl. 677.

⁵ Curlee v. Rose, 65 S. W. 197, 27 Tex. Civ. App. 259. In this instruc-

tion "credit" is used in the sense of reputation.

⁶ Bell v. Matthews, 16 P. 97, 37 Kan. 686.

and the reasonable value, not to exceed \$——, of such time, if any, as the evidence may show was consumed by plaintiff in attending the trial of the prosecutions against him, and also the amount, if any, of such reasonable attorney's fee, not exceeding \$——, as the evidence may show was necessarily paid by plaintiff for his defense in the prosecutions aforesaid; provided that your finding upon the whole case cannot exceed \$——, the amount claimed in the petition.⁷

§ 3585. Exemplary damages

§ 3585(1). Maryland

The court instructs the jury that, if they shall find a verdict for the plaintiff, they are at liberty to take into consideration all the circumstances of the case, and award such damages as will not only compensate the plaintiff for the wrong and indignity he has sustained in consequence of the defendant's wrongful acts, but may also award exemplary or punitive damages as a punishment to the defendant for such wrongful acts.⁸

§ 3585(2). Montana

You are instructed that, in an action for malicious prosecution, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, not exceeding in all the amount claimed in the complaint.⁹

§ 3585(3). North Carolina

I instruct you that, if you find that the conduct of the defendant in respect to this arrest and prosecution was reckless, wanton, and malicious, that it was without regard to the rights of the plaintiff, then, gentlemen, it is within your discretion to include in your answer to the —— issue a sum of money which you may deem proper as smart money or as punitive damages; you are not required by the law, notwithstanding what your finding as to the facts may be, to include any punitive damages, but the whole matter, as to whether or not you shall include punitive damages, is left to your discretion, to your sound judgment, provided you shall find that the conduct of the defendant was reckless, wanton, and malicious.¹⁰

⁷ Cincinnati, N. O. & T. P. Ry. Co. v. Cecil, 175 S. W. 654, 164 Ky. 377.

⁸ Bishop v. Frantz, 93 A. 412, 125 Md. 183.

⁹ Brantly, C. J., and Milburn, J., in 86 P. 33, 34 Mont. 308. This is prop-

er, where jury is instructed that they must find both want of probable cause and malice.

¹⁰ Brown v. Martin, 96 S. E. 642, 176 N. C. 31.

§ 3585(4). *Virginia*

The jury is instructed that, if they believe that the acts complained of were committed with actual malice and a design to injure or oppress the plaintiff, and that the said acts were either previously authorized or subsequently ratified by the defendant, the plaintiff may also recover punitive or exemplary damages; that is to say, the jury will not be limited to mere compensation for the actual damages sustained by him. They may give him such further damages as they may think right, in view of all the circumstances proved at the trial, as punishment to the defendant, and as a salutary example to others to deter them from offending in like manner, if the circumstances will warrant the implication of malice, but the existence of malice may be repelled by the circumstances, although there is not good ground for the prosecution, and in such case the action will not lie.¹¹

§ 3585(5). *Wisconsin*

You are instructed that, if you find that the defendant, without probable cause, and maliciously, caused the arrest of the plaintiff, you are authorized to go further, and award punitive damages in such sum as will be a warning to defendant and all other persons not to commit similar wrongs, and consequently such damages, to be effectual, must have some relation to the financial ability of the defendant. It is on this theory that evidence as to defendant's financial ability has been admitted.¹²

§ 3586. *Matters considered in determining exemplary damages—Financial ability of defendant*

You are instructed that, if the jury find that the defendant wantonly and maliciously caused the arrest of the plaintiff, with intent to injure his feelings and disgrace him in the estimation of the public, the jury not only may, but they ought to, go further, and give punitive damages in such a sum as will be a warning to the defendant and all other persons not to commit such wrongs and injuries. Punitive damages are given in law as an admonition to the defendant, and all other persons, not to perpetrate similar wrongs; and consequently such damages, to be effectual, must have some relation to the financial ability of the defendant. A sum in damages which would be a salutary warning to a man of limited means would hardly arrest the attention of a millionaire, and

¹¹ *Clinchfield Coal Corporation v. Redd*, 96 S. E. 836, 123 Va. 420.

¹² *Eggett v. Allen*, 96 N. W. 803, 119 Wis. 625. In this case the reviewing court says that, while the expression

"are authorized" is strictly correct, it would have better pleased if the trial court had expressly indicated to the jury that the matter of exemplary damages was within their discretion.

it is on that theory alone that the testimony of the financial ability of the defendant was admitted.¹³

§ 3587. Form of verdict

The court charges the jury that, if they find the issue in this case in favor of the plaintiff, the form of their verdict should be as follows: "We, the jury, find the issues in favor of the plaintiff and assess his damages at the sum of ——— dollars. ———, Foreman." ¹⁴

¹³ *Spear v. Hiles*, 30 N. W. 506, 67 Wis. 350.

¹⁴ *Rutherford v. Dyer*, 40 So. 974, 146 Ala. 685.

CHAPTER CXCI

MARINE INSURANCE

§ 3588. Warranty by insured of seaworthiness of vessel.

3589. Forfeiture by acts increasing hazard—Prohibition of “exposing buildings” within prescribed distance.

3590. Duty of insured with respect to employment of watchman.

§ 3588. Warranty by insured of seaworthiness of vessel

The jury are instructed that in every case of marine insurance upon a ship it is warranted by the insured that the ship is seaworthy, and that a ship is seaworthy only when it is reasonably fit to perform the services, and to encounter the ordinary perils of the voyage contemplated by the parties.¹

§ 3589. Forfeiture by acts increasing hazard—Prohibition of “exposing buildings” within prescribed distance

I charge you that what is meant by the word “exposing” or “exposure” as used in insurance matters means openness to danger, accessibility to anything that may affect especially detrimentally. The words “exposing buildings” mean buildings erected and occupied for the use therein of dangerous elements, as fire, whereby the exposure is increased. A building per se—that is, a building in itself—is not an exposing building. It is the use to which the building is put that determines whether or not it is an exposing building; and if you find that at the time of the burning of the ———, this launch, there was no building within five hundred feet erected and occupied for the use therein of a dangerous element, as fire, and where such dangerous element was used, there was no exposing building within five hundred feet, and the terms of the application and policy were not violated in that respect. Now that is a question for you to say, whether there is any proof in this case to show, under the definition that I have given you of “exposing buildings” that there were any exposing buildings within five hundred feet; that is a question for you to determine, whether the buildings you have heard spoken of here, under the definition I have given you of “exposing buildings,” did increase the danger, or were any element of danger under the meaning of this term here “exposing buildings.”²

¹ Nome Beach Lighterage & Transportation Co. v. Munich Assur. Co. (C. C. Cal.) 123 F. 820.

² Macatawa Transp. Co. v. Fireman's Fund Ins. Co., 134 N. W. 193, 168 Mich. 365, Ann. Cas. 1913C, 69.

§ 3590. Duty of insured with respect to employment of watchman

The jury are instructed that it was the duty of the plaintiff, under the policy of insurance sued on, to exercise ordinary care to employ two competent watchmen, one of whom should be kept on duty on board the boat at all times; and it was the duty of the watchman on board the boat to exercise such care and skill to watch the boat as reasonably prudent and careful men usually exercise in watching similar premises during night hours. If the jury believe, from the evidence, that either the plaintiff or his watchman failed to perform his duties above set forth, then they will find for the defendant. Ordinary care is that degree of care which ordinarily prudent persons usually exercise under the same or similar circumstances.³

³ St. Paul Fire & Marine Ins. Co. v. Kendle, 176 S. W. 368, 165 Ky. 122.

CHAPTER CC

MARRIAGE

- § 3591. Essentials of marriage contract.
- 3592. Requisites of common-law marriage.
- 3593. Duties of officials with respect to issuing marriage license—Liability for penalty.
- 3594. Criminal liability for sending forged telegram purporting to give consent of parent to marriage.

See, also, Breach of Promise to Marry; Husband and Wife.

Proof of prior marriage as element of offense of bigamy, see ante, § 1055.

§ 3591. Essentials of a marriage contract

You are instructed that an agreement either express or implied, coupled with a proviso or qualification, made at the time of entering into a marriage contract, that either or both of the parties to the contract could dissolve the contract at will, would not in law constitute a marriage contract.¹

§ 3592. Requisites of common-law marriage

The court instructs you that a common-law marriage is legal and valid, and neither the issuance of license or ministerial or official marriage ceremony is necessary to constitute a lawful and binding common-law marriage. All that is necessary to constitute such a marriage is that, if the parties mutually agree and consent together to become husband and wife and thereafter carry out the agreement and live and cohabit together as husband and wife, the marriage would be valid.²

You are instructed that, to constitute a valid common-law marriage, it is not necessary that the parties live together for any specified time, nor that they live together continuously for any specified time.³

The court instructs the jury that a common-law marriage is valid in this state, and the issuance of a license or a marriage ceremony is not necessary to constitute a common-law marriage. A common-law marriage exists when a man and woman enter into an agreement to become husband and wife, and in pursuance of such agreement do live together and cohabit as husband and wife, and hold each other out to the public as husband and wife. Such agreement to become husband and wife may be express or implied; an express agreement is where the parties thereto expressly agree, and an implied agreement is one where the conduct of the parties, with reference to the subject-matter, is such as to induce the belief in the

¹ *Schwingle v. Keifer* (Tex. Civ. App.) 135 S. W. 194.

² *Walton v. Walton* (Tex. Civ. App.) 191 S. W. 188.

³ *Walton v. Walton* (Tex. Civ. App.) 191 S. W. 188.

minds of the contracting parties that they intended to do that which their acts indicate they have done. If you believe from a preponderance of the evidence that the plaintiff, ———, and the deceased, ———, agreed to become husband and wife, as is claimed by the plaintiff, and that in pursuance of such agreement they lived together and cohabited as husband and wife, you will find that the plaintiff was the wife of ———, deceased. If you fail to find under the preceding clause that the plaintiff was the common-law wife of ———, deceased, then you are instructed that you need proceed no further, but you will return your verdict for the defendants.⁴

**§ 3593. Duties of officials with respect to issuing marriage license
—Liability for penalty**

The court instructs the jury that it was the duty of the defendant to make inquiry as to the age of ———, not as a mere matter of form, but for the purpose, conscientiously, of ascertaining the facts as to her age. Such inquiry as a business man, acting in the important affairs of life, would make. And if you find from the evidence that the defendant failed to do so, you will then find that he did not make reasonable inquiry, and your answer to the second issue will be "Yes." If, on the other hand, you find from the evidence that P. applied to the defendant for the marriage license; that the defendant inquired of P. the age of ———; that P. told the defendant she was ——— years of age; that the defendant, in good faith, then inquired of G. the age of the girl, and whether P. was himself reliable; and that the defendant did not know that P. was not reliable (if you find from the evidence that P. was not reliable); and that G. told the defendant that the girl was grown; and that P. was a straight boy and altogether reliable; and that G. was himself reliable and was known to the defendant to be reliable; and that the defendant then required P. to make a sworn statement of the girl's age, and that P. in the sworn statement said that she was ——— years of age; and that the defendant believed these statements to be true and acceptable, and acted on them in good faith—you will, in that event, find that the defendant made reasonable inquiry, and your answer to the second issue will be, "No."⁵

§ 3594. Criminal liability for sending forged telegram purporting to give consent of parent to marriage

You are instructed that, in the contract of marriage which forms the gateway to the marriage status, the parties take each other for better or for worse, for richer or poorer, to cherish each in sickness or in health; and, consequently, a mistake by one of the parties

⁴ *Berger v. Kirby* (Tex. Civ. App.) 135 S. W. 1122.

⁵ *Savage v. Moore*, 83 S. E. 549, 167 N. C. 383.

to the marriage, whether resulting from accident or in general from fraudulent practices in respect to character, fortune, health, or the like, is not a crime under the laws of this state.⁶

You are instructed that, if you find from the evidence that at the time of the sending of said telegram there was a preconceived arrangement between the defendant and N., the woman he was seeking to marry, that such a telegram should be sent by the defendant without the consent, authority, or knowledge of ———, the mother of N., and that at the time of the sending of the telegram the defendant did not intend to defraud, deceive, or injure N., by the sending of the said telegram, and if the said N. knew when said telegram was received that it was sent without the authority of her mother, then your verdict must be: "We, the jury, find the defendant not guilty."⁷

You are instructed that, if you find that N., at the time she received said telegram at ———, knew that the said telegram was not signed, authorized, or sent by her mother, ———, and knew that said telegram was sent in pursuance of an arrangement between her, the said N., and the defendant, and that she was not deceived thereby, and that the defendant did not intend to deceive, defraud, or injure her in the sending of the said telegram, then your verdict must be not guilty.⁸

I charge you that, even if you find that the defendant falsely represented himself as a man of wealth and social position to N., and concealed from her the fact that he had previously been convicted of felony, and thereby induced her to marry him, that this of itself was not sufficient to convict the defendant, nor does it prove any element of the crime charged in the information.⁹

I charge you that if you find that N., on ———, was more than ——— years of age, that the consent of her mother or father, or either of them, was not essential or necessary to consummate a legal marriage between the said N. and the defendant.¹⁰

As has been stated to you, the defendant is on trial for the crime charged in the information, and for no other crime. The law in its wisdom does not undertake to regulate the moral conduct of its subjects, and even if you find that the defendant's conduct has been very reprehensible morally, still if you are not convinced of his guilt beyond a reasonable doubt of the crime charged in the information, you should find the defendant not guilty, no matter what your opinion may be of his conduct otherwise.¹¹

⁶ People v. Chadwick, 76 P. 884, 143 Cal. 116.

⁷ People v. Chadwick, 76 P. 884, 143 Cal. 116.

⁸ People v. Chadwick, 76 P. 884, 143 Cal. 116.

⁹ People v. Chadwick, 76 P. 884, 143 Cal. 116.

¹⁰ People v. Chadwick, 76 P. 884, 143 Cal. 116.

¹¹ People v. Chadwick, 76 P. 884, 143 Cal. 116.

CHAPTER CCI

MASTER AND SERVANT

A. THE CONTRACT OF EMPLOYMENT—PERFORMANCE AND COMPENSATION
FOR SERVICES

- § 3595. Skill and care required from servant.
- 3596. Duty of servant to remain at place where business of master carried on.
- 3597. Recovery by master of damages for failure of servant to exercise reasonable care.
- 3598. Character of compensation—Implied contract.
- 3599. Recovery of full compensation as dependent upon full performance.
- 3600. Right of servant on voluntarily quitting employment to receive all wages due.
- 3601. Recovery for extra services.
- 3602. Damages for refusal to permit contract to be performed.
- 3603. Same—Duty of employee to seek other employment.
- 3604. Burden of proof.
- 3605. Sufficiency of evidence of performance by servant.

B. TERMINATION OF CONTRACT AND LIABILITY OF MASTER FOR WRONGFUL
DISCHARGE

- 3606. Termination by mutual consent.
- 3607. Conditional resignation—Duty of master to observe conditions.
- 3608. Right of discharge as dependent on whether hiring at will.
- 3609. Right to discharge where term of contract specified.
- 3610. Grounds for discharge.
 - 3610(1). United States.
 - 3610(2). Iowa.
 - 3610(3). Missouri.
- 3611. Same—Drunkenness.
 - 3611(1). United States.
 - 3611(2). Mississippi.
- 3612. Requirement that services of employee be satisfactory to employer.
 - 3612(1). Missouri.
 - 3612(2). Rhode Island.
- 3613. Waiver of grounds for discharge.
- 3614. Damages for wrongful discharge.
 - 3614(1). Indiana.
 - 3614(2). Iowa.
 - 3614(3). Missouri.
 - 3614(4). Pennsylvania.
- 3615. Mitigation of damages—Duty of plaintiff to seek employment elsewhere.
 - 3615(1). Indiana.
 - 3615(2). Iowa.

C. LIABILITY OF MASTER FOR INJURIES TO SERVANT

1. *Liability of Master in General*

- 3616. Existence of relation of master and servant.
 - 3616(1). Alabama.
 - 3616(2). Indiana.
 - 3616(3). Iowa.
 - 3616(4). Texas.
 - 3616(5). Virginia.
- 3617. Right of volunteers.

- § 3618. Negligence as basis of liability.
3618(1). Alabama.
3618(2). Iowa.
3619. Liability for unavoidable accidents.
3619(1). Alabama.
3619(2). Michigan.
3619(3). Missouri.
3619(4). Texas.
3620. Injuries caused by physical disability of servant.
3621. Degree of care required from master and what constitutes negligence and ordinary care.
3621(1). Alabama.
3621(2). Arkansas.
3621(3). Iowa.
3621(4). Michigan.
3621(5). Nevada.
3621(6). North Carolina.
3621(7). Oklahoma.
3621(8). Oregon.
3621(9). Texas.
3621(10). Washington.
3622. General instruction as to conditions warranting recovery against master.
3622(1). Michigan.
3622(2). Oklahoma.
3623. Effect of fact that employer is corporation.
3623(1). Arkansas.
3623(2). Texas.
3624. Power to delegate duty.
3625. Scope of employment.
3625(1). Delaware.
3625(2). Kentucky.
3625(3). Virginia.
3626. Knowledge of fellow servant as notice to master.
3627. Duty to children.
3628. Employment of minor in hazardous work.
3629. Particular instances of duties of master.
3630. Duty of master to observe warnings of danger given by strangers.
3631. Right of master to assume that servant will avoid obvious perils.
3631(1). Arkansas.
3631(2). North Carolina.
3631(3). Wisconsin.
3632. Release from liability—Setting aside for fraud.
2. *Duty of Master to Furnish Safe Place to Work and to Keep it Safe*
3633. Degree of care required from master.
3633(1). United States.
3633(2). Arkansas.
3633(3). California.
3633(4). Idaho.
3633(5). Iowa.
3633(6). Oklahoma.
3633(7). Texas.
3633(8). Utah.
3633(9). Washington.
3634. Duty to keep place safe.
3634(1). Iowa.
3634(2). Oregon.
3635. Power to delegate duty.
3635(1). Arkansas.
3635(2). Idaho.

- 3635(3). Montana.
- 3635(4). Nevada.
- 3635(5). Oregon.
- 3635(6). Utah.
- § 3636. Necessity of notice to master of defective condition of working place.
 - 3636(1). Iowa.
 - 3636(2). Texas.
- 3637. Duty of inspection of master.
- 3638. Liability to employee whose duty it is to make place safe.
- 3639. Same—Mine foreman.
- 3640. Place becoming unsafe after commencing work by reason of work done.
- 3641. Place made unsafe by climatic conditions.
- 3642. Places inherently dangerous and necessarily changing.
- 3643. Particular instances of unsafe places.
 - 3643(1). Kentucky.
 - 3643(2). Missouri.
 - 3643(3). Texas.
 - 3643(4). Washington.
- 3644. Injuries caused by falling object.
- 3645. Injuries caused by collapse of building.
- 3646. Duty as to furnishing place for blasting operations.
- 3647. Tripping over obstacles.
- 3648. Same—Hidden obstructions.
- 3649. Failure to place warning signal around excavation.
- 3650. Statutory requirements as to fire escapes.
- 3651. Duty of railroads to their employees.
 - 3651(1). United States.
 - 3651(2). Arkansas.
 - 3651(3). Colorado.
 - 3651(4). Mississippi.
 - 3651(5). Missouri.
 - 3651(6). North Carolina.
 - 3651(7). Oklahoma.
 - 3651(8). Texas.
- 3652. Same—Defective roadbed or tracks.
- 3653. Same—Defective highway crossing.
- 3654. Same—Defective bridge.
 - 3654(1). Missouri.
 - 3654(2). Utah.
- 3655. Same—Duty with respect to height of overhead bridge.
- 3656. Same—Approach to cars for purpose of making coupling.
- 3657. Same—Injuries from objects near track.
 - 3657(1). California.
 - 3657(2). Virginia.
- 3658. Same—Failure to light premises.
- 3659. Duty of mine owner.
 - 3659(1). Arkansas.
 - 3659(2). Kentucky.
 - 3659(3). Michigan.
 - 3659(4). Oklahoma.
 - 3659(5). Virginia.
- 3660. Same—Noxious and explosive gases.
 - 3660(1). Iowa.
 - 3660(2). Oklahoma.
- 3661. Same—Duty as to form and location of rooms.
- 3662. Same—Duty with respect to timbering or scaling.
 - 3662(1). Illinois.
 - 3662(2). Kansas.
 - 3662(3). Utah.
- 3663. Same—Duty as to shelter holes.

- § 3664. Defective gas main.
3665. Injuries caused by displacement of earth or rock.
3665(1). Iowa.
3665(2). Missouri.
3. *Duty of Master to Furnish Safe Ways, Appliances, and Equipment, and to Keep Them Safe*
3666. Degree of care required.
3666(1). Arkansas.
3666(2). Delaware.
3666(3). Iowa.
3666(4). Missouri.
3666(5). North Carolina.
3666(6). North Dakota.
3666(7). Oklahoma.
3666(8). Texas.
3667. Delegation of duty.
3667(1). California.
3667(2). Utah.
3668. Duty with respect to providing safe approaches and exits to and from work.
3668(1). North Carolina.
3668(2). South Carolina.
3668(3). Utah.
3669. Duty to keep appliances furnished reasonably safe.
3669(1). United States.
3669(2). Illinois.
3669(3). Indiana.
3669(4). Kentucky.
3669(5). Michigan.
3669(6). North Carolina.
3670. Duty as to inspection or testing of appliances.
3670(1). United States.
3670(2). California.
3670(3). North Carolina.
3670(4). Utah.
3671. Same—Simple tools.
3672. Necessity and sufficiency of notice to master of defects.
3672(1). Alabama.
3672(2). California.
3672(3). Delaware.
3672(4). Missouri.
3672(5). North Carolina.
3673. Effect of knowledge by master of defects.
3674. Right of master to opportunity for repairs.
3675. Defective appliance furnished by coservant with sanction of foreman.
3676. Duty of master where appliances of third person are used.
3676(1). California.
3676(2). South Carolina.
3677. Right of master to rely on guaranty of third person.
3678. Discretion of master in determining character and kind of appliances to be used.
3679. Duty with respect to furnishing best or most improved appliances.
3679(1). Delaware.
3679(2). North Carolina.
3679(3). Virginia.
3680. Appliances in ordinary use.
3681. Liability to servant whose duty it is to inspect or repair alleged defective appliance.
3681(1). Minnesota.
3681(2). Missouri.

- 3681(3). North Carolina.
 - 3681(4). Virginia.
 - § 3682. Duty to improve machine furnished to servant.
 - 3683. Method of tempering tools.
 - 3684. Particular defective appliances.
 - 3684(1). Mississippi.
 - 3684(2). Missouri.
 - 3684(3). North Carolina.
 - 3685. Scaffolds.
 - 3685(1). Missouri.
 - 3685(2). Oregon.
 - 3685(3). Washington.
 - 3686. Ladders.
 - 3686(1). Kentucky.
 - 3686(2). Texas.
 - 3687. Defective rope.
 - 3688. Protective appliances.
 - 3689. Appliances to prevent inhalation of poisonous substances.
 - 3690. Duty to guard dangerous machinery.
 - 3690(1). California.
 - 3690(2). Indiana.
 - 3690(3). Iowa.
 - 3690(4). Missouri.
 - 3690(5). Oklahoma.
 - 3690(6). Oregon.
 - 3691. Care required as to electrical appliances and safeguards against electricity.
 - 3691(1). Arkansas.
 - 3691(2). Missouri.
 - 3691(3). Texas.
 - 3691(4). Virginia.
 - 3692. Safety devices for elevators.
 - 3692(1). Missouri.
 - 3692(2). Oregon.
 - 3693. Duty of railroads.
 - 3693(1). United States.
 - 3693(2). Alabama.
 - 3693(3). Iowa.
 - 3693(4). Kentucky.
 - 3693(5). Missouri.
 - 3693(6). Oklahoma.
 - 3693(7). Texas.
 - 3694. Same—Defective drawbar or drawhead.
 - 3695. Same—Air brakes.
 - 3696. Defective hand car.
 - 3697. Duty of railroad company to inspect cars of other roads.
 - 3698. Duty of master under federal Safety Appliance Act.
 - 3698(1). Iowa.
 - 3698(2). Missouri.
 - 3698(3). Virginia.
 - 3699. Duty of telephone company.
 - 3700. Duty of operator of mines.
 - 3700(1). Alabama.
 - 3700(2). Missouri.
 - 3700(3). Oklahoma.
 - 3701. Same—Duty to furnish safe and suitable oil.
- 4. Methods of Work**
- 3702. Duty of master in general.
 - 3702(1). Michigan.
 - 3702(2). Oregon.
 - 3702(3). Texas.

- 3703. Delegation of duty.
 - 3704. Use of improper and unusual methods of work as ground of liability.
 - 3705. Presumption of knowledge by master of customary method of work.
 - 3706. Failure to furnish sufficient men to enable work to be done with safety.
 - 3706(1). Delaware.
 - 3706(2). Missouri.
 - 3706(3). Virginia.
 - 3707. Method of handling explosives.
 - 3708. Care required while moving heavy objects at an elevation.
 - 3709. Railroad operations.
 - 3710. Duty to give warning signals in operation of engines and cars.
 - 3710(1). Alabama.
 - 3710(2). Arkansas.
 - 3710(3). California.
 - 3710(4). Kentucky.
 - 3710(5). Missouri.
 - 3710(6). Texas.
 - 3710(7). Virginia.
 - 3710(8). West Virginia.
 - 3711. Same—Kicking or shunting cars.
 - 3712. Method of stopping trains.
 - 3712(1). Minnesota.
 - 3712(2). Texas.
 - 3712(3). Virginia.
 - 3713. Duty of railroad company to watch out for employees on track.
 - 3713(1). United States.
 - 3713(2). Alabama.
 - 3713(3). Idaho.
 - 3713(4). Kentucky.
 - 3713(5). Utah.
 - 3714. Mining operations.
5. *Duty of Master to Warn or Instruct Concerning Dangers Connected with Work*
- 3715. Duty in general.
 - 3715(1). Alabama.
 - 3715(2). Arkansas.
 - 3715(3). California.
 - 3715(4). Delaware.
 - 3715(5). Iowa.
 - 3715(6). Kentucky.
 - 3715(7). Michigan.
 - 3715(8). Texas.
 - 3716. Duty as dependent upon knowledge or means of knowledge of servant.
 - 3716(1). Arkansas.
 - 3716(2). California.
 - 3716(3). Delaware.
 - 3716(4). Oklahoma.
 - 3716(5). Texas.
 - 3717. Duty as dependent on whether servant engages to work generally or to do some specific work.
 - 3718. Duty with respect to minors and inexperienced employees.
 - 3718(1). Alabama.
 - 3718(2). Arkansas.
 - 3718(3). California.
 - 3718(4). Delaware.
 - 3718(5). Oregon.
 - 3718(6). Tennessee.
 - 3718(7). Utah.

- § 3719. Same—Knowledge by master of incapacity of infant.
- 3720. Duty with respect to elevators and elevator shafts—Duty to warn as to removal of elevator.
- 3721. Duty in operation of mines.
 - 3721(1). Utah.
 - 3721(2). Virginia.
- 3722. Duty with respect to use of explosives.
- 3723. Care required in blasting operations—Duty to warn as to unexploded charges.
- 3724. Warning against danger of flying fragments of steel or iron.
- 3725. Warning against rolling stones.

6. *Assumption of Risk*

- 3726. Risks naturally and ordinarily incident to employment.
 - 3726(1). United States.
 - 3726(2). Alabama.
 - 3726(3). Arkansas.
 - 3726(4). California.
 - 3726(5). Delaware.
 - 3726(6). Indiana.
 - 3726(7). Iowa.
 - 3726(8). Kentucky.
 - 3726(9). Oklahoma.
 - 3726(10). Texas.
 - 3726(11). Utah.
- 3727. Open, obvious, or known dangers.
 - 3727(1). Arkansas.
 - 3727(2). California.
 - 3727(3). Iowa.
 - 3727(4). Michigan.
 - 3727(5). Missouri.
 - 3727(6). Nebraska.
 - 3727(7). North Dakota.
 - 3727(8). Oklahoma.
 - 3727(9). Texas.
 - 3727(10). Virginia.
 - 3727(11). Washington.
 - 3727(12). Wisconsin.
- 3728. Same—Risk of customary dangerous method of work.
 - 3728(1). United States.
 - 3728(2). Texas.
- 3729. Same—Risks arising in building construction.
- 3730. Same—Risks from machinery.
 - 3730(1). Delaware.
 - 3730(2). Missouri.
 - 3730(3). Washington.
 - 3730(4). Wisconsin.
- 3731. Same—Risk of handling electric wires with naked hands.
- 3732. Same—Risks from railroad operations.
 - 3732(1). Iowa.
 - 3732(2). Missouri.
 - 3732(3). Oklahoma.
- 3733. Same—Risks incident to coupling cars.
 - 3733(1). Delaware.
 - 3733(2). Texas.
- 3734. Same—Risks assumed by section men or railroad.
- 3735. Same—Risks from mining operations.
 - 3735(1). United States.
 - 3735(2). Alabama.
- 3736. Same—Risk of disease.

- § 3737. Same—Rule under federal Employers' Liability Act.
3737(1). United States.
3737(2). Virginia.
3738. Rule as affected by duty of injured servant to inspect.
3739. Unknown risks and latent and invisible defects.
3739(1). United States.
3739(2). California.
3739(3). Idaho.
3739(4). Indiana.
3739(5). Missouri.
3739(6). Oklahoma.
3739(7). Oregon.
3740. Risks growing out of negligence of master.
3740(1). Arkansas.
3740(2). Illinois.
3740(3). Indiana.
3740(4). Iowa.
3740(5). Missouri.
3740(6). Nevada.
3740(7). North Carolina.
3740(8). Oklahoma.
3740(9). Oregon.
3740(10). South Carolina.
3740(11). South Dakota.
3740(12). Virginia.
3741. Same—Duty of inspection and right of employee to assume that master has done his duty.
3741(1). Alabama.
3741(2). Arkansas.
3741(3). California.
3741(4). Georgia.
3741(5). Missouri.
3741(6). Texas.
3741(7). Virginia.
3742. Same—Risk of improper guard furnished for machinery.
3743. Same—Railroad operations.
3743(1). Texas.
3743(2). Virginia.
3744. Same—Risks from accumulation of explosive materials.
3745. Continuing in employment with knowledge of omission of master to provide proper safeguards or safe ways, appliances, etc.
3745(1). United States.
3745(2). California.
3745(3). Delaware.
3745(4). Iowa.
3745(5). Missouri.
3745(6). North Carolina.
3745(7). Oklahoma.
3745(8). Texas.
3745(9). Washington.
3746. Same—Knowledge by servant of danger or appreciation by him of risk incident to use of defective ways, appliances, etc.
3746(1). United States.
3746(2). Arkansas.
3746(3). California.
3746(4). Missouri.
3746(5). North Carolina.
3747. Same—Elevators.
3748. Same—Rule, under statute, as to liability of railroads.
3749. Right of servant to rely on promise of master to remedy defects.
3749(1). Arkansas.

- 3749(2). Missouri.
- 3749(3). Oklahoma.
- § 3750. Reliance on assurances of safety.
 - 3750(1). Alabama.
 - 3750(2). Kentucky.
 - 3750(3). Missouri.
 - 3750(4). Virginia.
- 3751. Known dangers not of imminent or threatening character.
- 3752. Risk of temporary peril to which servant suddenly exposed by act of master.
 - 3752(1). Illinois.
 - 3752(2). Missouri.
 - 3752(3). Oregon.
 - 3752(4). Virginia.
- 3753. Extraordinary risks or dangers.
 - 3753(1). Arizona.
 - 3753(2). Colorado.
 - 3753(3). Texas.
 - 3753(4). West Virginia.
- 3754. Agreement by servant to make his working place safe.
- 3755. Risks attendant on work outside of scope of employment.
 - 3755(1). Arkansas.
 - 3755(2). California.
 - 3755(3). Texas.
- 3756. Same—Effect of knowledge acquired at usual task.
- 3757. Rule as to youthful employees and minors.
 - 3757(1). Arkansas.
 - 3757(2). Wisconsin.

7. Contributory Negligence

- 3758. Concurrence of negligence of servant in causing injury as essential element of contributory negligence.
 - 3758(1). Kansas.
 - 3758(2). Texas.
- 3759. Duty of servant to exercise ordinary care.
 - 3759(1). Florida.
 - 3759(2). Michigan.
 - 3759(3). Missouri.
 - 3759(4). North Carolina.
 - 3759(5). Oklahoma.
 - 3759(6). Oregon.
 - 3759(7). Texas.
 - 3759(8). Utah.
- 3760. Question of negligence as dependent upon knowledge of servant.
 - 3760(1). California.
 - 3760(2). Texas.
- 3761. Duty to inspect place of work.
- 3762. Disregard by servant of known dangers.
 - 3762(1). Alabama.
 - 3762(2). California.
 - 3762(3). South Carolina.
 - 3762(4). Texas.
- 3763. Duty to guard against obvious danger.
- 3764. Injuries received while temporarily absent from place of work.
- 3765. Unnecessarily remaining in dangerous place.
 - 3765(1). Arkansas.
 - 3765(2). Missouri.
- 3766. Going voluntarily or unnecessarily into dangerous place.
 - 3766(1). Alabama.
 - 3766(2). Iowa.
 - 3766(3). Kansas.

- 3766(4). Kentucky.
- 3766(5). Missouri.
- 3766(6). North Carolina.
- 3766(7). Texas.
- 3766(8). Virginia.
- 3767. Disregard of warnings or signals.
 - 3767(1). California.
 - 3767(2). Kentucky.
 - 3767(3). Missouri.
 - 3767(4). North Carolina.
 - 3767(5). Texas.
 - 3767(6). Virginia.
- 3768. Disobedience of orders or violation of rules of master.
 - 3768(1). United States.
 - 3768(2). Alabama.
 - 3768(3). Arkansas.
 - 3768(4). Georgia.
 - 3768(5). Illinois.
 - 3768(6). Indiana.
 - 3768(7). Kansas.
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 - 3768(10). Virginia.
- 3769. Same—Rule as to method of coupling cars.
 - 3769(1). Alabama.
 - 3769(2). Minnesota.
 - 3769(3). Missouri.
- 3770. Same—Effect of custom in violating rule.
 - 3770(1). Alabama.
 - 3770(2). Missouri.
- 3771. Failure to perform routine duty relating to condition of premises.
- 3772. Acts in obedience to direction of master.
 - 3772(1). Alabama.
 - 3772(2). Arkansas.
 - 3772(3). Delaware.
 - 3772(4). Indiana.
 - 3772(5). Missouri.
 - 3772(6). Oregon.
 - 3772(7). Texas.
 - 3772(8). Virginia.
 - 3772(9). West Virginia.
- 3773. Going into dangerous place in obedience to orders.
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 - 3773(2). Washington.
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- 3776. Duty to use safest of two or more methods of work.
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 - 3790(7). North Carolina.
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 - 3790(11). West Virginia.
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- 3795. Liability for injuries to minor employed in violation of statute.
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3803. Duty not to employ incompetent foreman.**3804. Liability for negligence of incompetent fellow servant.**

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 - 3836(2). Missouri.
- 3837. Liability for malicious prosecution.

A. THE CONTRACT OF EMPLOYMENT—PERFORMANCE AND COMPENSATION FOR SERVICES

§ 3595. Skill and care required from servant

You are instructed that, if the jury believe from the preponderance of the evidence that the plaintiff, solely because of ignorance, incompetence, or negligence erected for the defendant works of an antiquated style and plan, and such as were insufficient for the purpose intended, and placed therein engines, pumps, and other machinery and appliances which were antiquated and insufficient, and at an expense which was unreasonable and unnecessary, allowances may be made in behalf of the defendant of the damage, if any, thus occasioned, whether by original cost, by loss in operation, or by necessary repairs and reconstruction. But in this connection the jury will consider whether or not the plant at ——— was contemplated by both parties to the contract as the model after which the ——— plant would be constructed, and

whether or not this contemplated design was reasonably carried out.¹

The jury are instructed that when the plaintiff entered into the contract of employment of ———, the law implied a promise and undertaking on his part that he would use reasonable care and diligence, and that he had and would exercise reasonable skill and knowledge in the prosecution of his duties under said contract. But in deciding on this question the jury will consider the knowledge had by the defendant at the time of making the contract of the previous experience and training of the plaintiff.²

§ 3596. Duty of servant to remain at place where business of master carried on

The court instructs the jury that the contract in question gave to the plaintiff the option to make his residence at ——— during the first period of his service for two or three years, and during said time he had the right to take such vacation as could be availed of without detriment or hindrance to the proper management of the business of the company. For the remainder of the full term of ——— years the said plaintiff was not required by the contract to spend any more time in ——— than he might elect to spend; but he was required to give such attention to the business of the company as may have been necessary in order to promote its best interest. It follows that mere absence in ——— during the second period of the employment was not of itself a breach of contract by the plaintiff, unless the jury shall consider, under all the evidence in the case, that his presence in ——— was required in order that he could give such attention to the business as was necessary in order to promote its best interests. In other words, the court construes the contract in this respect as not requiring the presence of the plaintiff in ——— unless some exigency occurred which made it essential to the promotion of the best interests of the company that he should be in ———.³

§ 3597. Recovery by master of damages for failure of servant to exercise reasonable care

You are instructed that if the jury believe from the preponderance of the evidence that at the time of the performance of the contract the plaintiff did not have and exercise reasonable knowledge, skill, and care for and in the performance of the duties devolving on him under said contract, and that the company suffered

¹ Mathieson Alkali Works v. Mathieson (C. C. A. Va.) 150 F. 241, 80 C. A. 129.

² Mathieson Alkali Works v. Math-

ieson (C. C. A. Va.) 150 F. 241, 80 C. A. 129.

³ Mathieson Alkali Works v. Mathieson (C. C. A. Va.) 150 F. 241, 80 C. A. 129.

damages thereby, then the court instructs the jury that in arriving at their verdict they should deduct from the claim of the plaintiff the amount of the said damages, and that, if the amount of said damages exceeds the claim of the plaintiff, a verdict over for such excess against the plaintiff and in favor of the defendant should be given.⁴

§ 3598. Character of compensation—Implied contract

With reference to the contention that plaintiff was to be paid, if at all, in new employment, and not in money, you are instructed that, if you find from a fair preponderance of the evidence that the plaintiff performed the services set forth in his complaint, that such services were rendered for and received and accepted by the defendant, and if you further find, from a fair preponderance of the evidence and under all the circumstances of the case as reflected by the evidence, that the services, if any, were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that a pecuniary compensation should be made for them, then you would be warranted, under the law, in finding there was an implied promise upon the part of the defendant to pay the plaintiff in money for any such services; but otherwise if you should find that there was an express contract to the contrary, or if you should find that the services were not of a nature leading to such a reasonable belief.⁵

§ 3599. Recovery of full compensation as dependent upon full performance

The court instructs the jury that the contract sued on by the plaintiff is an entire one, and that he cannot in any event recover the entire amount sued for by him, unless they believe that he performed in the manner above set out each and every material duty required of him under said contract.⁶

§ 3600. Right of servant on voluntarily quitting employment to receive all wages due

The court construes the law to require that, when the servant quits the employ of the master voluntarily, the master is entitled to a reasonable time in which to pay the servant or employé the amount of wages due the servant or employé and that in this case, if, by reason of defendant's custom, its regular day and time for the payment of employes and servants came on ———, and plaintiff left the service of defendant on ———, ——— days prior to

⁴ Mathieson Alkali Works v. Mathieson (C. C. A. Va.) 150 F. 241, 80 C. C. A. 120.

⁵ North American Union v. Oil-
phint, 217 S. W. 1, 141 Ark. 346.

⁶ Mathieson Alkali Works v. Mathieson (C. C. A. Va.) 150 F. 241, 80 C. C. A. 120.

such pay day, then the intervening time between said dates was such a reasonable time as defendant was entitled to, in contemplation of law; and, the contract of employment and service between plaintiff and defendant having been terminated on said ——— day of ———, then all wages due plaintiff from defendant were due and payable to plaintiff on said pay day, and plaintiff had a right to sue for and recover the entire amount of wages due him from defendant.⁷

§ 3601. Recovery for extra services

The jury are instructed that, if they believe from the evidence that the plaintiff was employed by defendant for the sole purpose of exploiting a certain specific machine—that is, explaining it and its mode of operation, and the results produced by it, to persons inquiring concerning it, and meeting arguments and objections made against it—and also find from the evidence that these services were to be rendered at a specified sum per week, which was paid, still if they find that during the term of his employment plaintiff, at the request of defendant, rendered certain services outside the sphere of his employment, he is entitled to recover a reasonable compensation for such services, although there was no express agreement to pay therefor.⁸

§ 3602. Damages for refusal to permit contract to be performed

You are instructed that if, under the evidence and these instructions, you find for plaintiff, it will then be your duty to determine and assess the damages, if any. In that connection you may consider, only however, as may be shown by the evidence the following elements, viz. the kind of work at which he was engaged before and at the time of his alleged injury and the wages, if any, paid him therefor. When, if at all, he has been able and willing, since his alleged injury, to perform the work he was engaged in when injured, and what, if any, period of time since the alleged injury he has been unable to secure employment of the class at which he was engaged when injured. And you may consider what, if any other employment he has had since his alleged injury, and the wages he has received therefor, if any. And from a consideration of the elements enumerated, only as may be shown by a preponderance of the evidence, you may assess the recovery at such an amount as will fully compensate plaintiff for the damages, if any, he has sustained, as alleged in the complaint, but not to exceed the sum demanded therein.⁹

⁷ *Burnetta v. Marcelline Coal Co.*, 79 S. W. 136, 180 Mo. 241.

⁸ *Brown v. Crown Gold Milling Co.*, 89 P. 86, 150 Cal. 376.

⁹ *Carter v. Richart*, 114 N. E. 110, 65 Ind. App. 255.

§ 3603. Same—Duty of employee to seek other employment

You are instructed that, where one holds a contract to perform service and the other party, wrongfully refuses to permit the services to be performed, it is the duty of the one who is to perform the services to seek similar employment elsewhere, and thereby save himself harmless, if he is reasonably able to do so. And so for a violation of such a contract the measure of damages is the wages stipulated for the full term, where the injured party has been unable to secure other employment during the term. And where the injured party has been able to secure employment, then the measure of damages is the diminution between the wages agreed to be paid under the contract and the wages received under the new employment. So in this case if you find that the contract existed between plaintiff and defendants as charged, and that defendants wrongfully violated it as charged, then under such circumstances it was the duty of plaintiff to seek other employment.¹⁰

§ 3604. Burden of proof

The court instructs the jury that the burden of proof is on the plaintiff to show that he performed the express and implied obligations of the contract in a reasonably efficient and competent manner. And the burden of proof is on the defendant to show as a ground of counterclaim the converse of this state of fact and to prove damage. In a civil case such as this the burden of proof is sustained by a preponderance of evidence.¹¹

§ 3605. Sufficiency of evidence of performance by servant

You are instructed that, if the jury believe from the preponderance of evidence that the plaintiff reasonably performed the obligations of his contract, they should find for the plaintiff in the amount sued for.¹²

B. TERMINATION OF CONTRACT AND LIABILITY OF MASTER FOR WRONGFUL DISCHARGE**§ 3606. Termination by mutual consent**

The court instructs you that, when the plaintiff voluntarily left the service of the defendant company, and defendant company accepted plaintiff's action, and issued to him its memorandum slip or duebill, showing the amount due plaintiff to date of his quitting service, and further accepted plaintiff's room or place in the mine, and issued to him its clearance, then the contract of employ-

¹⁰ Carter v. Richart, 114 N. E. 110, 65 Ind. App. 255.

¹¹ Mathleson Alkali Works v. Mathleson (C. C. A. Va.) 150 F. 241, 80 C. C. A. 129.

¹² Mathleson Alkali Works v. Mathleson (C. C. A. Va.) 150 F. 241, 80 C. C. A. 129.

ment, express or implied, existing between plaintiff and defendant, ceased by mutual consent and action of the parties.¹³

§ 3607. Conditional resignation—Duty of master to observe conditions

You are instructed that the letter written by the plaintiff at M. on the ——— day of ———, was not of itself a letter of resignation, but was what might be termed in law a conditional resignation, and by the terms and conditions of said letter the defendants had the right to accept or reject the said resignation on or before the time fixed by the said letter of said date. And in this connection you are further instructed the defendants did not comply with the terms and conditions of said letter on that date, and as a matter of law, had no right to accept said resignation at a later time than that fixed by the terms and conditions of said letter, unless you find from a preponderance of the evidence that the plaintiff was guilty of misconduct toward the defendants subsequent to the time he left M. or unless you further find that the defendants had discovered other misconduct of the plaintiff that occurred prior to the time they answered such letter.¹⁴

§ 3608. Right of discharge as dependent on whether hiring at will

The jury are instructed that the case divides itself, under the pleadings, into two branches. There are two inquiries, the determination of one of which may render it unnecessary to go into the other, according as you determine that from the proofs in the case. The first of these is as to whether or not the plaintiff has proved, by a preponderance of the evidence, a determinate hiring for a year or from year to year. This is essential, and that burden was upon him to prove to your satisfaction by a preponderance of the evidence that this hiring was not what we call a general hiring for an indeterminate time, but that it was a hiring for a definite, determinate time, namely, from January 1st to January 1st. The general principle is a true one, and I will give you a written instruction to that effect that I have been asked to give you, that an indeterminate hiring is to be denominated as a hiring at will and may be terminated by either party, without notice; and it is only in the event that you determine that a contract existed between the plaintiff and the defendant for a hiring from year to year—that is, from January 1st to December 31st—that the further consideration of the other questions involved becomes necessary, be-

¹³ *Burnetta v. Marceline Coal Co.*, 79 S. W. 136, 180 Mo. 241.

¹⁴ *Nesbit v. Giblin*, 148 N. W. 138, 96 Neb. 369, L. R. A. 1915D, 477, Ann. Cas. 1916A, 1008.

cause, if you do not find that a hiring existed from January 1st to December 31st, this defendant, without giving any reason and without any cause, had a right at any time to terminate that service, and, under the circumstances proved in this case, there could be no injury to the plaintiff by so terminating the employment.¹⁵

The jury are charged that under the evidence in this case there is no definite period fixed for the duration of the employment of the plaintiff by the defendant, and therefore the same is merely a contract at will, terminable by either party at any time without notice, and no liability rests upon the defendant to pay the plaintiff any salary subsequent to her discharge on _____.¹⁶

§ 3609. Right to discharge where term of contract specified

You are instructed that under a contract of employment entered into between the parties, where the time of employment is not definitely stated, the employer may discharge an employé at any time he sees fit, but where the time is definitely fixed for which the employé has been employed, then the employer cannot discharge the employé unless for good cause, without becoming liable for the balance due under the contract.¹⁷

You are instructed that if, after a fair and impartial consideration of all of the testimony in this case, and in compliance with the instructions herein given you, you believe that the plaintiff has established by a preponderance of the testimony that he had a contract in writing with the defendant, by the terms of which he was employed for one year, beginning _____, and terminating _____, by the terms of which he was to be paid the sum of \$_____ per month, and that the defendants, without any fault on plaintiff's part, discharged the plaintiff and has since failed to pay him from the _____, it would be your duty to find for the plaintiff for the balance due under the terms of the contract, not to exceed in all the sum of \$_____, with interest at the rate of _____ per cent. from _____.¹⁸

§ 3610. Grounds for discharge

§ 3610(1). United States

The jury are instructed that a master may discharge an employé for incompetency and that a presumption of such incompetency may arise from the excessive use of alcoholic liquors, and, if the jury believe from all of the evidence that after employment by the

¹⁵ E. I. Du Pont Co. v. Waddell (C. C. A. W. Va.) 178 F. 407, 101 C. C. A. 335.

¹⁶ Warden v. Hinds (C. C. A. Va.) 163 F. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529.

¹⁷ Sharpless Separator Co. v. Gray, 161 P. 1074, 62 Okl. 73.

¹⁸ Sharpless Separator Co. v. Gray, 161 P. 1074, 62 Okl. 73.

defendant, and after the ———, and prior to the ———, the said plaintiff did so use such liquors, then the defendant had a right, without liability, to discharge said plaintiff, and they shall find for the defendant.¹⁹

§ 3610(2). *Iowa*

The court instructs the jury that, if you find from the evidence as hereinbefore instructed that the plaintiff was ready, able, and willing to perform the services necessary in pursuance of the terms and conditions of the contract between said plaintiff and defendant, as determined by you, and that the defendant, without cause, discharged the plaintiff before the entire services were completed under the terms of the contract, this would not prevent the plaintiff from recovery, as the law forbids parties to enter into a legal contract from wantonly, and without cause, repudiating such contract to the injury and detriment of the other parties thereto. But, if you find that the plaintiff was not in good faith carrying out or attempting to carry out the said contract according to its terms and conditions, then and in that case the defendant would have a right to dispense with the services of the plaintiff, and terminate said contract.²⁰

§ 3610(3). *Missouri*

You are instructed that by the term "good cause" as used in these instructions is meant that plaintiff was bound to render such services for defendant, and in such manner as a reasonably skillful and competent workman should have rendered, under defendant's directions, and if you find from the evidence that plaintiff failed to render such services, then the court declares there was a good cause for his discharge, and the verdict will be for defendant; and you are further instructed that the burden is upon the defendant to establish to your satisfaction, by a preponderance of the evidence, that the plaintiff failed to so render such services.²¹

§ 3611. *Same—Drunkenness*

§ 3611(1). *United States*

The court instructs the jury that, if they believe from all of the evidence that between ——— and ———, the plaintiff drank intoxicating liquors to excess, and that while in the employ of the defendant, the ——— Company, the business of the said company was neglected as a result of such habit, that then the defendant had the right to act upon the knowledge of such conduct and discharge the said plaintiff, and they should find for the defendant.²²

¹⁹ *E. I. Du Pont Co. v. Waddell* (C. C. A. W. Va.) 178 F. 407, 101 C. C. A. 335.

²⁰ *Tullis v. H. S. Chase & Co.*, 144 N. W. 17, 162 Iowa, 264.

²¹ *Maxton v. Gilsontite Const. Co.*, 114 S. W. 577, 134 Mo. App. 360.

²² *E. I. Du Pont Co. v. Waddell* (C. C. A. W. Va.) 178 F. 407, 101 C. C. A. 335.

§ 3611(2). Mississippi

The court instructs the jury for the defendant that if you believe from the evidence that, unknown to the defendant, the plaintiff had been drunk during the greater part of the months of ———, ———, and ———, so as to so seriously interfere with the proper discharge of his duties to defendant, and that defendant discharged him as soon as he found out this fact, then it makes no difference that at or about the time of the discharge plaintiff sobered up without the knowledge of defendant, still defendant had a right to discharge him, and the jury will in such case find for the defendant.²³

§ 3612. Requirement that services of employee be satisfactory to employer

§ 3612(1). Missouri

The court instructs the jury that if it believes and finds from the evidence that the plaintiff was employed by the defendant as a traveling salesman, credit man, adjuster, and collector for a period commencing ———, to continue until ———, at a salary of \$—— a month from the ———, until the ———, and \$—— per month from the ——— until the ———, ———; and if you further find that the plaintiff performed the services required of him to be performed in the contract, was competent, did not dissipate, was not guilty of misconduct, did not violate his instructions, and was ready and willing at all times to perform the services required of him by the terms of said contract; and if you believe that plaintiff rendered services under said contract and that on the ——— plaintiff was discharged by defendant for some other reason than that his services were not satisfactory to defendant, then in that event you should find in favor of plaintiff and against the defendant.²⁴

The court instructs the jury that if they believe and find from the evidence in this case that on ———, the defendant was dissatisfied with the services rendered defendant by plaintiff under the terms of the contract, then defendant had a right to discharge the plaintiff, notwithstanding you may further believe from the evidence that the defendant's dissatisfaction was not the result of incompetency, dissipation, misconduct, violation of instructions, unwillingness or unreadiness at all times to perform the services required of him as set out in said contract on the part of the plaintiff.²⁵

§ 3612(2). Rhode Island

The court instructs the jury that, where the contracting parties have in view to satisfy the personal taste, feelings, sensibilities, or

²³ *Willis v. Lowery*, 57 So. 418, 101 Miss. 118, 38 L. R. A. (N. S.) 339, Ann. Cas. 1916A, 1018.

²⁴ *Butsch v. Emerson-Brantingham*

Implement Co., 196 S. W. 1024, 197 Mo. App. 387.

²⁵ *Butsch v. Emerson-Brantingham Implement Co.*, 196 S. W. 1024, 197 Mo. App. 387.

judgment of one of the parties, the stipulation in the contract that the thing to be done must be to his satisfaction is absolute, and his decision that it is not to his satisfaction is final and unquestionable. On the other hand, where the chief thing the parties have in mind is to effect some definite purpose or end, of the performance of which others can judge just as well as the parties can, and which involves no consideration strictly personal, the stipulation that it shall be done to the satisfaction of the party is not controlling. In such case, the stipulation that the service to be performed, or the thing to be done, to effect such purpose or end, shall be satisfactory to one of the parties, means "reasonably satisfactory," that is, as well as it could be expected to be done, and does not justify a merely personal or whimsical rejection of such work. A simple allegation of dissatisfaction with the work, without some good reason assigned for it, does not justify a repudiation or breach of a contract in such case. The motive which induced the defendant to terminate the contract and discharge the plaintiff is immaterial, if there was sufficient ground for his discharge, and it was not necessary that the defendant state the reasons for the discharge at the time.²⁶

The court instructs the jury that if the plaintiff entered the defendant's employ under the contract declared on, and continued in such employ to the time of the breach thereof by the defendant, performing the work undertaken by him in accordance with the terms of the contract in a reasonably satisfactory manner all that time, and while he was still ready and willing to go on the defendant, without his consent, and against his protest, and without reasonable cause, discharged the plaintiff, he is entitled to recover the wages for the unexpired portion of the term, less the amount he has earned, or might have earned by a reasonable effort to obtain other employment in the same line of business.²⁷

§ 3613. Waiver of grounds for discharge

Upon the question of performance of the contract, you are further instructed that any breach of contract may be waived by the employer, and whether or not there has been a waiver of any particular act is to be determined by the jury; and, if you find a waiver or condonation of any particular act, that act cannot subsequently be relied upon by the employer as a reason to discharge the servant. Such discharge must then arise from another act or other acts occurring subsequently to those waived or condoned.²⁸

²⁶ *Hanaford v. Stevens & Co.*, 93 A. 209, 39 R. I. 182. In this case the employee was required to do his work in an "efficient and satisfactory manner."

²⁷ *Hanaford v. Stevens & Co.*, 96 A. 209, 39 R. I. 182.

²⁸ *Hauerbach v. Calder*, 49 P. 649, 15 Utah, 371.

§ 3614. Damages for wrongful discharge**§ 3614(1). Indiana**

The court instructs the jury that, if plaintiff was wrongfully discharged before his contract expired, he had a right to sue at once for a breach of the contract, and would have a right to recover his full damages to the end of his term.²⁹

§ 3614(2). Iowa

You are instructed that, if you find that plaintiff was discharged from his said employment, you will consider the second matter already indicated. That matter is this: After plaintiff's discharge, if discharged, did plaintiff use reasonable diligence to secure employment at said place? The burden is upon plaintiff to show that he did. If, then, upon considering this matter, you find and believe from the evidence that plaintiff did use reasonable diligence to secure employment, and failed, then you may allow him on account of this against defendants \$—— for each day that he remains at said —— after said discharge and failed to find employment. You will observe that there will remain some time from the time plaintiff left —— to go to ——, to the end of said —— months, to wit, ——. Now, as to that time, if you find and believe from the evidence that no employment could then have been had by the use of reasonable diligence at said —— by plaintiff up to said ——, then you may allow him on account of such time the sum of \$—— per day for each day thereof. The total amount, if anything, allowed by you for plaintiff, shall not exceed the sum of —— days, at \$—— per day, with interest on the amount so allowed by you, if anything.³⁰

§ 3614(3). Missouri

The court instructs the jury that, if from the evidence, you find for the plaintiff, then your verdict should be for the amount of his salary for the remaining —— months of the period of hire, at the rate of \$—— per month, less any sum or sums that plaintiff may have received for wages during said —— months, provided you believe from the evidence that the plaintiff and defendant entered into an agreement of hire for a period of —— months from the —— day of ——, and that plaintiff was discharged on or about the —— day of ——, without fault on part of plaintiff.³¹

The court instructs the jury that, if you find for the plaintiff, you will fix your verdict for the whole amount that would have been

²⁹ *Inland Steel Co. v. Harris*, 95 N. E. 271, 49 Ind. App. 157.

³⁰ *Gillespie v. Ashford*, 101 N. W. 649, 125 Iowa, 729.

³¹ *Osterman v. St. Louis Fish &*

Oyster Co. (App.) 218 S. W. 410. In this case the defendant did not attempt to show what the plaintiff might have earned after his discharge.

due the plaintiff if he had continued to work for the defendant under the contract sued upon, from the date of his discharge until the expiration of the contract, after allowing a credit for anything which the evidence shows the defendant may have paid him since that time and for anything which plaintiff may have earned from services rendered to others, and after allowing a further credit of an amount equal to what the jury may believe from the evidence he will be able to earn between now and the date of the expiration of said contract.³²

§ 3614(4). Pennsylvania

The jury are instructed that, if the plaintiff is entitled to any damages for breach of contract, the measure of the damage is the value of the contract at the time of breach; and in considering the value the jury must bear in mind that the defendants were not obliged to furnish any specified number of machines, or even to continue their manufacture. The plaintiff's rights under his contract were subject to the contingencies of business, depression of trade, which might tend to reduce the sales; and in estimating the damages consequent upon the loss of the contract the jury must take into consideration what the plaintiff probably could earn in some other employment or occupation during the period during which the contract ran.³³

§ 3615. Mitigation of damages—Duty of plaintiff to seek employment elsewhere

§ 3615(1). Indiana

The court instructs the jury that it is the duty of a person, when unlawfully discharged, to make reasonable effort to obtain work elsewhere, and that in no event could he recover more than what his actual loss might have been had he made such reasonable effort to obtain employment; that the employment he is required by the law to seek is that which is similar to, or of the same general character as, that which he had contracted to perform; that plaintiff was bound to seek employment which was of the same general character as that of his trade as a roller.³⁴

§ 3615(2). Iowa

You are instructed that "reasonable diligence," as used in these instructions, as meant by them, is such diligence as a man of ordinary care and prudence, desiring work, would make, under the cir-

³² *Ross v. Grand Pants Co.*, 156 S. W. 92, 170 Mo. App. 291. In this case, although the expiration of the term of employment was after the trial, the unexpired term was only three months.

³³ *Rightmire v. Hirner*, 41 A. 538, 188 Pa. 325.

³⁴ *Inland Steel Co. v. Harris*, 95 N. E. 271, 49 Ind. App. 157.

cumstances surrounding plaintiff at said place, to get it. In other words, the reasonable diligence that plaintiff should have made at said place to obtain employment is such care or diligence as such a man at such a place, desiring work, would ordinarily and reasonably make to get it. As to what such effort or diligence is in this case, you are to determine from the facts and circumstances surrounding the matter at the time in question.³⁵

C. LIABILITY OF MASTER FOR INJURIES TO SERVANT

1. *Liability of Master in General*

§ 3616. Existence of relation of master and servant

§ 3616(1). Alabama

The court instructs the jury that, if you believe from the evidence that the defendant reserved no right to interfere with the details of H.'s work, but only to require it to be done by H., and by the men who were working under him, so as to conform to his contract and the mining rules, the jury must find that H. is an independent contractor; and in the event you do so find, you cannot find for the plaintiff under those counts of the complaint which allege that plaintiff's intestate was an employé of the defendant.³⁶

§ 3616(2). Indiana

I instruct you, therefore, that if you find from the evidence that the miners working in defendant company's mine had elected to have the plaintiff employed as a shot firer in said mine, and were contributing of their wages earned by mining coal in said mine to the payment of the wages of said ———, as such shot firer, and that the defendant company was holding back the portion of the miners' wages so contributed to pay the plaintiff as such shot firer, and paying the same over to the treasurer of the miners' local union, to be paid by such treasurer to plaintiff, then, in that view of the case, the plaintiff was neither a trespasser nor a mere licensee in the defendant's mine, but his employment there was contemplated and provided for by the law of the state, and while engaged in the performance of his duties under and pursuant to such employment, if you find from the evidence he was so engaged, the defendant would owe him the duty to furnish him a reasonably safe place to perform his duties as such shot firer in defendant's mine.³⁷

§ 3616(3). Iowa

The court instructs the jury that, if you find from the evidence that said J. had been an employé of the defendants in and about

³⁵ Gillespie v. Ashford, 101 N. W. 649, 125 Iowa, 729.

³⁶ Porter v. Tennessee Coal, Iron & R. Co., 59 So. 255, 177 Ala. 406.

³⁷ Princeton Coal Mining Co. v. Downer, 93 N. E. 1009, 48 Ind. App. 136.

said building improvements shown by the evidence for some months and up to a week or two prior to the accident, and that at that time was offered further employment, at a reduced wage, but refused to continue in said employment on that account, and you further find that on the day of the accident deceased called at the premises where the work was going on, and was offered and was ready to take up said employment at said reduced wage, but that said offer was made to F., an employé of defendants, who had no authority to employ servants, but, notwithstanding such fact, said F. directed said J. to go to work and assist him in the work in which he was engaged, and that he (F.) would thereafter speak to the superintendent about such employment when he should return to the place where such work was going on, and you further find from the evidence that said J. in good faith acted upon said direction, believing that when said superintendent returned he would approve the act of said F., and so believing entered upon said work, and assisted said F. in carrying on the same, and that thereafter the superintendent, ———, did return to the place where said work was being done, and saw said J. there engaged in said work, and you further find that said superintendent knew and understood, or had reasonable time and opportunity to know and understand, that said J. was there at work for the defendants at the request and direction of F., and made no objection thereto, and acquiesced therein, then you would be justified in finding that said J. was an employé of the defendants, and that the relation of master and servant existed between the defendants and said J. at the time the accident occurred which resulted in his death. But if you fail to so find, you would not be justified in finding that the relation of master and servant existed between said parties at said time.³⁸

§ 3616(4). Texas

The jury are instructed that, if you believe from the evidence that M. was the foreman of defendant's water service at the time and prior to plaintiff's injuries, and as such had authority to employ hands to work for defendant at said service, and that he employed C. to operate its pump near ———, and if you believe that one of the provisions and understandings of such employment was that plaintiff should work with said C. in the operation of said pump until he was sufficiently competent to operate the same alone, when he was to be given charge of the same during nights, and to be placed upon the pay rolls of defendant, and if under said arrangement plaintiff did work at said pump with C., and was by

³⁸ Woodard v. Herald Pub. House, 165 N. W. 47, 181 Iowa, 791.

said C. left in charge of said pump, and that he so worked at said pump with the knowledge, consent, and approval of said M. or other authorized employes of defendant intrusted with the supervision of the water service, then you will find that plaintiff was in the employment of defendant and was its servant.³⁹

§ 3616(5). Virginia

The jury are instructed that, if the jury shall believe from the evidence that at the time of the collision which resulted in the injuries to the plaintiff of which he complains in this action, ———, as section master of the defendant company on that part of said company's road on which the collision occurred, was on the hand car involved in said collision, and in the control and management of the same, and that the plaintiff was then and there on said hand car by permission of said ———, and without knowing that it was contrary to the rules of the defendant company to be on said hand car, and that the injuries sustained by the plaintiff in said collision resulted from the gross negligence of the defendant company, or of its agents, or any of them, while the plaintiff was on said hand car, then the court instructs the jury that the defendant company is liable to the plaintiff in this action for said injuries.⁴⁰

The jury are instructed that, if the jury believe from the evidence that when the collision occurred between the hand car and train, which resulted in the injuries to the plaintiff for which he seeks to recover in the action, ——— was the section master of the defendant company on that part of said company's road upon which said collision took place, and that, as such section master, he was then on the aforesaid hand car, and in the actual control and management of the same and of the laborers thereon, and was in the habit of employing and discharging and controlling the laborers under him, and did, on the day upon which the collision occurred, and but an hour or two before its occurrence, agree with the plaintiff that he would take him on said hand car with his force from ——— to ———, a point on defendant's road, ——— miles west of said starting point, and bring him back on said hand car in a short time on the same day, upon the condition and understanding that the plaintiff would aid in loading scrap iron along the track at and near ——— on said hand car, to be brought to ———, and that the plaintiff, in ignorance of any regulation of the company which forbade his being on the hand car so under the control of said ———, did go thereon to ———, and did, according to his undertaking, aid in loading scrap iron on said hand car, and that, in returning from ——— on said hand car, the plain-

³⁹ Ft. Worth & D. C. Ry. Co. v. Lynch (Civ. App.) 136 S. W. 580.

⁴⁰ Tyler v. Chesapeake & O. R. Co., 13 S. E. 975, 88 Va. 389.

tiff, by reason of the gross negligence of the defendant company, or of its agents and representatives, in permitting the aforesaid collision to take place, was seriously and permanently injured, then the court instructs the jury that the plaintiff is entitled to recover of the defendant for such injuries.⁴¹

§ 3617. Right of volunteers

The court charges the jury that if they believe from the evidence that the plaintiff was under the management and control of G., and not of H., and that plaintiff volunteered his services, just before he was hurt, to H., and, while so engaged with H. in voluntary service, was injured, he cannot recover in this action against the defendant.⁴²

The court charges the jury that if they believe from the evidence that ordinarily, and up to the time when the plaintiff started out with H. to get the wheels, the plaintiff was a member of G.'s crew, and under his control, and subject to his orders or control, and that in going with H.'s crew to get the wheels, and in and about doing the work of removing the wheels and being on the car, and doing the service he was engaged in when injured, he was a mere volunteer, performing service for the accommodation merely of H., their verdict must be for the defendant.⁴³

§ 3618. Negligence as basis of liability

§ 3618(1). Alabama

The jury are instructed that this suit is brought under the — statutes relating to the liability of employers for damages when their employes are injured, while engaged at the work for which they were employed. This statute does not authorize the jury to award damages to a plaintiff unless defendant's agent has been guilty of negligence.⁴⁴

§ 3618(2). Iowa

The court instructs that, if it was an accident, plaintiff cannot recover, and, further, defendant is not an insurer of the safety of its employes, and is only liable where injuries are incurred without fault on the part of the person injured, and because of negligence on the part of the defendant.⁴⁵

⁴¹ *Tyler v. Chesapeake & O. R. Co.*, 13 S. E. 975, 88 Va. 389.

⁴² *Southern Ry. Co. v. Guyton*, 25 So. 34, 122 Ala. 231.

⁴³ *Southern Ry. Co. v. Guyton*, 25 So. 34, 122 Ala. 231.

⁴⁴ *Barker v. Tennessee Coal, Iron & R. Co.*, 68 So. 600, 189 Ala. 579.

⁴⁵ *Bird v. Hart-Parr Co.*, 146 N. W. 74, 165 Iowa, 542.

§ 3619. Liability for unavoidable accidents**§ 3619(1). Alabama**

The court charges the jury that, if ——— came to his death by reason of something which was unexpected and could not reasonably be provided against, the plaintiff cannot recover.⁴⁶

The court charges the jury that, if plaintiff's intestate came to his death by reason of a mere accident, the plaintiff cannot recover.⁴⁷

The jury are instructed that, if the jury believe from the evidence that the plaintiff signaled the engineer to back his train while he was standing on the outside of the track, and the engineer in obedience to said signal backed up his engine and cars in an ordinarily prudent manner, and before the cars reached those to which they were to be coupled the plaintiff went in between the cars, and that as soon as the engineer discovered this fact he used all means at hand to stop his train, and could not stop his train before striking the other cars, then the plaintiff cannot recover in this cause.⁴⁸

§ 3619(2). Michigan

You are instructed that if, when defendant last saw the boy he was in a safe place, and not where by his position or action or movements she had reason to suspect he would change his place to where he would be in danger, and at this time of seeing him it was very shortly before the accident, and her attention was directed to driving her machine around the tree, and without any reason on her part to suspect he would run in front of the cutter bar, and he did so suddenly, and she had no opportunity to prevent the accident to him, she should not be adjudged careless or negligent, and in such event she should not be found guilty, even if the boy himself was free from negligence.⁴⁹

§ 3619(3). Missouri

The court instructs the jury that, if the jury find from the evidence that the hammer used by the plaintiff when hurt was a new one, apparently free from defects when received by him, and was selected from a lot of hammers furnished and to be used in the work which plaintiff was performing, which were of a brand or kind suitable or commonly used, and reasonably safe to use, and reasonably free from defects, and they should further find from the evidence that the plaintiff before the accident had not shown or exhibited said hammer to his foreman; that, in the use of such

⁴⁶ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

⁴⁷ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

⁴⁸ *Huggins v. Southern Ry. Co.*, 41 So. 856, 148 Ala. 153.

⁴⁹ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

hammer, a piece of it chipped off and struck the plaintiff's eye, thereby causing the injury complained of, then such injury should be considered an accident, and your verdict must be for the defendant, even though it should appear from the evidence that such hammer was defective and dangerous to use.⁵⁰

§ 3619(4). Texas

You are further instructed that if you believe from the evidence that the said —— exercised ordinary care in the particulars hereinbefore mentioned, and that the plaintiff himself exercised ordinary care for his own safety, you will find for defendant, even though you should believe from the evidence that plaintiff was injured by the falling of said block, for in such a case plaintiff's injury would be an accident, for which defendant would not be liable.⁵¹

You are instructed that if the proof does not show that defendant company was guilty of negligence in regard to the alleged existence of said hole or excavation, then, under the issues in this case, the alleged injuries to plaintiff would have been occasioned by one of those accidents incident to all human works, which would not render the defendant company liable for damages.⁵²

§ 3620. Injuries caused by physical disability of servant

You are instructed that, if you believe from the evidence that, at the time plaintiff got work at defendant's furnace breaking runner, he knew he was subject to fits, and that such a fit might cause him to fall into the hot iron, you must find for defendant. A man, laboring under any physical disability of which he has full knowledge, who accepts employment with another, cannot recover damages of that other in the event he sustains personal injuries while in his employment, where such personal injuries were directly caused by such physical disability. Even though you should find from the evidence that defendant through its employé knew that plaintiff was subject to fits, plaintiff cannot recover in this case, if you should find from the evidence that at the time he accepted such employment plaintiff also knew that he was subject to said fits, and of the danger of his sustaining personal injuries while at work as a result of falling in such fit.⁵³

⁵⁰ Duerst v. St. Louis Stamping Co., 63 S. W. 827, 163 Mo. 607.

⁵¹ Sherman Oil & Cotton Co. v. Stewart, 42 S. W. 241, 17 Tex. Civ. App. 59.

⁵² Missouri, K. & T. Ry. Co. of Texas v. Kirkland, 32 S. W. 588, 11 Tex. Civ. App. 528.

⁵³ Tennessee Coal, Iron & R. Co. v. Moody, 68 So. 274, 192 Ala. 384, L. R. A. 1915E, 369.

§ 3621. Degree of care required from master and what constitutes negligence and ordinary care

§ 3621(1). Alabama

You are instructed that, if you believe from the evidence that the accident complained of was of an unusual character and one that could not be reasonably anticipated by the use of ordinary care, then the plaintiff cannot recover in this case, and your verdict must be in favor of the defendant.⁵⁴

The jury are instructed that you cannot award plaintiff damages from the mere fact that he was injured while at work, but in order to find for plaintiff you must find that ——— was guilty of negligence, and, if you do not find that ——— failed to use the care which a reasonably prudent man would have used under like circumstances, you must find for defendant.⁵⁵

§ 3621(2). Arkansas

The court instructs the jury that, if you find by a preponderance of the evidence that the train of the defendants ———, ———, and ———, as receivers of the ——— Railroad Company, upon which the deceased was employed, collided with the train of the ——— Railway Company, and that such collision was caused by the negligence of the agents and employes of the defendants in failing to exercise ordinary care to prevent the same as set forth in the complaint and amendment thereto, and that the deceased, ———, was injured and killed in said collision, and that his injury and death was caused in whole or in part by the negligence of the agents and employes of the said defendants as stated in these instructions and as alleged in the complaint and amendment thereto, then your verdict should be for the plaintiff, unless he assumed the risk.⁵⁶

§ 3621(3). Iowa

The court instructs the jury that negligence is the omission to do something which a reasonably prudent person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or doing which a reasonably prudent person would not do under similar or like circumstances. Reasonable and ordinary care and diligence is such care and diligence as an ordinarily prudent person would exercise under similar or like circumstances.⁵⁷

The court instructs the jury that, if you find from the weight or preponderance of the evidence introduced upon the trial that

⁵⁴ *Sloss-Sheffield Steel & Iron Co. v. Thomas*, 80 So. 69, 202 Ala. 231.

⁵⁵ *Barker v. Tennessee Coal, Iron & R. Co.*, 66 So. 600, 189 Ala. 579.

⁵⁶ *Lusk v. Osborne*, 191 S. W. 944, 127 Ark. 170.

⁵⁷ *Bird v. Hart-Parr Co.*, 146 N. W. 74, 165 Iowa, 542.

defendant failed to exercise reasonable care, and that, because of such failure, plaintiff was injured, and that he was free from contributory negligence, then the plaintiff is entitled to recover.⁵⁸

§ 3621(4). *Michigan*

You are instructed that if, in view of the situation and what defendant was doing, and where she was doing it, she was using the care that an ordinarily careful and prudent person, in the same situation and under the same circumstances, taking also into consideration where the boy was, and what she saw or should have seen, would exercise, then she was not guilty of negligence, and is not liable.⁵⁹

§ 3621(5). *Nevada*

The court instructs the jury that the term "negligence," as used in these instructions, imports the want of such attention to the nature or the probable consequence of any act or omission, as a reasonably prudent man ordinarily bestows in acting in his concerns of like importance; while ordinary care is such care as a person of ordinary prudence usually exercises about his own affairs of ordinary importance. With these definitions well in mind, you will determine the question as to whether the defendant was negligent in providing for the safety of its employé, the plaintiff, and also whether the plaintiff exercised that degree of care for his safety which, under the circumstances, he ought to have exercised.⁶⁰

§ 3621(6). *North Carolina*

The jury are instructed that the defendant owed the duty to his servants or employés to exercise reasonable and ordinary care to prevent any personal injury to any of them in the prosecution of his work.⁶¹

§ 3621(7). *Oklahoma*

You are instructed that negligence, as used in these instructions, means a want of ordinary care. By ordinary care is meant such care as men of ordinary prudence usually exercise under the same or similar circumstances.⁶²

You are instructed that "ordinary care," as used in these instructions, means such care as a person of ordinary prudence would exercise about his own affairs of ordinary importance. The want of ordinary care constitutes ordinary negligence.⁶³

⁵⁸ *Bird v. Hart-Parr Co.*, 146 N. W. 74, 165 Iowa, 542.

⁵⁹ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

⁶⁰ *Konig v. Nevada-California-Oregon Ry.*, 135 P. 141, 36 Nev. 181.

⁶¹ *Turrentine v. Wellington*, 48 S. E. 739, 136 N. C. 308.

⁶² *Chicago, R. I. & P. Ry. Co. v. Penix*, 159 P. 1141, 61 Okl. 4.

⁶³ *St. Louis & S. F. R. Co. v. Long*, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

§ 3621(8). Oregon

You are instructed that negligence is the failure to do something that a person of reasonable care and prudence would have done, or the doing of something that a person of reasonable care and prudence would not have done under the circumstances. It is the want of due care in the particular situation. Due care and negligence are relative terms, and what in one situation might be due care might be negligence in another; and the measure of duty always is reasonable care and caution upon the part of an employer for the safety of his employes. And that care should be proportioned always to the dangers reasonably to be apprehended from the employment in which the servant is engaged.⁶⁴

You are instructed that the word "negligence" in the law has been defined to be the doing of something which a man of ordinary prudence would not do under all the existing circumstances of the case. You will see that the phrase "ordinary prudence" is made the criterion. The doing of something which a man of ordinary prudence would not do under all the existing circumstances of the case, or the failure to do something which a man of ordinary prudence would do under all the existing circumstances of the case.⁶⁵

§ 3621(9). Texas

You are instructed that, although the jury may believe that the foreman, ———, failed to take proper precautions to prevent the pile of lumber from falling, still, if you should believe that a person of ordinary care under the same circumstances would have acted as the foreman did at the time, then it will be your duty to return a verdict for the defendant.⁶⁶

You are instructed that "ordinary care," as used in this charge, means that degree of care which a person of ordinary care and prudence would use under like circumstances.⁶⁷

You are instructed that "negligence" as used herein means a want of ordinary care to another to whom care is due, and by "ordinary care" is meant such care as an ordinarily prudent person would have exercised under the same or similar circumstances.⁶⁸

The jury are instructed that it is the duty of the master to ex-

⁶⁴ *Heiser v. Shasta Water Co.*, 143 P. 917, 71 Or. 566.

⁶⁵ *Hudson v. Brown Lumber Co.*, 154 P. 533, 80 Or. 506. It was objected to this instruction that "ordinary prudence" is not the test under the Employers' Liability Act. Such general instructions are useful, however, on the question of comparative negligence, and therefore are not errone-

ous, when given along with other instructions properly setting out the rule under such act.

⁶⁶ *Lancaster v. Johnson* (Civ. App.) 224 S. W. 207.

⁶⁷ *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

⁶⁸ *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

ercise ordinary care, which means the care that a person of ordinary prudence would use under the particular circumstances for the safety of the servant, while the servant is engaged in performing the duties of such servant's employment; and it is a part of the duty of the master to exercise ordinary care in the selection and employment of other servants who may work with such servant. If the master fails to exercise ordinary care for the safety of the servant while the servant is engaged in performing the duties of such servant's employment, and thereby causes an injury to the servant, he is liable to the servant in damages on account of such injury, unless the servant himself has failed to exercise ordinary care for his own safety, and has thereby helped cause his own injury. But the master does not insure the safety of the servant while the servant is engaged in performing the duties of his employment; nor does he insure the carefulness and competency of coservants. If the master has exercised ordinary care for the safety of the servant while the servant is engaged in performing the duties of his employment, and has exercised ordinary care in the selection and employment of the servant's coservants, and has exercised ordinary care with regard to retaining such coservants in employment, he has discharged his full duty under the law to the servant, and is not liable to the servant in damages, no matter how badly injured the servant may be while engaged in the performance of the duties of the employment.⁶⁹

§ 3621(10). *Washington*

The jury are instructed that the master owes a duty to his employé not only to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe, but also to observe such care as will not expose the employé to perils and dangers which may be guarded against by reasonable care and diligence.⁷⁰

You are instructed that, in determining the question as to whether the defendant or its foreman was negligent, I instruct you that the way to determine whether a man has been negligent or not is to compare what was done by such person—or left undone by him—with what would have been done or left undone by a man acting with ordinary prudence. If a man acts as an ordinarily prudent man would act under the same circumstances and conditions, there is no negligence. If a man fails to act as an ordinarily pru-

⁶⁹ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

⁷⁰ *McLeod v. Chicago, M. & P. S. Ry. Co.*, 117 P. 749, 65 Wash. 62.

dent man would under the same circumstances and conditions, there is negligence.⁷¹

§ 3622. General instruction as to conditions warranting recovery against master

§ 3622(1). Michigan

You are instructed that this action is what is known in law as an action upon the case to recover damages for claimed negligence on the part of the defendant. Under the law no one has any right to a verdict or to maintain an action of this character unless the evidence—the greater weight of the evidence—establishes two propositions, and these must both be established in the affirmative before the jury have any occasion to consider the question of damages at all. Those two propositions are that the party seeking to recover and claiming damages must himself have been free from any negligence or carelessness which helped to bring about the injury complained of; and the second is that the other party against whom damages are sought must have been guilty of negligence or carelessness, and that negligence must have been the sole and only cause of the injury complained of.⁷²

§ 3622(2). Oklahoma

You are instructed that if, after a fair and impartial consideration of all of the testimony in this case and in compliance with the instructions herein given you, you believe that the plaintiff has established by a preponderance of the testimony that while in the employ of the defendant in and about the operation of the machine, known as the "gut reel," he was injured in the manner alleged in his petition, and that such injury was the direct or proximate result of the negligence of the defendant, as alleged in his petition, and on account of such injury so received he has suffered physical pain and mental anguish, and loss of time from his work, and that he will continue to suffer physical pain and mental anguish on account of said injury, as alleged in his petition, and that as a result of said injuries his earning capacity has been impaired, as alleged in his petition, it would be your duty to find for the plaintiff, and assess his recovery in damages in such sum as you find from the evidence will compensate him for the injury so sustained, not to exceed the sum of \$——.⁷³

You are instructed that, upon the other hand, if after a fair and impartial consideration of all of the testimony in this case, and in compliance with the instructions herein given you, you

⁷¹ *Cox v. Wilkeson Coal & Coke Co.*, 112 P. 231, 61 Wash. 343.

⁷² *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

⁷³ *Sulzberger & Sons Co. of Oklahoma v. Strickland*, 150 P. 833, 60 Okl. 158.

find that the plaintiff has failed to establish the allegations of his petition by a preponderance of the testimony, it would be your duty to find for the defendant; or, if you find that the defendant has established by a preponderance of the testimony that the injury sustained by the plaintiff was occasioned by the risks of his employment which he assumed, or was occasioned, and was the direct or proximate result of his own contributory negligence, it would be your duty to find for the defendant.⁷⁴

§ 3623. Effect of fact that employer is corporation

§ 3623(1). Arkansas

The court instructs the jury that if you find from the evidence in this case that the plaintiff was employed by the defendant company as alleged in his complaint and was working on its railroad under orders and directions of its foreman, and while in the exercise of ordinary care for his own safety, and when he had not assumed the risk, and that he was injured on account of the negligence of the defendant company, or any of its agents, servants, or employes, you will find for the plaintiff in this case.⁷⁵

§ 3623(2). Texas

The jury are instructed that, in law, every one that employs another, whether an individual or a corporation, is called the "master," and every one who accepts employment is called a "servant." Thus, in this case the _____ Company, the defendant, was the master, and the plaintiff was the servant. The law makes no discrimination whatever, with respect to the duties hereinbefore mentioned, between an individual and a corporation. A farmer, a merchant, or a carpenter owes precisely the same duties to his servants that a corporation does to its servants.⁷⁶

§ 3624. Power to delegate duty

Duty to furnish safe appliances and equipment, see post, § 3667.

Duty to furnish safe place to work, see post, § 3635.

You are instructed that among the nonassignable duties of the defendant to the plaintiff is the duty to use ordinary care to furnish him a reasonably safe place in which to perform the duties of his employment, and reasonably safe means, instruments, and appliances with which to perform his duties, and to use ordinary care to maintain them in that condition, and also, if plaintiff was young and inexperienced, and for this reason did not know of or

⁷⁴ *Sulzberger & Sons Co. of Oklahoma v. Strickland*, 159 P. 833, 60 Okl. 158.

⁷⁵ *A. L. Clark Lumber Co. v. Edwards*, 216 S. W. 18, 144 Ark. 641. In this case the word "any" was object-

ed to as permitting a verdict based on negligence not shown by the complaint and testimony.

⁷⁶ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

appreciate the danger of his immediate employment, if any, and defendant knew, or ought to have known, this in the exercise of ordinary care on its part, then it was defendant's duty to instruct him as to both latent and patent dangers, so that, as far as might be by proper care on his own part, the plaintiff would be enabled to perform his duties in safety to himself. If defendant failed to properly discharge any of these duties to plaintiff in so far as they are covered by the allegations of negligence in this case, and by reason of such neglect or failure of defendant plaintiff was injured while using due care himself, and in the line of his duties, and when he had not assumed the risk, then defendant is liable in this action. If defendant performed its duty to plaintiff as above indicated, or if plaintiff was himself wanting in ordinary care for his own safety, contributing to his injury, or if plaintiff had assumed the risk, in either case you should find for the defendant.⁷⁷

§ 3625. Scope of employment

§ 3625(1). Delaware

You are instructed that if the plaintiff, at the time of the accident, was acting outside the scope of his employment without the order of the master, he cannot recover, even though the machinery or appliance was defective and dangerous. Neither is he entitled to recover, if the accident was caused by his attempt to do something which he was warned not to do. In the one case he would be doing something he was not authorized to do, and in the other something he was forbidden to do, and in either case assumed his own risk, for which he could not hold the master liable.⁷⁸

§ 3625(2). Kentucky

The court instructs the jury that if they believe from the evidence that the said minor was employed by the defendant without consent of the plaintiff, and that the said business was dangerous and hazardous, and the injury complained of was the result of circumstances not connected with said employment, or incidental thereto, then they must find for the defendant.⁷⁹

§ 3625(3). Virginia

The court instructs the jury that if they shall believe from the evidence that ———, the mine boss of the defendant, knew, or by the exercise of ordinary care should have known, that the roof of the mine at the place where the accident occurred was loose and

⁷⁷ *St. Louis Stave & Lumber Co. v. Sawyers*, 119 S. W. 830, 90 Ark. 473.

⁷⁸ *Selninski v. Wilmington Leather Co.*, 83 A. 20, 3 Boyce, 288.

⁷⁹ *Union News Co. v. Morrow*, 46 S. W. 6, 20 Ky. Law Rep. 302.

liable to fall at any time, then it became his duty to use all reasonable care to see that the slate was secured or taken down, or that all employes who were sent to work in that part of the mine were warned of the said danger, if danger there was, and if the jury shall believe from the evidence that the machine foreman told said O. to take his machine and go to that section of the mine and cut all the coal that C. had ready to cut, and the jury shall further believe that in pursuance of said instructions it was proper for O. to inquire of C. what places he had ready to cut, and that C. informed O. that the place in question was the first to be cut then the jury should find that the said O. and the plaintiff, his assistant, went into said place where the accident occurred in the performance of their duties, and the defendant cannot be excused from its duty to have used all reasonable care, as defined in the first part of this instruction.⁸⁰

§ 3626. Knowledge of fellow servant as notice to master

The court instructs the jury that the knowledge of a fellow brakeman is not knowledge of the company, but the burden is upon the plaintiff to show that such knowledge of the brakeman was brought home to the company by a report or otherwise to the conductor in charge of the train, or other competent authority charged with the duty of having the defect remedied, and, unless the jury believe from the evidence that the knowledge was so brought home to the company and the opportunity then given for remedying the defect by proper repair, they must find for the defendant.⁸¹

§ 3627. Duty to children

Now, gentlemen, as matter of law, children, wherever they are, or wherever they go, must be expected to act upon childish impulses incident to their years and understanding, and their employers are chargeable with a duty of care and caution towards them such as their years, want of knowledge, and understanding demand, such as their want of information, when it is the duty of the defendant to give that information, would imply or demand, and must calculate upon those, and take precautions accordingly.⁸²

§ 3628. Employment of minor in hazardous work

Recovery by parent for injuries to minor child employed in hazardous position, see post, § 4131.

I charge you that, within the meaning of the statute, a hazardous employment is one that is fraught with or exposed to hazard,

⁸⁰ *Darby Coal Mining Co. v. Shoop*, 53 S. E. 412, 116 Va. 848.

⁸¹ *Southern Ry. Co. v. Childrey*, 74 S. E. 221, 113 Va. 376.

⁸² *Force v. Standard Silk Co.* (C. C. N. Y.) 160 F. 992, affirmed 170 F. 184, 95 C. C. A. 236.

peril, danger, or risk, in the ordinary course of conduct, and does not mean that the employment is hazardous because of the possibility of accident resulting from the ordinary operation of the machine or knives, or from a careless or negligent conduct of such employment.⁸³

I charge you that, before you can find the defendant liable in this case, the plaintiff must satisfy you by the preponderance of the evidence that, in addition to proving that he himself was free from fault, he must also show to you that the employment at which he was engaged was hazardous; that is, exposed to hazard, peril, or danger greater than the ordinary danger in the ordinary vocations of life.⁸⁴

I further charge you that the law under which this action is brought does not contemplate that capable, experienced young men above the age of ——— years, and under the age of ——— years, shall not be employed to operate or work near machinery; it simply contemplates that they shall not be employed in an employment that is hazardous, within the meaning of the statute, as defined by me. Under the undisputed evidence in the case, plaintiff was employed in taking away boards from the tail end of what is known as a double tenoner machine, upon which were placed knives in certain positions, as have been shown to you, and upon which it is claimed, and I think admitted, he was injured. But in considering this you should take into account the character of the work which he was employed to do, the place in which he was employed to work, the character of the machinery which he was employed to work adjacent to, and the location of its parts, the knives and belts, and guards that have been shown to you which it is claimed protected the knives, and say from the evidence in the case, and from all the surroundings, and all the conditions, was the employment of the plaintiff of such character as to be hazardous employment, under the definition which I have given you.⁸⁵

§ 3629. Particular instances of duties of master

The court instructs the jury that, if you believe from the evidence in this case that the defendants failed to exercise ordinary care to furnish plaintiff a safe place to perform his work, and that they sent plaintiff to perform a dangerous task without sufficiently warning him of the dangers of same, or that they failed to furnish sufficient men to perform the work, or that their foreman failed to

⁸³ Radic v. Thomas Jackson & Co.,
146 N. W. 136, 178 Mich. 618.

⁸⁴ Radic v. Thomas Jackson & Co.,
146 N. W. 136, 178 Mich. 618.

⁸⁵ Radic v. Thomas Jackson & Co.,
146 N. W. 136, 178 Mich. 618.

properly direct the removal of the glass, and that such failure, if any, on the part of defendants was the proximate cause of plaintiff's injuries, if any, you will find for the plaintiff, unless you find for the defendant under another section of this charge.⁸⁶

§ 3630. Duty of master to observe warnings of danger given by strangers

You are instructed that the engineer is not bound under all circumstances to observe warnings of danger which may be given to him by strangers who are in no way associated with the railway company, yet there are circumstances under which the exercise of ordinary care would require that those signals be obeyed, and it is for you to say in this case whether from all the circumstances and conditions shown by the evidence here, the requirements of ordinary care required that the engineer in this instance obey the signals and warnings given him by ——— in reducing the speed of this train or stopping the train if he had time to do so. If it was his duty in the exercise of ordinary care to observe those signals given to him by ——— and if he failed to do so then he would be negligent, and if that negligence contributed to the injury to the plaintiff the defendant railway company would be liable therefor.⁸⁷

§ 3631. Right of master to assume that servant will avoid obvious perils

§ 3631(1). Arkansas

You are instructed that the engineer and fireman had a right, after seeing that plaintiff was upon the track, to rely upon the presumption that plaintiff would get off the track and clear the danger from the train; and if it afterward became apparent that plaintiff was not going to get off the track, and from the time it became so apparent the engineer and fireman used reasonable care and diligence to stop the train or to avoid the injury, and could not reasonably do so, by reason of the nearness of the engine to plaintiff, then your verdict should be for the defendant.⁸⁸

§ 3631(2). North Carolina

You are instructed that, if the jury shall find from the evidence that the plaintiff in the performance of his duties was at a point on or near the track upon which one of the trains was approaching, and so near as to be stricken by said train, if he did not move him-

⁸⁶ *Stockey & White v. Mears* (Tex. Civ. App.) 181 S. W. 774. In other instructions the jury were told that plaintiff could recover only in the event he did not know, or would not by the exercise of ordinary care nec-

essarily have known, of the dangers in performing the work.

⁸⁷ *McGillivray v. Great Northern Ry. Co.*, 178 N. W. 200, 145 Minn. 51.

⁸⁸ *St. Louis, I. M. & S. Ry. Co. v. Morgan*, 171 S. W. 1187, 115 Ark. 529.

self out of the way; that the defendant's engineer blew the whistle of the engine in time, while approaching the plaintiff, and in such a way and manner as that the plaintiff could have heard it, under such circumstances of the situation as was known to the defendant, and in time for him to have moved out of danger, then the defendant performed its duty to the plaintiff, and the answer to the first issue should be, "No."⁸⁹

§ 3631(3). Wisconsin

The jury are instructed that the defendant had a right to assume that the plaintiff was a person of ordinary common sense for one of his years and that he would exercise such care to avoid dangers which were visible and which he knew, or ought to have known, existed as might be reasonably expected of one of his years and capacity.⁹⁰

§ 3632. Release from liability—Setting aside for fraud

You are instructed that if you find from the evidence, by a preponderance thereof, that the defendant company was negligent as alleged, and that as a proximate result of such negligence the plaintiff was injured and suffered damage thereby it will be your duty to determine whether or not by a preponderance of the evidence the release testified to in this case was procured by fraud or is otherwise void. And in this connection you are instructed that fraud is never presumed and the burden of proof is therefore upon the plaintiff to prove to your satisfaction by a preponderance of the evidence that the release in question was procured by fraud. If you find all the other issues in the case in favor of the plaintiff, and believe by a preponderance of the evidence that the release in question was procured of the plaintiff by the defendant company by fraud, then your verdict should be for the plaintiff and against the defendant.⁹¹

2. Duty of Master to Furnish Safe Place to Work and to Keep It Safe

§ 3633. Degree of care required from master

§ 3633(1). United States

On this branch of the case the court instructs you, further, that an employer does not guaranty the absolute safety of the place where the employé works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employé to work in, and this duty cannot be delegated to

⁸⁹ *Brown v. Southern Ry. Co.*, 57 S. E. 397, 144 N. C. 634.

⁹⁰ *Horn v. La Crosse Box Co.*, 111 N. W. 522, 131 Wis. 384.

⁹¹ *Chicago, R. I. & P. Ry. Co. v. Penix*, 159 P. 1141, 61 Okl. 4.

a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risks arising from negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendants, resulting from their employment of the plaintiff as a laborer, to exercise reasonable care in properly timbering the tunnel.⁹²

§ 3633(2). **Arkansas**

You are instructed that the defendant is not a guarantor of the safety of the place in which the plaintiff was required to do his work, or of the appliances of the work, but it was its duty to see that ordinary care and prudence were exercised in this respect, to the end that the place in which the work was to be performed and the appliances of the work should be safe for the plaintiff, while engaged in his work. And you are further instructed that the plaintiff had the right to assume that it had performed such duties, and no duty devolved on him to make search for such defects, if any there were.⁹³

§ 3633(3). **California**

I instruct you that under no circumstances is a servant legally entitled to demand an absolutely safe place in which to work. All that the law requires of the master is to furnish a place as reasonably safe as the proper carrying on of the work will reasonably permit. A master is not bound to anticipate and guard against every possible danger, but only such as can be foreseen by the exercise of reasonable care. An employer is not an insurer of the safety of the place in which his servant works.⁹⁴

§ 3633(4). **Idaho**

You are instructed that it was the duty of the defendant to use reasonable care and diligence to furnish a safe place for plaintiff to perform the work for which he was employed, but this duty did not require the defendant to furnish a place free from hazards or dangers, but only to exercise ordinary care and prudence to furnish such a place. The defendant was under no obligation to keep the plaintiff absolutely safe or free from danger or to insure the plaintiff against accidents.⁹⁵

§ 3633(5). **Iowa**

You are instructed that it was the duty of the defendant to furnish a reasonably safe place for the plaintiff to work in, and to

⁹² Swensen v. Bender (C. C. A. Cal.) 114 F. 1, 51 C. C. A. 627.

⁹³ St. Louis, I. M. & S. Ry. Co. v. Howard, 188 S. W. 14, 124 Ark. 588.

⁹⁴ Pre v. Standard Portland Cement Co., 100 P. 122, 9 Cal. App. 591.

⁹⁵ Brayman v. Russell & Pugh Lumber Co., 160 P. 932, 31 Idaho, 140.

use such reasonable and ordinary care to maintain the place where plaintiff was at work, in a safe condition, as a reasonably prudent person would use under like and similar circumstances, and if you believe, from a preponderance of the evidence, that ——— was acting for and in place of the defendant at the time the accident happened, and that the acts of the said ——— were binding upon defendant, as particularly defined in paragraph ——— of these instructions, and the said ——— did any act alleged by plaintiff which a reasonably prudent person would not do under like circumstances, or omitted to do some act so alleged which said person would do under like circumstances, and that said omission to perform such duty or act so done was the proximate or direct cause which brought about the cave-in and the injury to plaintiff, defendant would be responsible therefor, and your verdict should be for plaintiff in such sum, if any, as you find him entitled to, providing you further find plaintiff was not guilty of contributory negligence which brought about or contributed to his said injury.⁹⁶

§ 3633(6). Oklahoma

You are instructed that it is not the duty of the employer to provide a place to work which is absolutely safe, and the law imposes on the employer, which in this instance would be the compress company, only the obligation to use reasonable and ordinary care, skill, and diligence in furnishing a suitable and safe place for its employes to work. In this instance the burden is on the plaintiff to show that the defendant compress company did not use reasonable and ordinary care and diligence in furnishing him a suitable and safe place in which to perform the duties incumbent upon him, and unless he does this by a fair preponderance of the testimony, or if from the testimony you find that the compress company did use reasonable and ordinary care in furnishing a place to work, then it would be your duty to find a verdict for the defendant in this case.⁹⁷

§ 3633(7). Texas

You are instructed that the defendant was not an insurer of the safety of the plaintiff, while in its employ; but the duty devolved upon the defendant to use ordinary care to furnish the plaintiff a safe place in which to work, and use ordinary care to inspect the building in which it put plaintiff to work, and to discover and remedy defects which would render his employment dangerous, and for any failure to exercise such ordinary care, and to discover and remedy such defects, if any, which would render plaintiff's

⁹⁶ McDonald v. Green, 154 N. W. 456, 172 Iowa, 186.

⁹⁷ Chickasaw Compress Co. v. Bow, 149 P. 1166, 47 Okl. 576.

employment hazardous, and which could have been discovered by the use of ordinary care, and from which injury resulted, the defendant would be liable.⁹⁸

§ 3633(8). Utah

You are instructed that it is the duty of the master to use ordinary care to provide a reasonably safe place for the servant to do the work which he is engaged to perform, and, if a servant is injured by reason of a failure to use such care, the breach of such duty is negligence for which the master is responsible to the servant.⁹⁹

You are instructed that it was the duty of the defendant company to keep the premises about which the plaintiff was employed in a reasonably safe condition; that is to say, in such a condition as the premises would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be accomplished.¹

§ 3633(9). Washington

The court instructs the jury that the master owes the positive duty to an employé to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe.²

§ 3634. Duty to keep place safe

§ 3634(1). Iowa

You are instructed that it was not only the duty of the defendant to furnish plaintiff with a safe place in which to work, but it was also his duty to use reasonable diligence in keeping said place in a safe condition, and not to do anything which a reasonably prudent person would not do which would render the place where plaintiff was at work unsafe and dangerous. Therefore, if you find from a preponderance of the evidence that ——— was in charge and control of the work, under instruction No. ——— hereof, at the time of the accident, and had authority to direct the men employed as to their duties, and that plaintiff, under the direction of said ———, went into the ditch in question at the time and place alleged by plaintiff, and while at work therein, without fault or negligence on his part, was injured, and that said injury was caused by the caving of said wall, and that said cave-in was caused by said wall not being held in place, and that defendant

⁹⁸ Decatur Cotton Seed Oil Co. v. Belew (Civ. App.) 178 S. W. 607.

⁹⁹ Andrews v. Free, 146 P. 555, 45 Utah, 505.

¹ Downey v. Gemini Mining Co., 68 P. 414, 24 Utah, 431, 91 Am. St. Rep. 798.

² Harris v. Brown's Bay Logging Co., 106 P. 152, 57 Wash. 8.

was negligent in not curbing or otherwise preventing said wall from caving, or by the dropping on the top thereof of the said water pipe, if he did so drop it, if said ——— was at said time acting in place of the defendant, and not as coemployé or fellow servant, or by either or both causes, then and in that event the defendant is liable to plaintiff for his damages, if any, which he has suffered, and you should so find.³

§ 3634(2). Oregon

I instruct you that under the law the master, who is the defendant in this action, is required to furnish a reasonably safe place for his employés to work, and not only a reasonably safe place to work, but also reasonably modern and safe appliances, tools, and machinery with which to carry on the business in which they are engaged, and it is his further duty to keep and maintain them in that condition while the employés are engaged in his service.⁴

You are instructed that it is not enough that the master shall furnish the employés with a reasonably safe place in which, and reasonably safe appliances, tools, and machinery with which, to work, but he is further charged with the duty of seeing that the place in which, and the tools, appliances, and machinery with which to work are kept and maintained in a reasonably safe condition, and I charge you that the employé or servant has a right to presume that the master or employer has performed these duties.⁵

§ 3635. Power to delegate duty

§ 3635(1). Arkansas

You are instructed that the duty that devolved upon the defendant to exercise ordinary care to provide the plaintiff a reasonably safe place to work was an absolute duty, and that the defendant could not delegate that duty to any of its employés so as to escape the responsibility of performing this duty, and if you find from the evidence that the defendant failed to perform this duty of exercising ordinary care to furnish and provide the plaintiff a reasonably safe place to work, and that this failure resulted in the injuries complained of herein, then the plaintiff is entitled to recover, and you will find for the plaintiff.⁶

§ 3635(2). Idaho

I instruct you that it was the duty of the defendant company to provide and maintain a reasonably safe place for its employé,

³ McDonald v. Green, 154 N. W. 456, 172 Iowa, 186.

⁴ Shields v. W. R. Grace & Co., 179 P. 265, 91 Or. 187.

⁵ Shields v. W. R. Grace & Co., 179 P. 265, 91 Or. 187.

⁶ Wisconsin & Arkansas Lumber Co. v. Irons, 184 S. W. 456, 123 Ark. 119.

the plaintiff, to work, and that this duty is one that could not be shifted or delegated to another. The duty of inspecting its poles to learn if they were in a decayed or rotten condition below the surface of the ground so as to make them unsafe or dangerous for a lineman, known as a troubleman, in repairing wire trouble, to ascend and work upon, was a primary duty of the company, which it owed to the servant and was bound to discharge in a reasonably diligent and careful manner.⁷

§ 3635(3). *Montana*

You are instructed that the duty of the master to use ordinary care to provide a reasonably safe place for work in his premises is one which is termed a nondelegable primary duty of the master; in other words, the law does not permit, or suffer, the master to shift his responsibility for performance of this duty onto the shoulders of any other servants (than the servant claiming to be injured) so as to relieve the master from liability. If the master does delegate or turn this duty over to any other servant, and such servant is negligent, then under the law such negligence is the negligence of the master, whether such master be corporation or natural person. You are further instructed that this instruction is to be considered with the other instructions which precede and follow it.⁸

The jury are instructed that where the master has created a place for work of his servants and such place is permanent under the master's general course of work, then the master owes to the servant a duty under the law to use ordinary care to the end that the said place be and remain reasonably safe, such duty is a continuing one, and is a nondelegable, primary duty of the master.⁹

§ 3635(4). *Nevada*

The court instructs the jury that it is the duty of the defendant company in this case to use ordinary care, diligence, and caution in providing for the safety of those in its employ, and in furnishing for their use in their work and employment reasonably safe, sound, and suitable appliances, tools, and machinery, and providing a reasonably safe place in which to work, and in keeping the same in a reasonably safe state of repair; and an employé has the right to assume that appliances, tools, and machinery and the place of employment furnished him by his employer to be used in the course of his employment are reasonably safe, sound, and suitable, and that they have been kept in a reasonably safe state of repair. The em-

⁷ *Ramon v. Interstate Utilities Co.*, 170 P. 88, 31 Idaho, 117.

⁸ *Kinsel v. North Butte Mining Co.*, 120 P. 797, 44 Mont. 445.

⁹ *Kinsel v. North Butte Mining Co.*, 120 P. 797, 44 Mont. 445.

ployer cannot delegate this duty to another and thereby free himself from responsibility.¹⁰

§ 3635(5). Oregon

You are instructed that, if you believe from the evidence that the defendant failed to furnish the plaintiff a safe place in which, or safe appliances, tools, and machinery with which, to work, or that the defendant failed to maintain them in that condition and that plaintiff was injured thereby, he is entitled to recover damages from the defendant, even though the failure to perform those duties was due to the negligence of one of plaintiff's fellow servants, for, as you have been instructed, the defendant could not escape liability by delegating such duties to such fellow servant of the plaintiff. Furthermore, the plaintiff has a right to assume that the defendant had performed its duties relative to providing a safe place and safe appliances.¹¹

§ 3635(6). Utah

You are instructed that the duty imposed by the law upon a master to use ordinary care to furnish a reasonably safe place for the servant to work in is a positive duty owing by the master to the servant and is nondelegable; that is to say, that the master cannot relieve himself from the obligations resulting from a failure to perform said duty by leaving the same to be performed by some other person or servant, and the master must see to it at his peril, that such duty is performed.¹²

§ 3636. Necessity of notice to master of defective condition of working place

§ 3636(1). Iowa

You are instructed that if you fail to find, from the evidence, that the defendant company had actual knowledge of the slippery condition of said track, or that, by the exercise of reasonable and ordinary care, taking into consideration the weather conditions which ordinarily exist at that season of the year, it should have had knowledge thereof such a length of time before the accident, that it could in the exercise of reasonable care, have taken steps reasonably necessary to prevent an accident, then the defendant is not liable for the injury received by plaintiff, and, in that event, your verdict should be for the defendant.¹³

You are instructed that, if you find from the evidence that the defendant did have actual knowledge of the slippery condition of

¹⁰ Cutler v. Pittsburg Silver Peak Gold Mining Co., 116 P. 418, 34 Nev. 45.

¹¹ Shields v. W. R. Grace & Co., 179 P. 265, 91 Or. 187.

¹² Andrews v. Free, 146 P. 555, 45 Utah, 505.

¹³ Doran v. Waterloo, C. F. & N. Ry. Co., 147 N. W. 1100.

the track, or by the exercise of reasonable and ordinary care, should have had such knowledge (i. e., actual knowledge), for such a length of time, before the accident that it could, in the exercise of reasonable care, have taken steps reasonably necessary to prevent the accident, then the defendant was negligent in not having such knowledge, and if the injury to the plaintiff was caused as a direct result of the negligence of defendant on which plaintiff predicates his right to recover, to wit, a failure to sand the tracks, or to equip the cars with sanding devices, and if the plaintiff was not guilty of contributory negligence, then the plaintiff is entitled to recover.¹⁴

§ 3636(2). Texas

You are instructed that if the building fell and injured plaintiff on account of some defect or defects in the construction of same, and of its having become defective and insecure, as claimed by plaintiff, yet if such defective and insecure condition or such defects were not known to the defendant, and if the defendant, in the exercise of ordinary care, could not have discovered any such defects or such defective and insecure condition, if such existed, then and in that event the defendant would not be liable, and in case you so believe and find from the evidence, you will find for the defendant.¹⁵

§ 3637. Duty of inspection of master

You are instructed that the grounds of negligence are that the mining company failed to furnish the defendant a safe place in which to work. You are instructed that it was the duty of defendant to use ordinary care to furnish to the plaintiff a reasonably safe place in which to labor, and that this duty involves the further duty on the part of the defendant to make a reasonable inspection to discover dangerous conditions in and about the place plaintiff was laboring, in order to render said working place in a reasonably safe condition.¹⁶

§ 3638. Liability to employee whose duty it is to make place safe

You are instructed that the law with reference to the master being required to furnish a safe place to work or safe instrumentalities does not apply as to work which the employé is employed to make safe. So in this case if you find it was plaintiff's duty under his contract to make the pole safe, he cannot complain because the pole may have been unsafe.¹⁷

¹⁴ *Doran v. Waterloo, C. F. & N. Ry. Co.*, 147 N. W. 1100.

¹⁵ *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

¹⁶ *Southern Anthracite Coal Mining Co. v. Smith*, 215 S. W. 719, 140 Ark. 269.

¹⁷ *Ramon v. Interstate Utilities Co.*, 170 P. 88, 31 Idaho, 117.

§ 3639. Same—Mine foreman

The jury are instructed that one of the contentions in this case on the part of the plaintiff is that he was not mine foreman within the full meaning and contemplation of the law of the state of ———, but that his authority and control was limited and curtailed by the superintendent of said mine. On the part of the defendant, it is contended that he was mine foreman and vested with all the powers and duties of said mine foreman, free from the control of, or interference from, the superintendent of said mine, and that in determining this fact, you shall take into consideration all of the evidence introduced on the trial tending to establish the issue as to what position plaintiff actually occupied at the time of the alleged injury; and while the evidence as to what the plaintiff was, at said time, called by those with whom he came in contact in the performance of his duty, should be taken into consideration by the jury in determining the question, nevertheless the question to be determined by you is not what he was in fact called, but what in fact really were his powers and duties under his employment by the defendant in this case.¹⁸

You are instructed that a mine foreman and pit boss are synonymous terms, and that there is no difference between the duties of the one and the duties of the other. In other words, they are the same as a matter of law.¹⁹

You are instructed that the duties of a mine foreman are to have charge of the inside operation of the mine, to devote the whole of his time to his duties in the mine when the mine is in operation, to keep a careful watch over the traveling ways, to see as far as possible that all dangerous rock overhead on traveling and hauling ways is taken down and secured against falling therein, and to see that on all hauling roads where hauling is done by animal power, and whereon men have to pass to and from their work shelter holes, clear of obstructions, shall be made at least every ——— yards, and to visit and examine every day every working place therein while the miners of such places are or should be at work therein, and to prevent every employé of the mine from working at any unsafe place therein unless it be for the purpose of making unsafe places safe, and that the mine foreman must have a certificate of competency issued by the state board to act in that capacity, and that the person employed by defendant who possessed this qualification and whose duties were just stated was the mine foreman.²⁰

You are instructed that if you find from the evidence that the

¹⁸ Henryetta Coal & Mining Co. v. O'Hara, 150 P. 1114, 50 Okl. 159.

¹⁹ Henryetta Coal & Mining Co. v. O'Hara, 150 P. 1114, 50 Okl. 159.

²⁰ Henryetta Coal & Mining Co. v. O'Hara, 150 P. 1114, 50 Okl. 159.

plaintiff was the mine foreman of the defendant on ———, and had been such mine foreman for a sufficient length of time prior to the accident complained of in this case, and with sufficient authority over men and appliances to have permitted the plaintiff, by using all the means under his control, to have opened rooms of entry along said hauling way or to have provided shelter holes as defined in these instructions, so that they would have afforded shelter for persons therein, and that the plaintiff failed and neglected to do so, and that the failure and neglect to do so on his part was the proximate cause of his injury, then and in that event he cannot recover in this case.²¹

The jury are instructed that even should they find from the evidence that the plaintiff was in fact mine foreman, and should they find that the entry wherein the plaintiff was injured was in full compliance with the law with regard to shelter holes and places of safety, nevertheless, should they find that such entry was used both as a hauling road for hauling coal by animal power and a passage-way for men going to and from their work, that such entry contained such a grade as to necessitate its being supplied with sprags or brakes, that the fact of such necessity was known to the defendant, but was unknown to the plaintiff and by the use of ordinary diligence in the performance of the duties of mine foreman could not have been discovered by the plaintiff prior to the injury, and should they further find that the injury to the plaintiff was the direct and proximate result of the negligence of the defendant in failing to supply such entry with sprags or brakes as aforesaid, and that plaintiff was without fault, then your verdict should be for the plaintiff in such amount as you may find him entitled to.²²

§ 3640. Place becoming unsafe after commencing work by reason of work done

The court charges the jury that, if you believe from the evidence in this case that the place where plaintiff was at work when injured was in a reasonably safe condition when he commenced work there, and it became in an unsafe condition after plaintiff commenced work there which proximately caused his injury, you cannot find for plaintiff for failure of defendant to furnish him a reasonably safe place in which to do his work, as charged in count ——— of complaint as amended.²³

§ 3641. Place made unsafe by climatic conditions

The court instructs the jury that it is claimed that the defendant has been negligent in not providing a safe place in which to work.

²¹ *Henryetta Coal & Mining Co. v. O'Hara*, 150 P. 1114, 50 Okl. 159.

²³ *Langhorne v. Simington*, 66 So. 85, 188 Ala. 337.

²² *Henryetta Coal & Mining Co. v. O'Hara*, 150 P. 1114, 50 Okl. 159.

It does not appear that this place became unsafe, if it was unsafe, by reason of any want of care on the part of the defendant. The particular act of negligence claimed in this respect is the matter of the accumulation of ice. But it appears that this particular place had been gone over by the plaintiff, and by his fellow servants; that any condition existing there must have been known to them, or at least it must have been as well known to them as it was to the defendant. The defendant is not a guarantor of climatic conditions, not the particular condition of any place which may confront workmen on temporary jobs. If this were a permanent employment, his accountability would be held in a more strict manner than where it is merely a temporary job, outside work, and the particular danger, if there was any danger, arises from climatic conditions. It does not appear, gentlemen, from the undisputed testimony in this case that the defendant has been negligent in any of the respects mentioned in the declaration. Aside from that, it might also be mentioned that the plaintiff is a man of mature years; that he has had considerable experience as a carpenter; that some of this has been on rough construction work such as this particular work, or work similar to it; and that he is a man of at least ordinary intelligence, and, as the methods used upon this occasion have been said to be dangerous, it must be apparent that such danger would be obvious to any man of ordinary intelligence, and he would be deemed to have assumed the risk of such danger by his contract of employment.²⁴

§ 3642. Places inherently dangerous and necessarily changing

The jury are instructed that the defendant was not an insurer of the safety of the plaintiff. The general rule is that the master is required to use ordinary care to furnish the servant a reasonably safe place in which to work; but such rule does not apply where the place of work is not permanent, or has not been previously prepared by the master as a place for the doing of the work, or where the servant is employed to make his own place to work in, and the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses. In such case the servant assumes the risk of the condition of the place in which he works.²⁵

§ 3643. Particular instances of unsafe places

§ 3643(1). Kentucky

The court instructs the jury that, if you shall believe from the evidence that defendant's agent, who directed plaintiff where to

²⁴ *Poirier v. Bartlett Lumber Co.*,
148 N. W. 750, 182 Mich. 678.

²⁵ *Creede United Mines Co. v. Hawman*, 127 P. 924, 28 Colo. App. 125.

work, knew, or by the exercise of ordinary care could have known, that said place where plaintiff was so directed to work was dangerous and not reasonably safe, because cars would become unhooked and were reasonably calculated to run down onto said place, if the jury shall believe from the evidence that such conditions did so exist, and the plaintiff did not know of said condition, and could not have known of said danger and condition, if any there was, by the exercise of ordinary care in the performance of his duties, and that by reason thereof the car ran over the plaintiff, and he was thereby injured without any negligence or default on his part which directly contributed to his injuries, then the law is for the plaintiff, and the jury should so find, but unless the jury shall so believe, you should find for the defendant.²⁶

§ 3643(2). Missouri

The court instructs the jury that, if you find and believe from the evidence that said platform was not a reasonably safe place for the use of the plaintiff, by reason of the fact that it was negligently constructed by the defendant, and that the negligence of defendant in the construction, if you find it was so negligently constructed, consisted in the fact that the platform was between ——— and ——— inches lower than the doorsill, that it had no barriers or balustrades around it, that the boards constituting and forming said platform were not nailed or fastened down, and that the defendant knew, or by the exercise of ordinary care could have known, that said platform was negligently constructed and maintained in time to have remedied same, and that the plaintiff by reason of the negligence in the construction of the platform aforesaid, in stepping upon said platform, fell to the floor below because the boards upon which he stepped slipped or tipped up (if you so find) and plaintiff was injured thereby, then your verdict must be for plaintiff.²⁷

§ 3643(3). Texas

You are instructed that, if you believe from the evidence in this case that the defendants failed to exercise ordinary care to furnish plaintiff a safe place to perform his work, and that they sent plaintiff to perform a dangerous task without sufficiently warning him of the dangers of same, or that they failed to furnish sufficient men to perform the work, or that their foreman failed to properly direct the removal of the glass, and that such failure, if any, on the part of defendants was the proximate cause of plaintiff's injuries, if any, and if you further believe from the evidence that plaintiff did not know, or would not by the exercise of ordinary care neces-

²⁶ Goodlin, *Brown & Co. v. Skaggs*,
195 S. W. 427, 176 Ky. 285.

²⁷ Deming v. Alpine Ice Co. (App.)
214 S. W. 271.

sarily have known, of the danger in performing the work, you will find for the plaintiff, unless you find for the defendant under another section of this charge.²⁸

§ 3643(4). Washington

You are instructed that, if you find from the evidence that the tier of lumber upon which plaintiff was working was piled in a careless and negligent manner, and that it fell upon him without any fault on his part, that he did not know of the danger he was in, and that he acted as an ordinarily prudent man would have acted under the same circumstances, then your verdict will be for the plaintiff.²⁹

§ 3644. Injuries caused by falling object

You are instructed that, if you find from a preponderance of the evidence in this case that, at the time in question, the plaintiff was at work in the employment of the defendant as foreman of a grading crew of laborers on its line of railway, that, while he was so engaged, one of defendant's freight trains was about to pass, and he stepped to the side of the track and occupied a position where his duties required him to be, and while in such position, and the train was passing, the defendant's employes and servants operating the train, negligently, and without the exercise of ordinary care and caution, caused, or permitted, a piece of ice to fall from the top of one of the cars in the train, which struck and injured plaintiff, if you find he was injured, then you should find for the plaintiff; unless, however, you should further find that plaintiff, by his own acts of negligence, contributed to the injury complained of, in which event you should find for the defendant.³⁰

§ 3645. Injuries caused by collapse of building

You are instructed that if, from a preponderance of the evidence, you believe that while plaintiff was in the employ of the defendant and at work in its pressroom, where the duties of his employment made it proper for him to be, the walls and superstructures of the building in which said room was located fell upon plaintiff, and that he thereby received the injuries complained of; and if you believe that the walls of said building consisted of an outer and inner wall, and that the timbers which supported the water tank and tower on said building rested upon the inner section only of said walls; and if you believe that the inner section of said wall was too weak to support the weight upon it and rendered it liable to fall, and that the defendant in the exercise of ordinary care and

²⁸ *Stockey & White v. Mears* (Civ. App.) 181 S. W. 774.

²⁹ *Holmes v. Strong*, 147 P. 434, 85 Wash. 7.

³⁰ *St. Louis, I. M. & S. Ry. Co. v. Carter*, 164 S. W. 715, 111 Ark. 272.

foresight should have known those facts, if they were facts; or if you believe from the evidence that said wall, by reason of the manner in which it was constructed and the stones and other material of which it was made, was too weak to bear the weight resting upon it, and that the defendant, in the exercise of ordinary care and prudence, ought to have known that fact, if it were a fact; or if you believe from the evidence that the mortar with which said wall was constructed had been dissolved and washed out by water from the tank overflowing and running down over said wall, and that said wall or walls had thereby become weakened and insufficient to support the water tank and weight resting upon said wall or walls, and that the defendant knew that fact, or by the use of ordinary care could have discovered the fact, if it were a fact; and if you believe the building fell and injured plaintiff, by reason of the defects in construction, or the defective condition of the wall or walls of said building, above referred to, if there were any such defects of construction or in the condition thereof, and if you believe plaintiff's said injuries, complained of, resulted directly and proximately from the failure of the defendant to use ordinary care in respect of any or all of the matters above referred to—you will find for the plaintiff, unless you find for the defendant under other instructions given you.³¹

§ 3646. Duty as to furnishing place for blasting operations

The court charges the jury that, if the plaintiff was in the employment of ——— and ———, or either of them, then it was the duty of his employer or employers to exercise ordinary care to furnish the plaintiff a safe place to work, and this duty the employer cannot delegate to others. The care required of an employer in this respect must be measured by and reasonably proportioned to the risks incident to the work which the servant is engaged in doing. Now if you should believe from a preponderance of the evidence that plaintiff was an employé of ——— and ———, or either of them, and was at work at a place where blasting was being done with dynamite, and plaintiff's employer or employers failed to exercise ordinary care, as that term is defined in this charge, to furnish plaintiff a reasonably safe place to work, and should further believe from the evidence that such failure (if there was such failure) on the part of his employers or employer was the proximate cause of plaintiff's injuries (if he was injured), then he would be entitled to recover against such employers or employer as failed to exercise such care.³²

³¹ Decatur Cotton Seed Oil Co. v. Belew (Tex. Civ. App.) 178 S. W. 607.

³² Farmers' Gin & Milling Co. v. Jones (Tex. Civ. App.) 147 S. W. 668.

§ 3647. Tripping over obstacles

The jury are instructed that if you find and believe from a fair preponderance of the evidence that the plaintiff, while in the employment of the defendant, was directed by a superior officer to board a passenger train and go to the union depot for the purpose of getting some steam hose, and bringing the same back to the storeroom, and that the plaintiff, in obedience to the command of his superior officer, attempted to board the moving passenger train of the defendant at a point where the defendant permitted or invited the plaintiff or its other employes to board the said passenger train, and that such act was not dangerous or hazardous under ordinary circumstances, and if there was any danger it was not obvious to him at the time, and that the plaintiff used at the time such care and discretion as an ordinarily prudent person would have used at the time, and that in attempting to board the train he was tripped by a pile of coal placed at this point; and if you further find and believe from a fair preponderance of the evidence that the said coal had been placed there by the servants or employes of the defendant in the course of their duties, and that the same was negligently placed there, or was negligently permitted to remain at the place and to render the place unsafe for the plaintiff and other employes to board said passenger train, and that the plaintiff, by reason of tripping, fell and his foot was crushed and injured; and you further find that the negligence, if any, of the servants in placing the coal at that place or permitting the same to remain at that point was the direct and proximate cause of plaintiff's injury, if any; and you further find that the plaintiff could not, by the use of ordinary care, have discovered the coal in time to have avoided the accident—then your verdict should be for the plaintiff.³³

§ 3648. Same—Hidden obstructions

The jury are instructed that, bearing in mind the foregoing instructions, if you believe from the evidence that on the occasion in question plaintiff and his coemployes were directed by their foreman to move some ties from one part of defendant's premises in the said town of ——— to another part, and if you further believe from the evidence that while plaintiff and his coemployes were engaged in carrying a switch tie, which was a long and heavy piece of timber, one or more of his said coemployes stumbled over some railroad rails, and were not guilty of negligence in so stumbling, and if you further believe from the evidence that by reason thereof the end of said railroad tie was thrown against the plaintiff whereby he was injured, and if you further believe from the evidence that said railroad rails were hid from view by being over-

³³ Missouri, O. & G. Ry. Co. v. Miller, 145 P. 367, 45 Okl. 173.

grown with Bermuda grass, and if you further believe from the evidence that the defendant in permitting said railroad rails to become overgrown with grass and hid from view of its employes, whose duties under their employment required them to pass over and along the place where said rails were situated if you should find that they were thus hid from view, and that it was the duty of its employes to pass over and along said place, was guilty of negligence, as that term has been hereinbefore defined to you, and that such negligence, if any, was the proximate cause of plaintiff's injury, then you will find for plaintiff, and assess his damages as hereinafter directed, unless you should find for defendant under other instructions given you.³⁴

§ 3649. Failure to place warning signal around excavation

See, also, post, § 3658.

You are instructed that, if you find by a preponderance of the evidence that the deceased was engaged in interstate commerce and that he was on the yards of the defendants preparatory to commencing actual work, and that the defendants kept and maintained a pit in said yards, and that for any reason in the discharge of his said duties he went around or near said pit or excavation, if you find such pit or excavation was kept, and that the defendants negligently failed to keep said pit lighted, and the deceased fell into said pit and lost his life, and that the negligence of the defendants in failing to maintain lights to light said pit was the proximate cause of the injury to the deceased, then your verdict will be for the plaintiff, unless you find for the defendants under other instructions herein given.³⁵

§ 3650. Statutory requirements as to fire escapes

It is my duty to say to you that this building was, in legal effect, a factory, and that an absolute duty was imposed upon this defendant to provide a fire escape for this building, and that there was a violation of this duty, as the proof indicates, so that, if you find that the failure to provide the fire escape was the direct cause of the death of the decedent, you will find a verdict in favor of the plaintiff, unless you find that the defendant has established affirmatively and by a fair preponderance of evidence that decedent was himself negligent, and that his negligence contributed in some way to cause the accident. The negligence of the defendant is established as a matter of law by his failure to provide a fire escape. You have only to determine whether or not the de-

³⁴ Texas & P. Ry. Co. v. Tuck (Tex. Civ. App.) 116 S. W. 620.

³⁵ Lusk v. Bandy, 184 P. 144, 76 Okl. 108.

defendant's failure was the cause of the accident outside of the question of contributory negligence.³⁰

§ 3651. Duty of railroads to their employees

§ 3651(1). *United States*

The jury are instructed that it is claimed that the defendant company was negligent in not foreseeing, not this particular contingency or situation, but similar contingencies, and providing against them by making the opening wider. That is, it is claimed that this was not a safe place for the men who placed those engines to work, for the reason that the defendant company, in the exercise of reasonable care to provide a safe place, ought to have foreseen, and was negligent in not foreseeing, that some such contingency would arise where it would be necessary for the person in charge of the engine to get off or jump off and take care of the engine and take care of the property, or do something to properly place the engine. Now, gentlemen, there is the crux of this case: Was the defendant, the railroad company, negligent in not foreseeing that, not this particular contingency, but that a similar contingency, might arise, and in not providing against it by providing a wider entrance, so that in case the person in charge of the engine had occasion to leave it or get down from it, that he could ride on the side or be at the side of it, and not be injured by being pushed against that post? The defendant is not liable for accidents which a prudent man, in the exercise of ordinary care, could not ordinarily have foreseen. Could and should this defendant company, in the exercise of ordinary care, have foreseen that the persons or person in charge of its engines, in placing them in the stalls in the roundhouse, would have occasion to leave the cab and get down from or out on the side of the engine when in motion, and so come in contact with the posts or uprights at the entrance to such stalls? If it could, and should, and ought to have foreseen that, in the exercise of ordinary care, as I have defined, then it would be negligence of the company in not so providing a place for the workmen to be carried into or walk into where they could not be crushed in the manner referred to. In determining that question, you are to consider the situation, the nature and character of the duties to be performed—that is, by the person in charge of the engine—and the acts to be done in properly performing the duty of placing the engines in the roundhouse; the liability to happenings which would or might make it necessary for the person in charge of the engine to leave the cab and ride on the side of the engine, or to descend therefrom. The burden is on

³⁰ *Amberg v. Kinley*, 108 N. E. 830, 214 N. Y. 531, L. R. A. 1915E, 519.

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the plaintiff to establish negligence by a fair preponderance of evidence. You cannot find negligence from the mere fact that this accident happened. You must find that in the exercise of ordinary care, in the light of human experience, which you have a right to consider, and with knowledge of the duties required, the defendant ought to have foreseen that such or similar accidents would occur by the employé coming in contact with the posts or uprights, the employé being engaged in the discharge of the duties required of him. The defendant was not required to so construct its stalls as to make accidents impossible; it was not an insurer of its employés or of the safety of the place. The defendant is not liable for an accident and a consequent injury that could not be or would not be foreseen by an ordinarily prudent person exercising reasonable and ordinary care under all circumstances of the case, and in view of the duties to be performed and the result to be accomplished and the risks to be encountered. But, gentlemen, if, on the other hand, an ordinarily prudent person in the exercise of reasonable care, in the light of human experience and the circumstances and the duties required, ought to have foreseen that such occurrences would be liable to happen, and that employés might be injured, then you can say that it was negligence not to provide for the safety of the employé in that regard by making the entrance wider.³⁷

§ 3651(2). Arkansas

You are instructed that, while the servant assumes all the ordinary risks incident to his employment, yet a duty rests upon the company to commit no act of negligence whereby he may suffer injury, and to exercise ordinary care to protect him from danger, and in this case, if you believe from a preponderance of the evidence that plaintiff was in the employ of the defendant, ——— Railway Company, and engaged in the performance of his duty, riding upon a freight car, in the yards of the company, at ———, and that there was a hole in the roof of said car, and that while upon the top of said car the plaintiff stepped into the hole in the roof of said car, and was thrown from said car to the ground, and was thereby injured, and that the defendant railway company knew of the condition of the roof of said car, and that the condition of the same was unknown to the plaintiff, and if you find that the company thereby failed to exercise ordinary care to protect plaintiff from danger, and that its act in leaving said hole in the roof of said car thus exposed was the proximate cause of the injury, and that plaintiff at the time was exercising ordinary care for his own safety, and had not assumed the risk, you will be authorized

³⁷ Dalley v. New York, N. H. & H. R. R. Co. (C. C. N. Y.) 167 F. 592.

to find for the plaintiff and assess his damages at such a sum as you may find from the evidence will compensate him for the injuries received.³⁸

§ 3651(3). Colorado

The jury are instructed that the company should have used all reasonable precaution and ordinary care to secure the safety of its employes by keeping a sufficient force at command, and of sufficient capacity, to keep its roadway reasonably safe for the passage of its trains and the employes in charge thereof. It cannot, for want of watchfulness, expose its employes to unreasonable risk and escape liability, but the duty imposed is that of ordinary care. The ordinary care required must be measured by the danger of the service and proportioned by it.³⁹

You are instructed that it seems by the testimony that the decedent met with his death on the ——— day of ———. If you find from the evidence that this was a season of the year when the defendant company knew, or by the exercise of ordinary care, prudence, and foresight it should have known, that freezing and thawing of the earth and snow on the south slope of the mountain was going on, and that by reason thereof boulders and rocks were more liable to become loosened and slide or roll down the mountain side onto the track at or in the vicinity of the place where ——— was killed, then it was the duty of the defendant company to be more watchful and careful to see that its roadway and track were safe for the passage of trains and its employes in charge thereof. And if you find from the evidence that the character of the country was such at and in the vicinity of the point in question that it was necessary to have track walkers at night in order to reasonably protect the passage of its trains and employes in charge thereof from danger, then it was the duty of the defendant company to provide such night inspectors or track walkers, and if it failed in this particular, and did not use reasonable and ordinary care and prudence in protecting the passage of its trains and the employes in charge thereof against such dangers as caused ———'s death, and did not so protect the train upon which ——— was riding, and ——— was killed by reason thereof, then your verdict should be for the plaintiff, unless you further find from all the evidence that he was guilty of contributory negligence which materially contributed to his death, or that he assumed the risk.⁴⁰

³⁸ St. Louis Southwestern Ry. Co. v. Ellenwood, 185 S. W. 768, 123 Ark. 428.

³⁹ Denver & R. G. R. Co. v. Waring, 86 P. 305, 37 Colo. 122.

⁴⁰ Denver & R. G. R. Co. v. Waring, 86 P. 305, 37 Colo. 122.

§ 3651(4). *Mississippi*

The court instructs the jury for the plaintiff that if you believe from the testimony in this case that the defendant company negligently failed to have the switch light at No. ——— switch lighted on the morning of ———, and further believe from the evidence that because of such failure on the part of the defendant to have such switch lamp lighted and as a proximate and direct result thereof plaintiff was injured, unless he knew of this condition, or by the use of ordinary diligence could have known of the danger before he was injured, then you will find for the plaintiff and assess his damages in such sum as you believe the evidence justifies, not to exceed the sum sued for.⁴¹

§ 3651(5). *Missouri*

The court instructs the jury that if you believe and find from the evidence in this cause that on, and for some time prior to, ———, the defendant carelessly and negligently furnished and maintained a switch stand without a lock therefor, at a point on its passing track, at the town of ———, where its crossover track connected said passing side track with defendant's main line at that point, and that such switch stand, without a lock, was not a reasonably safe appliance at said place and under the facts and circumstances, and that on the ———, the defendant, by its engineer, carelessly and negligently ran a train of cars along and upon said passing track at a rate of speed that was not reasonably safe to defendant's other employes working on and around said train, under the existing conditions; and that as a result of such speed of the train and as a result of the carelessness and negligence of the defendant in failing to provide and maintain a lock for such switch stand at the west end of said crossover track, and if you find that such act was, under the circumstances, negligent, one of defendant's cars, then being drawn by defendant's locomotive engine, then being operated by defendant, its servants and employes, was thereby and thus caused to suddenly leave said passing track and to go upon said crossover track, and to suddenly and violently collide with defendant's train of cars upon the main line, thereby and thus catching and crushing plaintiff between the car upon which he was riding and a car upon the main line aforesaid, while he was in the line of his duty as a brakeman for the defendant, thereby and thus wounding his left hip, back, bladder, testicle and urethra, and depriving him of any portion of his earnings, and that the danger incident to the operation of an engine and train of cars upon said passing track by said switch stand without a lock was not so apparent or obvious as to cause a reasonably

⁴¹ *Yazoo & M. V. R. Co. v. Dees*, 83 So. 613, 121 Miss. 439.

prudent person to not operate them, and that the plaintiff, when injured, was exercising such care as a person of ordinary prudence would have exercised under the same or similar circumstances, then and in that event your verdict in this cause must be for the plaintiff, ———.⁴²

§ 3651(6). North Carolina

The jury are instructed that, if you find from the evidence that the defendant engaged the plaintiff to take ———'s place as flagman on its train on ——— morning, ———, and engaged him on the day preceding ——— to go on its train from ——— to ———, in order to learn the road or to become more familiar with the duties that would be required of him as flagman, before undertaking in fact to perform these duties, and it became necessary for the plaintiff in doing the service required of him on ——— to walk on top of the car in front of the caboose, you will then find that it was the duty of the defendant to use ordinary and reasonable care to see that the top of the car was in a reasonably safe and suitable condition for this use, and, in the exercise of such care, to examine or inspect the car from time to time with a view to knowing its condition; and if you find that the defendant failed to exercise such care, you will then find that it was negligent.⁴³

The jury are instructed that if you further find from the evidence that the top of the car on which the plaintiff was required to walk was not in a reasonably safe condition, and that when the plaintiff, in the performance of the duty required of him at that time, was walking on the top of the car, the left side of the car was blown from its position against the plaintiff, and that the plaintiff was thereby thrown to the ground and injured, and that the defendant's negligence was the direct and proximate cause of the injury, you will answer the first issue, "Yes." If you do not find these to be the facts, you will answer it, "No."⁴⁴

§ 3651(7). Oklahoma

You are instructed that, if you find and believe, from a preponderance of the evidence in this case, that the place furnished by the defendant, ——— Railway Company, to the plaintiff, ———, in which to perform the work which the plaintiff was required to perform, was not a reasonably safe place, and that, because of the negligence of the defendant in failing to furnish the plaintiff a reasonably safe place, the plaintiff, while in the exercise of ordinary care, and as the direct and proximate result of the negligence of

⁴² *Thompson v. St. Louis & S. F. R. Co.*, 192 S. W. 1034, 270 Mo. 87.

⁴³ *Ridge v. Norfolk Southern R. Co.*, 83 S. E. 762, 167 N. C. 510, L. R. A. 1917E, 215.

⁴⁴ *Ridge v. Norfolk Southern R. Co.*, 83 S. E. 762, 167 N. C. 510, L. R. A. 1917E, 215.

the defendant company to furnish him a reasonably safe place to work, was injured, then and in that event plaintiff would be entitled to a verdict at your hands, unless you find the plaintiff has released the defendant by means of the release introduced in evidence in the case.⁴⁵

The jury are instructed that if you find and believe from the evidence that the plaintiff was employed by the defendant in the capacity of storekeeper, and further find and believe from the evidence that it was a part of his duties to go from the storeroom to the union depot for the purpose of receiving and transporting supplies from the union depot to the storeroom, and if you find and believe from a fair preponderance of the evidence that the defendant permitted or invited the plaintiff and other employes to board its passenger train in front of the storeroom in which the plaintiff was employed, then it would be the duty of the defendant company to use ordinary care, in keeping said place reasonably safe, as would protect the plaintiff in the performance of his duty in boarding the passenger train of the defendant.⁴⁶

§ 3651(8). Texas

The jury are instructed that it is the duty of a railway company to exercise ordinary care to furnish its employes a reasonably safe place in which to work in the performance of the duties required of them under their employment, so that their said work may be performed with a reasonable degree of safety to themselves, and if a railway company fails in the exercise of ordinary care in this respect and an employe suffers an injury directly and proximately caused by such failure, if any, then such railway company is liable in damages to such employe, provided such employe is himself free from negligence proximately causing or helping to cause the injury, and provided, further, that at the time of the injury such employe did not know, or in the ordinary discharge of his duties must not necessarily have known, of the danger attending his performing his work over and about said place.⁴⁷

§ 3652. Same—Defective roadbed or tracks

The court instructs the jury that, if they find and believe from the evidence that the plaintiff is the administratrix of ———, deceased, and that said ——— was killed on ———, while in the employment of defendant and operating an engine on the ——— Railway Company's tracks, and that the defendant on said date was and for a long time before said date had been receiver of said com-

⁴⁵ Chicago, R. I. & P. Ry. Co. v. Pe-nix, 159 P. 1141, 61 Okl. 4.

⁴⁶ Missouri, O. & G. Ry. Co. v. Mil-ler, 145 P. 367, 45 Okl. 173.

⁴⁷ Texas & P. Ry. Co. v. Tuck (Civ. App.) 116 S. W. 620.

pany and in charge of its track and the operation of trains thereon, and if the jury shall further find from the evidence that deceased was killed at a curve in said road, and at the time and place in question the roadbed, including the ties, was ballasted with dirt, and by reason thereof was inadequately and insufficiently ballasted, and thereby dangerous and unsafe, and if you further find that the rails on said road were ——— pound rails, and were old and worn, and were too light and insufficient to sustain the weight of the engines and trains running over them, and by reason thereof were dangerous and unsafe, and if you further find that the outer rail of the track on said curve was practically level with the inner rail, and by reason thereof an engine and tender in rounding said curve were likely to jump the track, and the said condition, if any, was dangerous and unsafe, and the maintenance of said track in the manner above set forth, if you so find, constituted negligence on the part of the defendant, and that the dangerous condition, if any, of said track, as above set forth, was known to the defendant, or had existed for such a period of time before the death of ——— that defendant in the exercise of ordinary care could have known it in time thereafter to remedy the same, and the defendant negligently failed to do so, if you so find, and as the direct result of such negligence, if any, the engine upon which ——— was riding was derailed, and ——— was thereby killed, then your verdict must be for the plaintiff, unless you find that deceased was guilty of contributory negligence, as defined in other instructions, and said contributory negligence, if any, was the sole cause of his death, or unless you believe from the evidence that the deceased came to his death by reason of the ordinary risks incident to his employment.⁴⁸

The court instructs the jury that if you find and believe from the evidence that the defendant employed the plaintiff as a conductor on one of the ——— avenue cars on or about ———, it became and was the duty of the defendant to provide the said plaintiff with a reasonably safe and sound track and roadbed over which he was required to perform his duties; and if the defendant failed to perform its duty in this regard, and did not provide the said plaintiff with a reasonably safe place in which to perform his duties, in this: That on the date aforesaid, near ——— avenue and on said ——— avenue line, defendant allowed the rails of said track to become bent, sunk down and unlevel, and the roadbed to become hollowed and worn out; and if you find that this condition was not reasonably safe, and that defendant knew the condition, or by exercising reasonable care might have known it, in time, by reasonable care,

⁴⁸ *Hurlburt v. Bush* (Mo.) 224 S. W. 323.

to have corrected it, and that the car on which plaintiff was performing his duties, in passing over that portion of the tracks, ran off or was thrown off the track by reason of the condition aforesaid, if you find it existed, and collided with a car coming in the opposite direction, and plaintiff was struck with great force and violence and injured—then your verdict must be for the plaintiff, unless you further believe that he was himself guilty of negligence which proximately contributed to his injury.⁴⁹

The court instructs the jury that it was the duty of the defendant to have kept its ties, roadbed, and track in a reasonably safe condition for the passage of trains over the same, and to have furnished, for use on said road, cars and appliances, which were reasonably safe for use thereon. And if you find, from the evidence, that, at the time of the accident, plaintiff was in the employ of the defendant as conductor of a freight train, and that defendant's roadbed and track were not in a reasonably safe condition for the passage of trains over the same at the place of the accident, on account of rotten ties, being therein, or on account of failure to properly ballast said roadbed, or on account of the inside rail of the curve, near said accident, being higher than the outside rail thereof, and that defendant knew or by the exercise of ordinary care might have known of the condition of said ties, roadbed, and track before the accident, and if you further believe from the evidence that, at the time of the accident, defendant had provided for use in said train a caboose with a defective brake, and had placed in said train a car so heavily loaded that it would not adjust itself to the track in passing over the same, and that by reason of the rotten condition of said ties, if they were rotten, or by reason of defendant's failure to ballast said road, if it did so fail, or by reason of the rail on the inside of said curve being higher than the outside rail thereof, if said inside rail was higher, or by reason of the overloaded condition of said car, if it was so overloaded, or by reason of the defective brake on caboose, if it was so defective, or if by reason of all said things, said train was wrecked, without the fault of plaintiff, and he was thereby injured, you will find for plaintiff.⁵⁰

§ 3653. Same—Defective highway crossing

As to the negligence of the defendant company in keeping the planking at the highway crossing in the condition claimed by the plaintiff, I desire to say to you, gentlemen, that it is the duty of the defendants to keep the highway crossing reasonably safe for the use of the public upon the highway, and also in a certain measure

⁴⁹ *Houts v. St. Louis Transit Co.*,
84 S. W. 161, 108 Mo. App. 686.

⁵⁰ *Gorham v. Kansas City & S. Ry. Co.*, 20 S. W. 1060, 113 Mo. 408.

for the protection of the employés of the railroad. In this case, if you find the planking was in a dangerous condition, it will not necessarily follow that the defendant company is responsible for that negligence, under all circumstances. If the planking was put down in a safe and proper manner and became suddenly warped out of place by frost or some such agency, and the company had no notice of it by or through its employés, using ordinary diligence, such as section foremen or track men, then the defendants would not be liable for such condition; but if the condition had existed there for several days, and their attention was called to it, and the defendants failed to repair it, they would be guilty of negligence. Still, if the decedent knew or had the means of knowing the road-bed at that point was in that condition, then he cannot recover, because it was his duty to report that fact to the defendants, and give them an opportunity to repair it, if he knew it existed.⁵¹

§ 3654. Same—Defective bridge

§ 3654(1). Missouri

The court instructs the jury that if they believe, from the evidence, that plaintiff was in defendant's employ as conductor of the east-bound passenger train on the ———, and that said train was wrecked by the falling of defendant's bridge across ———, and plaintiff was thereby injured, and the said wreck was caused by reason of the defective condition of said bridge in any of the particulars hereinafter mentioned, and that said bridge was a pile bridge, and on account of the character of the stream and the country drained it (said bridge) was not reasonably safe at that place, or that the piling that supported said bridge had become rotten, unsound, or defective, or that there was not sufficient earth around some of said piling, and that from any or all of said causes said bridge, on said ———, was not reasonably safe for the passage of defendant's said train over the same, and that defendant knew of the defective and unsafe condition of said bridge, or by the exercise of reasonable care and diligence could have ascertained the same before the arrival of the train, upon which plaintiff was conductor, at said bridge, then the verdict must be for the plaintiff.⁵²

§ 3654(2). Utah

The court instructs the jury that, if you believe from the evidence that the bridge crossing the ravine where the accident occurred was weak and insufficient to withstand the force of the waters which would flow down through said ravine under the conditions and circumstances prevailing on the night in question, so that the force

⁵¹ *Herrick v. Quigley* (C. C. A. Ohio) 101 F. 187, 41 C. C. A. 204.

⁵² *Copeland v. Wabash R. Co.*, 75 S. W. 106, 175 Mo. 650.

of such waters would wash away said bridge or any part thereof, as alleged in the complaint, or if you believe from the evidence that the east bank of said ravine was not protected by cribbing or other bulwark for the purpose of preventing the water flowing in said ravine under such circumstances from undermining and washing away the east bank and the supports to said bridge at the point where it reached the east bank, as alleged in the complaint, and if you believe from the evidence that the defendant knew, or, by the exercise of reasonable care and diligence, ought to have known, that said bridge was so insufficient, and that it was dangerous for the train upon which the deceased was riding to be moved over on the night in question, and that, notwithstanding such fact, the defendant caused or permitted the train upon which the deceased was riding to be moved upon said bridge in an attempt to cross said ravine while such dangerous condition existed, and if you believe from the evidence that the train was wrecked and precipitated into said ravine, and that the deceased was thereby killed, and that his death resulted by reason and on account of such defect or insufficiency of said bridge and its supports, then the defendant would be guilty of negligence, and would be liable to the plaintiff in this action, unless you find from the preponderance of the evidence that the deceased assumed the risk.⁵³

§ 3655. Same—Duty with respect to height of overhead bridge

The court instructs you that it was the duty of the defendant, in the construction and maintenance of the overhead portion of the bridge where decedent, ———, was injured, to construct and maintain it of sufficient height that the brakemen on the freight cars could pass under said overhead portion while engaged in the discharge of their duties, with reasonable safety to their person while standing or walking on top of the freight cars; and if they believe from the evidence that the bridge where decedent was injured was not so constructed and maintained as to the height thereof, and that by reason thereof decedent was injured, and that the injury caused his death, you must find for plaintiff, unless you believe from the evidence that decedent was not in the discharge of his duty as brakeman at the time he was struck, or that he knew the overhead portion of said bridge was insufficient in height to enable him to pass under it with safety while standing or walking on the top of a freight car upon which he was at the time he was struck, and that he recklessly, and with indifference to the consequences, and not in the discharge of his duty, exposed himself to the danger of being struck by the bridge, in which later state of case you will

⁵³ Kipros v. Uintah Ry. Co., 146 P. 292, 45 Utah, 389.

find for the defendant; or, if you believe from the evidence that the injury was not the cause of decedent's death, you will find for the defendant.⁵⁴

§ 3656. Same—Approach to cars for purpose of making coupling

You are instructed that it was the duty of the defendant company to have used ordinary and reasonable care in furnishing reasonably safe approaches to its cars at places where its employes, in the discharge of their duties, are required to approach trains and couple its cars, and to reasonably provide against such dangers as may be reasonably foreseen by its servants whose duty it is to keep the approaches to the road in proper condition for making such coupling as is alleged to have been attempted in this case. And if the defendant company did use such care in its approach to the railway, at the place where the injury is alleged to have been inflicted, as a man of ordinary care would have used under similar circumstances, then the defendant would not be guilty of such negligence as to entitle the plaintiff to recover in this case.⁵⁵

You are instructed that if, from the testimony, you believe the defendant failed to use ordinary and reasonable care and diligence in providing a safe approach to the cars at the place where the accident is alleged to have happened, and that the injury complained of was the direct or proximate co-operating result of such want of care, and that the accident happened without the fault or contributory negligence of the plaintiff, as the same is and will be explained to you in this charge, this, in law, would be such negligence on the part of defendant as would render it liable.⁵⁶

§ 3657. Same—Injuries from objects near track.

§ 3657(1). California

The court instructs the jury that it is the duty of a railway company to use ordinary care to see that its tracks are not in such close proximity to other structures as unnecessarily to endanger its servants and the employes who may be engaged in the discharge of their duties upon trains or cars passing along such tracks.⁵⁷

You are instructed that it is actionable negligence on the part of a railway company to suffer obstructions to remain so near their tracks that their trainmen, engaged in their ordinary duties, are liable to come in contact with them and be killed or injured while in the exercise of due care.⁵⁸

⁵⁴ *Louisville & N. R. Co. v. Tucker's Adm'r*, 65 S. W. 453, 23 Ky. Law Rep. 1929.

⁵⁵ *Missouri, K. & T. Ry. Co. of Texas v. Kirkland*, 32 S. W. 588, 11 Tex. Civ. App. 528.

⁵⁶ *Missouri, K. & T. Ry. Co. of Texas v. Kirkland*, 32 S. W. 588, 11 Tex. Civ. App. 528.

⁵⁷ *Humphres v. Western Pac. Ry. Co.*, 160 P. 415, 173 Cal. 428.

⁵⁸ *Humphres v. Western Pac. Ry. Co.*, 160 P. 415, 173 Cal. 428.

You are instructed that a railroad company is in duty bound to place its signal posts, telegraph poles, cattle guard fences and other structures used in connection with the road at a safe distance from the track, to the end that they will not be dangerous to those engaged in operating its trains.⁵⁹

§ 3657(2). Virginia

The court instructs the jury that, if they believe from the evidence that plaintiff was injured by reason of the fact that a caboose car of the defendant company was placed, moved, or allowed to remain by the employes of the said company dangerously near the track over which the said plaintiff had to pass on his engine, thereby rendering the track over which plaintiff had to pass unreasonably unsafe to the said plaintiff in the performance of his duty as fireman, and if they believe that the said plaintiff was attending to his accustomed duties, using such care as a man of ordinary prudence would use under the circumstances therein at the time he received the injury, they must find for the plaintiff, unless the jury further believe that the said plaintiff's injuries were caused by some risk of his employment assumed by him, as defined in instructions ——— and ———.⁶⁰

§ 3658. Same—Failure to light premises

You are instructed that it is admitted in this case that the plaintiff, on ———, was working for defendant as its employé, in defendant's car barn at ———, and that the defendant maintained, beneath the tracks in said car barn, pits to enable workmen to get under said cars; and you are instructed that it was defendant's duty, as plaintiff's employer, to exercise ordinary care to provide plaintiff a reasonably safe place in which to perform his work; and if you believe from the evidence that defendant negligently and carelessly failed to cause said barn and the place where plaintiff worked to be sufficiently lighted to enable plaintiff to see and avoid said pit, and that by reason of such failure, if any, to cause said barn to be sufficiently lighted, said place was rendered dangerous and unsafe for plaintiff working in said barn, and if you further find from the evidence that on said ———, plaintiff, while performing his duties as the employé of defendant and on account of being unable to see said pit as a result of said barn not being sufficiently lighted (if you believe he was unable to see said pit on account of its not being sufficiently lighted), stepped into said pit and was injured thereby, and if you further find that the plaintiff at said

⁵⁹ *Humphres v. Western Pac. Ry. Co.*, 160 P. 415, 173 Cal. 428.

⁶⁰ *Chesapeake & O. Ry. Co. v. Meadows*, 89 S. E. 244, 119 Va. 33.

time was exercising ordinary care for his own safety, then your verdict will be in favor of the plaintiff.⁶¹

§ 3659. Duty of mine owner

§ 3659(1). Arkansas

You are instructed that the defendant was not an insurer of the safety of ———, but it owed him the duty to exercise ordinary care to provide him a safe place in which to perform his duties, and this includes the entryways in its mine to his place of work, and to keep same free from dangerous accumulations of gas. This duty to use ordinary care to provide ——— a safe place to perform the duties of his employment included the duty of reasonable inspection of the mine, its entries, rooms, and working places, and of using such means as ordinary prudence dictates as proper to safeguard the lives and limbs of its employés. If defendant, its agents, servants, or employés, failed to perform such duty, then such failure was negligence.⁶²

§ 3659(2). Kentucky

The court instructs the jury it was the duty of the defendant, ——— Company, to exercise ordinary care to furnish the plaintiff a reasonably safe place in which to work, considering the nature and character of the work he was required to do, and if the jury believe from the evidence that the defendant's employé, superior in authority to the plaintiff, who had the work in charge, directed the plaintiff to remove the coal from under the slate where plaintiff was required to work when he was injured, and that the place where the plaintiff was directed to remove said coal, by reason of said loose slate, was a dangerous or unsafe place in which to do the work of removing said coal, and the said superior, in charge of said work for the defendant knew, or by the exercise of ordinary care could have known, that it was a dangerous or unsafe place in which to do said work, and was dangerous to remove said coal in the manner directed, and that the plaintiff did not know, and by the exercise of ordinary care could not have known, that it was a dangerous and unsafe place in which to do said work of removing said coal, and that by reason of the dangerous and unsafe condition of said place the plaintiff was injured in his legs and hips by falling slate, and was caused to suffer physical pain and mental anguish, or his power to earn money was impaired, they will find for the plaintiff. Unless, the jury so believe and find, they will find for the defendant.⁶³

⁶¹ Haggard v. Southwest Missouri R. Co., 220 S. W. 22, 205 Mo. App. 7.

⁶² Sterling Anthracite Coal Co. v. Strobe, 197 S. W. 858, 130 Ark. 435,

⁶³ North East Coal Co. v. Setzer, 183 S. W. 553, 169 Ky. 245.

The court instructs the jury that it was the duty of defendant to use ordinary care to furnish plaintiff a reasonably safe place in which to work, and if you believe from the evidence that the defendant failed to use such care, and that by reason thereof defendant's tracks on the occasion in question were not in a reasonably safe condition, and such defective condition, if any, was known to the defendant, or could have been known to it by the exercise of ordinary care, and was not known to the plaintiff, or was not so obvious that plaintiff, by the exercise of ordinary care in the discharge of his duties, should have known it, and that by reason thereof the car on which plaintiff was riding was derailed and wrecked, and plaintiff while using ordinary care for his own safety, was thereby injured, you will find for the plaintiff; unless you so believe, you will find for the defendant.⁶⁴

§ 3659(3). Michigan

The jury are instructed that the plaintiff claims the defendant was negligent, first, in failing to test and inspect the hanging wall of the mill; second, in failing to warn the plaintiff, before putting him or allowing him to work in the mill, of the existence in the hanging wall of the mill of loose rock which was liable to fall from or roll against the plaintiff while he was at work in that mill; third, in failing to bar down loose rock which the plaintiff claims existed in the hanging wall of that mill, in failing to brace and protect the hanging wall so as to prevent loose rock dropping therefrom, by timbering, and in ordering the plaintiff to work in the mill, and assuring him it was safe for him to work therein when in fact, as the plaintiff claims, it was not safe for the plaintiff to work in the mill. This, in substance, is a statement of the negligence which the plaintiff claims the defendant was guilty of.

If you find by a preponderance of the evidence that the plaintiff was ordered, required, or expected by the defendant to work in the ——— mill, and that the hanging wall of that mill was a permanent wall—that the company had got through working on that wall is what we mean by a permanent wall—and if you further find it was reasonably necessary, for the safety of the plaintiff while at work in that mill, that the hanging wall of the mill should be tested, inspected, and examined from time to time to ascertain whether it was reasonably safe for the plaintiff to work under, it was the duty of the defendant to cause such hanging wall to be tested, inspected, and examined with such reasonable frequency, skill, and care as was reasonably necessary for the safety and protection of the plaintiff while he was working under the wall, and

⁶⁴ Bell-Knox Coal Co. v. Gregory, 153 S. W. 465, 152 Ky. 415.

the defendant would be chargeable with knowledge of all such loose, shaky, and unreliable ground which existed in the hanging wall, and which would have been discovered by such reasonable, careful, skillful, and diligent inspection of the wall, and of the existence of any loose, shaky, or any unreliable ground liable to fall or roll against the plaintiff while he was at work in the mill, or any characteristic or condition in the mill which rendered it dangerous for the plaintiff to work therein, under the hanging wall, of the existence of which the defendant knew, or in the exercise of due and ordinary care in the inspection and testing of the wall it should or would have known, it was the duty of the defendant to warn the plaintiff before putting or permitting the plaintiff to work in that mill, and under that hanging wall. Again, if you find by a preponderance of the evidence that the hanging wall of the mill could have been kept in a reasonably safe condition for the plaintiff to work thereunder by a reasonably careful, skillful, and diligent testing and inspection of the hanging wall, and by pinching or (as the miners say) barring down, as often as the same was discovered by such testing and inspection, of loose rock in the wall which was liable to fall and falling to injure the plaintiff, then it was the duty of the defendant to carefully, skillfully, and diligently and reasonably pinch and bar down from such hanging wall all such loose rock. Again, if you find by a preponderance of the evidence that the hanging wall above the mill No. ——— where the plaintiff claims he was injured could only be made and kept in a reasonably safe condition for the plaintiff to work therein by timbering the same, then it was the duty of the defendant to carefully, and skillfully, and diligently brace and timber the hanging wall, so as to, by means of such timber, render such wall reasonably safe for the plaintiff to work under.⁶⁵

§ 3659(4). Oklahoma

You are instructed that it was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work, reasonably safe appliances and machinery with which to work, and a reasonably safe track over which the cars were to be hauled, and a failure to furnish such a place, appliances, and track, if there was such a failure, was negligence on the part of the defendant, and if the injuries complained of were the result of such failure, your verdict should be for the plaintiff, unless you shall find that he assumed the risk of injury on account of such failure.⁶⁶

⁶⁵ *Oiva v. Calumet & Hecla Mining Company*, 146 N. W. 181, 178 Mich. 645.

⁶⁶ *Great Western Coal & Coke Co. v. Malone*, 136 P. 403, 39 Okl. 693.

§ 3659(5). Virginia

The court instructs the jury that if they believe from the evidence that the defendant company was running the train of empty mine cars through the main entry with the trip motor at the time the plaintiff was injured, without providing a proper system of signals therefor, or without providing a conspicuous light on the front end of said train, then the defendant was guilty of negligence, and the plaintiff is entitled to recover, provided the said negligence was the proximate cause of the plaintiff's injury, and the defendant was not guilty of contributory negligence; and, if the defendant relies upon contributory negligence as a defense, the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of contributory negligence.⁶⁷

The court instructs the jury that if they believe from the evidence that the plaintiff was assistant to O., and that O. was a machine runner in the employment of the defendant company, at the time of the accident, and that his duties were to go from place to place with O., and assist O. in making cuttings, whenever and wherever they were told to do so by ———, the machine foreman of the company, it was the duty of the company to exercise all reasonable care to provide that the place or places through which he had to go in order to reach and do his work, and the place at which he was to do his work, should be made reasonably safe; and if the jury shall believe that the defendant did not perform this duty, and that such failure to perform said duty was the proximate cause of the injury complained of, the jury shall find for the plaintiff and assess his damages at such sum as the jury under the evidence shall believe he is entitled to recover.⁶⁸

§ 3660. Same—Noxious and explosive gases

§ 3660(1). Iowa

You are instructed that it was the duty of the defendant to provide and maintain a sufficient amount of atmosphere to be circulated throughout its mine so as to dilute, render harmless, and expel all noxious and poisonous gases in all working parts of its mine, and a failure on the part of the defendant to so ventilate would constitute negligence on the part of the defendant.⁶⁹

§ 3660(2). Oklahoma

The court instructs you that if you find from a preponderance of the evidence that the defendant failed to exercise ordinary care

⁶⁷ Carter Coal Co. v. Bates, 105 S. E. 76, 127 Va. 586.

⁶⁸ Darby Coal Mining Co. v. Shoop, 83 S. E. 412, 116 Va. 848.

⁶⁹ Mosgrove v. Zimbleman Coal Co., 81 N. W. 227, 110 Iowa, 169.

to furnish a sufficient current of fresh air to the face of the ——— air course to dilute and render harmless any noxious and explosive gases that might be accumulated there, if there were any, and that this was the proximate cause of the plaintiff's injury, then your verdict should be for the plaintiff, unless you find the plaintiff guilty of contributory negligence as herein defined, or the gases, if any, were suddenly opened up by the plaintiff in his work and could not be discovered by the ordinary and customary methods of inspection; but on the other hand, if the defendant did use ordinary care in furnishing a sufficient current of air to render harmless any gases, if any, therein accumulated, or if the plaintiff by his negligence contributed to the injury, or if the injury was caused by the sudden opening up of a gas feeder as herein stated, then the plaintiff should not recover, and your verdict should be for the defendant.⁷⁰

You are instructed that the statute of the state of ———, in force on ———, in defining the duties of coal mining companies in mines such as the evidence in this case shows this mine to have been, with relation to clearing its mine, and the working places therein of standing gas, as set out in section ———, is as follows: "The operator of every coal or other mine, whether shaft, slope or drift, shall provide and hereafter maintain ample means of ventilation affording not less than one hundred and fifty cubic feet of air per minute for each and every person employed therein, and seven hundred and fifty feet of cubic feet of air per minute for every animal employed therein; but, in a mine where fire damp has been detected, the minimum shall be two hundred cubic feet of air per minute for each person employed therein, and as much more in either case as one or more of the mine inspectors may deem requisite, and the ventilation shall be conducted through the main cross entries and all other working places so as to dilute and render harmless and expel therefrom the noxious and poisonous gases, and all working places shall be kept clear of standing gas."⁷¹

The court instructs you that if you find from a preponderance of the evidence that there was standing gas in explosive quantities in room No. ———, and that the plaintiff ignited the gas and was burned from the same, then your verdict should be for the plaintiff for such damages as you may believe he may have sustained, as hereinafter instructed, unless, however, you find from a preponderance of the evidence he was guilty of contributory negligence as hereinafter defined, or unless you further find from the

⁷⁰ Rock Island Coal Mining Co. v. Toleikis, 171 P. 17.

⁷¹ McAlester-Edwards Coal Co. v. Hoffar, 166 P. 740.

preponderance of the evidence that it was his duty as shot firer to look for gas before firing a shot. If it be his duty to look for gas before firing a shot, then the defendant owes to him the duty only of using ordinary care to provide him a reasonably safe place for him to work, and if in this connection you believe from the evidence that the defendant furnished the plaintiff with a reasonably safe place to work, or used ordinary and reasonable care to furnish same, then your verdict should be for defendant.⁷²

§ 3661. Same—Duty as to form and location of rooms

The court instructs the jury that, if you find from the evidence that it was the duty of the mine boss to direct and govern the form and location of the rooms made in the mine, and to see that pillars or partitions of coal should be left between such rooms from ——— to ——— feet thick, and the mine boss negligently failed to so direct and govern the form and location of the rooms referred to in the evidence, but permitted them to be driven into the coal, that at the place where the shot was fired, the said rooms were separated by a partition only five to seven feet thick, and that this was the proximate cause of the injury, and that plaintiff was not guilty of negligence proximately contributing to his own injury, and that the risk was not one of the assumed risks assumed by plaintiff, as explained in these instructions, then your verdict should be for the plaintiff.⁷³

§ 3662. Same—Duty with respect to timbering or scaling

§ 3662(1). Illinois

The jury are instructed that the law makes it the duty of the owner, agent or operator of every coal mine to keep a supply of timber constantly on hand, of sufficient lengths and dimensions, to be used as props and cap pieces, and to deliver the same as required, with the miner's empty car, so that the workmen may at all times be able to properly secure said workings for their own safety; and if such operator fails willfully so to do, and by reason of such failure a person employed about such mine is injured, the owner or operator of such mine is liable to such person so injured for any direct damages sustained thereby.⁷⁴

The jury are instructed that, if you believe from the evidence that under the custom established by the defendant in its mine the manner in which miners made demand for props was by writing or causing to be written with chalk on a blackboard placed

⁷² *McAlester-Edwards Coal Co. v. Hoffar*, 166 P. 740.

⁷³ *Princeton Coal Mining Co. v.*

Downer, 93 N. E. 1009, 48 Ind. App. 136.

⁷⁴ *Mt. Olive & Staunton Coal Co. v. Herbeck*, 60 N. E. 105, 190 Ill. 39.

near the mouth of the shaft for that purpose the props and caps they wanted and the length of the props, and if you further believe from the evidence that the plaintiff caused to be written on said blackboard a demand for props ——— feet long for said room, then it became and was the duty of defendant to furnish the same for said room.⁷⁵

§ 3662(2). **Kansas**

The jury are instructed that, if you find from a preponderance of the evidence that at the time or very soon after the time when the plaintiff was assigned to room No. ———, or the place in which he alleges he was injured, he at that time agreed with the company's room boss, ———, that he, the plaintiff, would set prop timbers under the roof in said room and in that portion of said room which had been worked by some person other than himself, the defendant to pay him for such services, and you further find from a preponderance of the evidence that the defendant through its room boss, ———, furnished to the plaintiff at his working place prop timbers sufficient in number and of the proper size and length to properly secure the roof in said room from falling in and upon him, and the plaintiff refused or neglected to use such prop timbers for the purpose of making his place safe, then your verdict shall be for the defendant.⁷⁶

§ 3662(3). **Utah**

The court instructs the jury that if you find by a preponderance of the evidence that the defendant company used reasonable care in inspecting, scaling off, and propping up or securing the loose rock and earth in question, and that after such work was performed the condition and appearance of said earth and rock, and the supports thereof, were such as would cause a reasonably prudent man, who was reasonably well versed in the art of inspecting places and timbering in places of that nature, to believe in good faith that said earth and rock were properly scaled, and were properly timbered and secure, and would not fall, and that the servants of said defendant making said inspection were competent therefor and did so believe, then, and in that case, you cannot find defendant guilty of negligence in failing properly to inspect said place or in failing to scale off or timber the same properly. But, on the other hand, if you find from the preponderance of the evidence that the condition of the said earth and rock and the supports thereof was such that defendant, or the agents or servants of defendant who inspected the same, knew, or, by the exercise of reasonable care and competency in that art, could have

⁷⁵ *Poreba v. Illinois Midland Coal Co.*, 156 Ill. App. 140.

⁷⁶ *Ricardo v. Central Coal & Coke Co.*, 163 P. 641, 100 Kan. 95.

known, that the same was loose or not properly timbered or scaled, and that the same might fall, and if you further find from a preponderance of the evidence that said defendant set plaintiff to work in a place where the performance of said work and the smaller duties incident thereto might bring him under said loose rock, and that defendant did not warn plaintiff of said danger, and plaintiff did not know of the same, and the nature of said danger was such that it was not open and obvious, and readily observable by plaintiff from his place of work or places he occupied in said mine, then, and in that case, you must find that defendant was guilty of negligence in not providing plaintiff a safe place in which to work.⁷⁷

§ 3663. Same—Duty as to shelter holes

You are instructed that in all hauling roads on which hauling is done by animal power, and whereon men have to pass to and from their working places, holes for their shelter which shall be kept clear of obstruction shall be made at least every ——— yards, and kept whitewashed; but shelter holes shall not be required in entries from which rooms are driven at regular intervals not exceeding ——— feet, where there is a space of ——— feet between the car and the rib.⁷⁸

You are further instructed that it did not devolve upon the defendant to keep the plaintiff in this case absolutely free and safe from danger or to insure the plaintiff against accident; but it was the duty of the defendant, except in so far as it may have been excused therefrom by the duty of the plaintiff in this case, under the evidence, to comply with the law of the state of ——— controlling the operation of mines, and to use ordinary care, prudence, and skill in the management of its business, for the protection of plaintiff; and if you believe from the evidence that the defendant failed to provide shelter holes as defined in instruction ——— in these instructions, and failed to exercise ordinary care in the management of its business for the protection of the plaintiff in order to provide a reasonably safe working place for the plaintiff, and that the injury of the plaintiff was caused by such failure on the part of the defendant without fault or negligence on the part of the plaintiff, then your verdict should be for the plaintiff for such an amount as you, from all the facts and circumstances in evidence in this case, believe he is entitled to recover, not exceeding, however, the amount prayed for in plaintiff's petition, to wit, \$———.⁷⁹

⁷⁷ *Miller v. Utah Consol. Mining Co.*, 178 P. 771, 53 Utah, 366.

⁷⁸ *Henryetta Coal & Mining Co. v. O'Hara*, 150 P. 1114, 50 Okl. 159.

⁷⁹ *Henryetta Coal & Mining Co. v. O'Hara*, 150 P. 1114, 50 Okl. 159.

§ 3664. Defective gas main

You are instructed that, if you find from the evidence that the gas mains or pipes in the vicinity of the cistern in question were in a defective condition, that gas was escaping therefrom into the cistern and manholes in the vicinity, and that the city had knowledge of said condition, or, in the exercise of ordinary care, should have known of it, for a sufficient length of time for it, in the exercise of ordinary diligence, to have caused said gas pipes or mains to be repaired, or the gas to have been shut off from that part of the city, and failed to do so, but permitted said gas pipes and mains to remain in such defective condition, and the gas to continue to escape therefrom and to fill the cistern in question, and an explosion occurred, then I instruct you that such failure on the part of the city would constitute negligence.⁸⁰

§ 3665. Injuries caused by displacement of earth or rock**§ 3665(1). Iowa**

You are instructed that if ——— dropped the pipe on the bank, where plaintiff was at work, and if ——— was defendant's foreman in charge of the work, as defined in paragraph ——— hereof, and, if the dropping of said pipe caused or contributed to the cause of said bank caving in, and that a reasonably prudent man would not have so dropped said pipe under the circumstances as disclosed in this case, and plaintiff was injured by reason thereof, and you find it was the duty of the defendant, through and by ———, to maintain a reasonably safe place for plaintiff to work in at the time, and that the dropping of said pipe, in whole or in part, rendered unreasonably unsafe the place where the plaintiff was then at work, and that because of said act plaintiff was injured without fault upon his part, then and in that case you will find that the act of the said ——— in dropping said pipe, if he did so, was binding on the defendant, and he would be liable, and you should so find; on the other hand, if you find ——— was not representing the defendant, as defined under paragraph ——— hereof, and that he was acting merely as a coemployé, then and in that case the defendant would not be liable, and you should so find.⁸¹

§ 3665(2). Missouri

The court instructs the jury that if you find from the evidence in this case that on the ——— day of ———, plaintiff's decedent and S. were in defendant's employ and that said S. was then authorized by defendant to instruct said decedent where, when, and how to perform his duties to defendant, and that defendant was

⁸⁰ *Finson v. City of Topeka*, 123 P. 723, 87 Kan. 87.

⁸¹ *McDonald v. Green*, 154 N. W. 456, 172 Iowa, 186.

then engaged in moving dirt from a tract of ground near ——— and ——— avenues, in the city of ———, and caused and permitted such dirt to be removed in such a way as to leave an embankment on said premises, and that said embankment was unsupported and likely to fall upon and injure persons near by, and that by reason thereof the premises near said embankment were not a reasonably safe place for said decedent to work, and that said S., by the exercise of ordinary care, could have discovered that said embankment, if any, was unsupported and likely to fall upon and injure persons near by, and by the exercise of ordinary care, could have discovered that by reason thereof the premises near said embankment were not a reasonably safe place for said decedent to work, and if you further find from the evidence that S. then negligently instructed and thereby caused said decedent then to work at and near said embankment, and that thereupon a portion of said embankment, if any, by reason of its unsupported condition, if any, fell and struck, and thereby injured and killed said decedent, and that said decedent was in a place of safety when he received said instruction, if any, and was near said embankment, if any, and in a position of danger when he was injured and killed, if at all, and would not have been killed if said instruction, if any, had not been given, and that plaintiff was then the lawful wife of said decedent, and that by reason of the death, if any, of said decedent, plaintiff has suffered pecuniary loss and damage, then you will find in favor of plaintiff, unless you further find that said decedent was guilty of contributory negligence, and thereby directly and proximately contributed to cause himself to be killed.⁸²

The court instructs the jury that if on ———, plaintiff was employed in the service of defendants ——— and ——— as a laborer or workman, and was engaged in the work of shoveling and removing rock, earth, and other material from the ledge on the side of the bluff mentioned in the evidence, then it was the duty of said defendants to exercise reasonable care (so far as the nature and character of the work would permit) to make the place at which plaintiff was so doing said work reasonably safe and secure for him. And the jurors are further instructed that if they find and believe from the evidence that defendant ——— was plaintiff's foreman as to said work, and as such foreman had the direction and control of plaintiff in and about the same, and that said foreman directed plaintiff to go on said ledge and to shovel and remove the loose rock and earth therefrom, and that plaintiff proceeded to carry out the directions of said foreman; and if you further find from the evidence that said ledge where plaintiff was directed to work was

⁸² Medley v. Parker-Russel Min. & Mfg. Co. (App.) 207 S. W. 887.

unsafe and insecure because of the existence of loose rock and earth in the side of the bluff above plaintiff which was liable to fall down on plaintiff and to injure him (if such was the case), and that said foreman knew of the said unsafe and insecure condition of the place where plaintiff was so at work, or could have so known by a reasonably careful inspection on his part, and negligently failed to warn plaintiff of the same, or to take reasonable precautions to remedy said condition; and if you further find from the evidence that rock, earth, or other material (while plaintiff was so at work on said ledge) fell down from the side of the bluff above plaintiff and on him, and inflicted and caused the injuries complained of in this action, and that said injuries were the immediate and direct result of the aforesaid negligence (if such was the case) of said foreman, then the plaintiff is entitled to recover in this case, and you will return a verdict for him, and assess his damages as indicated by and in the other instructions given by the court, unless you further find that the danger of the place at which plaintiff was so working was so obvious and manifest that he as an ordinarily prudent person ought to have observed the same and to have refused to have worked thereat.⁸³

The court further instructs the jurors that if they find and believe from the evidence that while plaintiff was working on the ledge of the bluff referred to in evidence, and under the control and direction of said ———, as foreman of said work (if such was the case), loose rock, earth, or other material fell from the side of the bluff from above where plaintiff was so working and down upon him, and caused the injuries sued for by him in this action, and that said injuries were immediately and directly caused by the negligence and carelessness (if such was the case) of said foreman in directing R., another employé of defendants ——— and ———, and also under the control and direction of said foreman (if such was the case), to pry out and displace rock or stone and material connected therewith, and in assisting said R. so to do, from their places or positions in the side of the bluff adjacent to or near the place where plaintiff was so at work as aforesaid, and did thereby cause, if such was the case, rock or stone and connected material in the side of the bluff and above where plaintiff was working to become loose and displaced and to fall down on plaintiff and to cause the injuries sued for herein by him, the jurors will find the issues for plaintiff, and will return a verdict for him, and assess his damages as indicated in the other instructions given by the court in this case.⁸⁴

⁸³ Roberts v. Jones, 137 S. W. 639, 156 Mo. App. 552.

⁸⁴ Roberts v. Jones, 137 S. W. 639, 156 Mo. App. 552.

3. *Duty of Master to Furnish Safe Ways, Appliances, and Equipment, and to Keep Them Safe*

§ 3666. Degree of care required

§ 3666(1). Arkansas

The court instructs the jury that the defendant was not an insurer of the plaintiff's safety, and there is no duty resting upon it to guarantee that the machinery, tools, and instrumentalities furnished by it to the plaintiff to work with may not prove defective. The defendant was only required to use reasonable care to that end.⁸⁵

§ 3666(2). Delaware

You are instructed that it is the duty of the master to provide for his servant a reasonably safe place in which to work and reasonably safe and proper tools and appliances with which to perform such work.⁸⁶

§ 3666(3). Iowa

The jury are instructed that it was the duty of defendant to use all reasonable precaution for the safety of its employes, and among other things it was bound to furnish suitable machinery, materials sound and safe, and to keep it in such condition as would not endanger their safety—such as was least likely to do or cause injury. This, however, does not imply that defendant was bound to use the highest skill, the greatest foresight, the most extraordinary care, in procuring the very best appliances, but rather those appliances which were reasonably best calculated to answer the end proposed.⁸⁷

§ 3666(4). Missouri

The court instructs the jury that it was the duty of the defendant, as employer, to furnish to the plaintiff, who was in its employ, such tools, appliances, and instrumentalities as were reasonably safe for the purpose for which they were used; and the court instructs the jury that if they believe from the evidence that the defendant company furnished plaintiff with a hammer, to be used in the performance of his duties, as such employe, which it knew to be defective, or which it, or its agent or foreman whose duty it was to superintend the plaintiff's work, knew to be defective, or which by the exercise of reasonable diligence the company or its said agent might have known to be defective and liable to chip off, and that in consequence of such defect the plaintiff,

⁸⁵ St. Louis, I. M. & S. Ry. Co. v. Steed, 151 S. W. 257, 105 Ark. 205.

⁸⁶ Coughlan v. Philadelphia, B. & W. R. Co., 67 A. 148, 6 Pennw'Ul, 242.

⁸⁷ Cooper v. Central Railroad, 44 Iowa, 134.

while exercising ordinary care, was injured while in the performance of his duties, then the jury should find for the plaintiff.⁸⁸

The court instructs the jury that, if they believe from the evidence that the tools and appliances used by the plaintiff at the time of receiving the injury complained of were reasonably safe and suitable for the plaintiff to use in the performance of his duties, then he cannot recover, and the verdict must be for the defendant.⁸⁹

§ 3666(5). North Carolina

You are instructed that, if you are satisfied by the greater weight of the evidence that after defendant had installed this machine, in its operation it threw pieces of wood out of the front end next to the feeder, subjecting the one feeding it to danger from these flying missiles in the proper discharge of his duty, these pieces flying over the top of this spring, and you further find by the greater weight of the evidence that this could have been corrected and prevented by the use of a spring of sufficient width to obstruct and turn these flying pieces, and that this could have been done without impairing the efficiency of the machine or interfering with its work, and you should further find that the failure to use a wider spring under the circumstances was a failure to do what a reasonably prudent employer would have done under the circumstances, or that the continued use of this spring under such conditions was doing what a reasonably prudent employer would not have done, and you further find by the greater weight of the evidence that this was the proximate cause of ———'s injury, you should answer the first issue, "Yes."⁹⁰

§ 3666(6). North Dakota

I charge you, gentlemen of the jury, that it was the direct personal and absolute obligation of the defendant in this case to provide reasonably safe and suitable machinery and appliances for the business then in hand. This includes the exercise of reasonable care in furnishing such appliance. An employer must furnish a safe place in which his employé is to work. But the defendant was not an insurer of the plaintiff's safety, nor of any of the appliances which the plaintiff was required to use, nor was he an insurer of the methods of the doing of the work in which the plaintiff was engaged at the time of the accident, but the defendant was only required to exercise ordinary care; that is, such care as a man of ordinary prudence would exercise in the like or similar circumstances.⁹¹

⁸⁸ Duerst v. St. Louis Stamping Co., 63 S. W. 827, 163 Mo. 607.

⁸⁹ Duerst v. St. Louis Stamping Co., 63 S. W. 827, 163 Mo. 607.

⁹⁰ Ainsley v. John L. Roper Lumber Co., 81 S. E. 4, 165 N. C. 122.

⁹¹ Wyldes v. Patterson, 153 N. W. 630, 31 N. D. 282.

§ 3666(7). *Oklahoma*

The court instructs the jury that if you believe from a preponderance of the evidence that the defendant failed to use ordinary care in furnishing the plaintiff reasonably safe tools with which to work, and that the same were defective when furnished to the plaintiff, and that the foreman in the defendant's shop ordered the plaintiff to perform said work after being notified by the plaintiff of the defective character of said tools, and you further find and believe from the evidence that the plaintiff was not guilty of contributory negligence, in this, that after discovering the defect in the tool furnished, although ordered by the foreman to use the same, an ordinarily prudent person would not have used the same under the circumstances, and that the plaintiff was injured by losing his eye as a direct and proximate result of the negligence of the defendant in ordering the plaintiff to work with said tools, and you believe the injury was not the result of a risk assumed by the plaintiff in accepting said employment, then you should find for the plaintiff; otherwise, you will find for the defendant.⁹²

You are instructed that a master or employer owes his servants or employes the duty of furnishing to them a reasonably safe place wherein to work and reasonably safe tools and appliances with which to work, and his failure to use reasonable and ordinary care in providing a reasonably safe place and reasonably safe tools and appliances may constitute negligence; and, if the injury results to the employé by reason of such negligence, and the employé exercises reasonable care himself to avoid injury, then the employer would be liable in damages, for such resulting injury.⁹³

You are instructed that an employer cannot be held to insure the safety of his employes, but he must, as I have said, exercise reasonable care and diligence in providing a reasonably safe place where, and reasonably safe appliances with which, to work.⁹⁴

§ 3666(8). *Texas*

You are instructed that, in determining whether defendant's agents in charge of said mill at the time were guilty of negligence in respect to the matters submitted to you in the foregoing section of this charge, you will bear in mind that it was the duty of defendant's agents in charge of said mill to exercise ordinary care to inspect, keep, and maintain its said line shaft and coupling and set screw thereto attached in a reasonably safe condition, failing which the defendant and its agents in charge would be guilty of negligence.⁹⁵

⁹² *Chicago, R. I. & P. Ry. Co. v. Lillard*, 161 P. 779, 62 Okl. 63.

⁹³ *Ft. Smith & W. R. Co. v. Knott*, 159 P. 847, 60 Okl. 175.

⁹⁴ *Ft. Smith & W. R. Co. v. Knott*, 159 P. 847, 60 Okl. 175.

⁹⁵ *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

§ 3667. Delegation of duty**§ 3667(1). California**

The jury are instructed that the duty which the defendants owed to the plaintiff to furnish him with safe machinery and appliances, was a personal one, and such a duty as the law will not permit them to escape by trusting it to an employé who negligently performs it.⁹⁶

§ 3667(2). Utah

The court instructs the jury that it is the duty of the employer to furnish reasonably safe appliances, reasonably well adapted to do the work required to be done by the exercise of ordinary care and prudence, and this duty cannot be delegated to an agent or servant so as to enable him to escape responsibility.⁹⁷

§ 3668. Duty with respect to providing safe approaches and exits to and from work**§ 3668(1). North Carolina**

The jury are instructed that an employer owes the employé a legal duty in the exercise of reasonable care to provide for him not only a reasonably safe place in which to work, but he also owes that employé a duty to provide a way of access and departure from that work that is reasonably safe. That is the test.⁹⁸

§ 3668(2). South Carolina

The jury are instructed that a master is bound to provide reasonably safe places and structures for his servants while they are in the performance of his work, and reasonably safe approaches for the purpose of enabling them to go to and to depart in safety from their place of work.⁹⁹

The jury are instructed that, where a master has provided for the use of his servants several ways of approach to a building, or several ways of entering and leaving it, a servant, unless he is forbidden to do so, can, in going to and leaving his work, enter or leave by either of these ways that may be most convenient to him; and if, while he is using any of these ways, he is injured by reason of the neglect of the master to keep this way in a reasonably safe condition, such master is responsible for such injury.¹

§ 3668(3). Utah

The jury are instructed that defendant is not obliged to make every place where plaintiff might elect to go reasonably safe, nor

⁹⁶ *Higgins v. Williams*, 45 P. 1041, 114 Cal. 176.

⁹⁷ *Russell v. Borden's Condensed Milk Co. of Utah*, 174 P. 633, 53 Utah, 457.

⁹⁸ *Nelson v. R. J. Reynolds Tobacco Co.*, 57 S. E. 127, 144 N. C. 418.

⁹⁹ *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

¹ *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

was it obliged to anticipate that he would leave his place of work by any other than the usual way, or that he intended to put his tools in any particular place, and therefore, if you find that plaintiff, upon reaching the foot of the ladder, started to go in any other or different direction from that usually traveled by workmen leaving that portion of the stope from which plaintiff was returning at the time of the accident, then, in that case, he must be held to have assumed the risk and all dangers incident to such acts, and cannot recover in this action, and your verdict must therefore be for the defendant.²

§ 3669. Duty to keep appliances furnished reasonably safe

§ 3669(1). United States

You are instructed that if the jury believe from the evidence, under the foregoing instructions, that the boiler which exploded, and killed ———, was defective and unfit for use, in the matters alleged by plaintiff, and that defendant's servants, whose duty it was to repair said machinery, knew, or by reasonable care might have known, of said defects in said boiler and engine, then said negligence on the part of its servant is imputable to the defendant. And if said boiler exploded by reason of said defects, and killed ———, the defendant would be responsible to plaintiff for his death, if deceased in no way, by his own neglect, contributed approximately to his death. If, on the other hand, the jury believed from the evidence that the locomotive engine and boiler which exploded, and killed ———, were reasonably safe appliances, and that the said ———, deceased, negligently let the water get too low in the boiler, and then negligently injected fresh water in the boiler, and thereby causing the explosion, then you will find for the defendant. An employer of labor, in connection with machinery, is not bound to insure the absolute safety of the mechanical appliances which he provides for the use of his employes; nor is he bound to supply for their use the best and safest or newest of such appliances; but he is bound to use all reasonable care and prudence for the safety of those in his service by providing them with machinery reasonably safe and suitable for use, and the like care devolves on the master to keep it in repair.³

§ 3669(2). Illinois

The jury are instructed that it was the duty of the defendant in this case, at the time of the accident in question, to exercise reasonable care to furnish to the plaintiff appliances that were in a

² Downey v. Gemini Mining Co., 68 P. 414, 24 Utah, 431, 91 Am. St. Rep. 798.

³ Texas & P. Ry. Co. v. Elliott (C. C. A. Tex.) 71 F. 378, 18 C. C. A. 139.

reasonably safe condition to be used by the plaintiff in the performance of his duty for said defendant, and that it was the duty of said defendant to exercise like reasonable care in keeping said appliances in a reasonably safe condition and repair.⁴

§ 3669(3). *Indiana*

The court instructs the jury that the law exacted of defendant the duty to furnish and provide the plaintiff with a reasonably safe place in which to perform his work, and that duty on the part of defendant did not end with simply providing safe equipment and appliances in the first instance, but the further duty was imposed upon the defendants of continuously exercising ordinary care to ascertain the condition of such equipment and appliances. It was chargeable with notice of the tendency of the equipment and appliances to deteriorate, or wear out by use or exposure, and it was required to keep the equipment and appliances in a reasonably safe condition, and it was chargeable with notice of any defect which could have been ascertained by the exercise of reasonable care in that particular.⁵

§ 3669(4). *Kentucky*

The court instructs the jury that, although you find that the evidence shows that the defendant used ordinary care in the selection of reasonably safe appliances for the construction and installation of its crusher, yet if the jury shall believe from the evidence that in the use of said appliances at its crusher and prior to the date of the injury complained of, there had been such failure of said appliances, hook, and attachments, to remain fastened and hooked together while employed in hoisting said car or cars and stone up and down the incline track, mentioned in the evidence, as to make it reasonably apparent to a person in the exercise of ordinary care that the car or cars being so drawn up said incline would become detached and run down into the quarry, where plaintiff was working at the time of his injury, and that by reason thereof said appliances and place where the plaintiff was so engaged in work were not reasonably safe, and said condition, if any there was, was known to the defendant, or its agents or servants, superior in authority to the plaintiff, or could have been known to it or them by the exercise of ordinary care, and was not known to the plaintiff, or was not so obvious that the plaintiff by the exercise of ordinary care in the discharge of his duty should have known of it, and that by reason thereof plaintiff, while using ordinary care for his own safety, was injured by said car

⁴ *Illinois Steel Co. v. Wierzbicky*, 68 N. E. 1101, 206 Ill. 201.

⁵ *Cincinnati Gas, Coke, Coal & Min-*

ing Co. v. Underwood, 107 N. E. 28, 60 Ind. App. 351.

coming unhooked and running over and against him, you will find for the plaintiff; but, unless you shall so believe from the evidence as above set out, you should find for the defendant.⁶

§ 3669(5). **Michigan**

I charge you as a matter of law that it was the duty of defendant to construct and maintain the said friction clutch in a reasonably safe and fit condition for use, and if you find that in such construction and maintenance defendant should have inserted a key through such bolt and over such nuts, and that it was negligent in its failure to do so, and that while in the exercise of due care and without notice of such failure on the part of plaintiff he was injured in the manner claimed, then he is entitled to recover from defendant such damages as he has sustained through such negligent failure. The duty of defendant to construct and maintain such clutch with reference to said bolt in a reasonably safe and firm condition for use called upon it to so construct the same in the first instance, and it also called upon it to maintain the same in a reasonably fit and safe condition for use after it was first so constructed. This last duty is what is known as a continuing one, and was not discharged as to plaintiff and others working thereabout as he was by a reasonably safe construction in the first instance. The defendant must continue to maintain the same in a reasonably safe and fit condition to answer the purposes for which it was designed at all reasonable times thereafter while it was in use.⁷

§ 3669(6). **North Carolina**

You are instructed that it is the law in ——— that an employer of labor, to assist in the operation of mill and plants, where the machinery is more or less complicated, is required to provide his employes, in the exercise of reasonable care, a reasonably safe place to work, and to supply them with machinery reasonably safe and suitable, and he is also required to keep such machinery in such condition as far as can be done in the exercise of reasonable care and diligence.⁸

§ 3670. **Duty as to inspection or testing of appliances**

§ 3670(1). **United States**

The court instructs the jury that the defendant was not a guarantor of the safety of instrumentalities and the attachments upon its cars. If that inspection was then suitably and properly made, and this defect did not appear, and did not exist at that time, then

⁶ Goodin, Brown & Co. v. Skaggs, 195 S. W. 427, 176 Ky. 285.

⁷ Deary v. Hecla Co., 126 N. W. 846, 161 Mich. 677.

⁸ Midgette v. Branning Mfg. Co., 61 S. E. 5, 150 N. C. 333.

I charge you that the defendant used ordinary care. But the mere fact that it had suitable inspectors, and that its inspectors inspected, does not carry with it, of necessity, the conclusion that the car was properly inspected. It is for you to say whether or not, upon all of this testimony, the presumption that this car was defective at the time of the accident has been removed by their testimony showing the kind and extent and time of inspection.⁹

Under the evidence in this case I charge you that the defendant cannot be held negligent because of its failure to apply to the hose in question the test of air pressure greatly in excess of that to which it was ordinarily subjected in the use thereof. There is no doubt about that. Ordinary care requires such care as is ordinarily used by a prudent person under the circumstances; and you have the evidence in the case of persons connected with this company and many others as to the amount of pressure which is used. It is very evident, also, that it might not be the exercise of proper care to use very much greater pressure in testing hose, because, while it might stand the greater pressure at the time, the use of such greater pressure might tend to weaken the hose and render it more liable to burst, or might weaken it so that it would be more liable to receive other injuries, and more liable to burst in the future. In the absence of evidence that it is usual or customary, or regarded by prudent railroad men as essential, that this hose should be subjected in testing it to a much greater pressure, it would not be the exercise of such ordinary care to subject it to such greater pressure.¹⁰

The court instructs the jury that, for the discovery of defects in the air brake hose the defendant was not required to adopt or apply any extraordinary inspection or tests, which are not approved, practical, and customary; but it fulfilled its duty if it adopted such tests and inspection as are ordinarily adopted and applied and regarded as sufficient by prudently conducted railway companies in like circumstances.¹¹

The court instructs the jury that, even if the defendant failed in any manner to inspect or test the air brake hose in question, such failure was not necessarily negligence, and proof of such failure is not sufficient evidence of negligence, unless you are also satisfied by the evidence that the adoption and application of such tests and inspection as are ordinarily adopted and applied by prudently conducted railway companies in like circumstances would disclose

⁹ *Erie R. Co. v. Schomer* (C. C. A. Ohio) 171 F. 798, 96 C. C. A. 458.

¹⁰ *Shandrew v. Chicago, St. P. M. & O. Ry. Co.* (C. C. A. Minn.) 142 F. 320, 73 C. C. A. 430.

¹¹ *Shandrew v. Chicago, St. P. M. & O. Ry. Co.* (C. C. A. Minn.) 142 F. 320, 73 C. C. A. 430.

the defective condition thereof which caused the bursting of the hose.¹²

§ 3670(2). California

You are instructed that a merely visual or ocular inspection of external conditions does not satisfy the measure of the employer's obligation where the servant's safety depends upon the soundness of the material of which an instrumentality is composed, or upon the firmness with which the separate parts of such instrumentality are attached to each other.¹³

§ 3670(3). North Carolina

You are instructed that if you find from this testimony that the pulley was defective, worn, and in the condition as alleged in the complaint, if you find that the defendant company did not know of that defect, and could not have known of that defect by the exercise of ordinary care and prudence, notwithstanding there was a defect about the pulley or about the machinery, as alleged in the complaint, the court charges you, if the company did not know it, and could not have known it by the exercise of ordinary care and prudence, then the company would not be guilty of negligence, and it would be your duty to answer the first issue, "No." The court charges you, however, gentlemen, that the law imposes upon any man who runs machinery to have that machinery inspected at reasonable times to see whether there are any defects about the machinery that would make it dangerous to the employés in charge; and it is the duty of a company working, handling this machinery, to have it inspected at reasonable times to see that it is in good condition.¹⁴

§ 3670(4). Utah

You are instructed that the duty of a master toward a servant in his employ is to exercise reasonable and ordinary care and skill to provide safe machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in safe condition for such use, including the duty of making inspections, tests, and repairs at proper intervals while the work progresses.¹⁵

You are instructed that an employé is required to observe and avoid known perils, or conditions such as would, upon ordinarily careful observation, convince an employé of ordinary intelligence and prudence, of danger, even though they may arise from a de-

¹² *Shandrew v. Chicago, St. P., M. & O. Ry. Co.* (C. C. A. Minn.) 142 F. 820, 73 C. C. A. 430.

¹³ *Ronconi v. Northwestern Pac. R. Co.*, 170 P. 635, 35 Cal. App. 560.

¹⁴ *Nixon v. Buckeye Cotton Oil Co.*, 94 S. E. 410, 174 N. C. 730.

¹⁵ *Hunt v. F. J. Moran*, 150 P. 953, 46 Utah, 388.

fect in the machinery or appliance which he is using; but he is not bound to search for defects, or to make a critical inspection of the appliances which are provided for his use. These are the duties of the employer, who is required not only to furnish reasonable, safe, and suitable tools and machinery, but to exercise such a reasonable supervision over them by such reasonable, careful, and skillful inspection and repairs as will keep the appliances which the employé is required to use in such a condition as not to expose him to extraordinary danger.¹⁶

§ 3671. Same—Simple tools

The court instructs the jury that under the law and the evidence in this case the alleged defective tool which it is alleged defendant furnished to plaintiff and with which plaintiff is alleged to have been working at the time of receiving the injuries described in his petition was of such a simple character that there was no duty upon the defendant to inspect the same before furnishing it to the plaintiff, and you would not be justified in finding that defendant was negligent in furnishing such tool, although you should further find that it was in a defective condition at the time plaintiff received the same.¹⁷

§ 3672. Necessity and sufficiency of notice to master of defects

§ 3672(1). Alabama

The court charges the jury that they cannot find the issues in favor of the plaintiff, on account of the defect in the wires connected with the lamp or fan used in the boiler, if there was such defect, unless such defect arose from, or had not been discovered by reason of, the negligence of the defendant, or of the person intrusted by the defendant with the duty of seeing that the said cord or wire was in proper condition.¹⁸

§ 3672(2). California

The jury are instructed that, to render defendants liable to plaintiff in damages, it is not necessary that they should have had actual knowledge of the unsafeness of the said machine. The proof is sufficiently made out by plaintiff when it is shown that said machine was defective and unsafe in such respect that, if a proper inspection of it had been made by defendant, such unsafeness and defectiveness would have been ascertained in time to prevent the injury. If the unsafeness was conspicuous, defendants will be presumed to have had knowledge of it.¹⁹

¹⁶ *Hunt v. P. J. Moran*, 150 P. 953, 46 Utah, 388.

¹⁷ *Chicago, R. I. & P. Ry. Co. v. Lillard*, 161 P. 779, 62 Okl. 63.

¹⁸ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

¹⁹ *Higgins v. Williams*, 45 P. 1041, 114 Cal. 176.

§ 3672(3). Delaware

You are instructed that, if you should believe from the evidence that the defendant exercised reasonable care in the inspection of the car in question and of the brakes and other appliances thereon, and that the same were found in reasonably good working condition when the car was turned over to the plaintiff to operate as a motor-man, shortly before the accident, and that any defect or disorder (if any) in said appliances occurred during the operation of the car by the plaintiff, and that there was no opportunity to repair the same or discontinue the use of the car before the accident, in such event the existence of such defect or disorder would not constitute negligence on the part of the defendant.²⁰

You are instructed that, if you should believe from the evidence that the defendant exercised reasonable care in the inspection of the trolley car which the plaintiff was operating at the time of the accident, and that the brakes of said car, or other appliances complained of, when last inspected before the accident, were in reasonably good working condition, and that any defect or disorder (if any) in any of said appliances was not discovered sufficiently long before the accident to reasonably permit the repair thereof or the discontinuance of the operation of such car, in such event the existence of such defect or disorder would not constitute negligence on the part of the defendant.²¹

§ 3672(4). Missouri

The court instructs the jury that knowledge by or notice given to the company's foreman who had charge of the plaintiff, upon a matter within the scope of said foreman's authority, was such knowledge by or notice to the company itself, within the meaning of these instructions.²²

§ 3672(5). North Carolina

The only allegation of negligence in this case is the use of this lathe machine with the spring not high enough to act as an obstruction or guard to prevent the hurling back to and through the front of the machine pieces of wood which might be inside. In this case I charge you that plaintiff has not shown that the defendant has been negligent in failing to use a machine such as was known, approved, and in general use in mills of that kind at that time, and upon that question and allegation you would not be justified in answering this first issue in the plaintiff's favor. The plaintiff contends that after the defendant installed this machine, in its operation

²⁰ Spahn v. People's Ry. Co., 83 A. 27, 3 Boyce, 302.

²¹ Spahn v. People's Ry. Co., 83 A. 27, 3 Boyce, 302.

²² Duerst v. St. Louis Stamping Co., 63 S. W. 827, 163 Mo. 607.

it hurled missiles out of the front, to the danger of the man or boy feeding it, before the injury to plaintiff, sufficiently frequent and for such a length of time for defendant to have known of this, or in the exercise of ordinary care to have learned it, and that in the face of this knowledge defendant continued to use it with the narrow spring, when they could have corrected it by using a wider spring, and have thereby prevented missiles or slivers or pieces of wood from being thrown back through the front end to the danger of the feeder of the machine. I charge you that, unless you are satisfied by the greater weight of the evidence, the burden being upon the plaintiff, that this machine had, previous to the injury to plaintiff, thrown out missiles or pieces of wood with such force, frequency, and for a sufficient length of time prior to this injury to plaintiff that defendant knew of it, or in the exercise of reasonable care and diligence could have known of it, you should answer the first issue, "No." ²³

§ 3673. Effect of knowledge by master of defects

The court charges the jury that mere knowledge of the defect, if there was a defect, does not constitute negligence.²⁴

§ 3674. Right of master to opportunity for repairs

The court charges the jury that, if they are reasonably satisfied from the evidence that there was no danger in the electric lamp or wire supplying the same until the lamp or globe thereof became broken, the defendant would not be negligent, and would not be liable for injuries resulting from the breaking of said lamp until it had had a reasonable opportunity of remedying or repairing the same.²⁵

The court charges the jury that, even if they could be reasonably satisfied from the evidence that the plaintiff's intestate came in contact with the wire supplying the electric lamp which he had in his hand and that the electric current from such wire caused his death, but that he would not have been injured by said current but for the breaking of the globe, and that the defendant had not had an opportunity of repairing said lamp after the same had been broken, the defendant would not be liable for this accident, under the second count of the complaint.²⁶

§ 3675. Defective appliance furnished by coservant with sanction of foreman

The court instructs the jury that although they believe from the evidence that the hammer in question was not directly furnished

²³ *Ainsley v. John L. Roper Lumber Co.*, 81 S. E. 4, 105 N. C. 122.

²⁴ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

²⁵ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

²⁶ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

by defendant, but was furnished by a coemployé, in violation of the rules of the company, yet if the jury also find from the evidence that the company's foreman under whom plaintiff worked was aware of the fact that plaintiff was using same in performing his duties, and gave his consent or sanction to such use, or instructed plaintiff to continue using it, then the liability of the defendant thereafter was just the same as if it had originally furnished plaintiff with said hammer.²⁷

§ 3676. Duty of master where appliances of third person are used

§ 3676(1). California

The jury are instructed that the duty of the master to furnish safe machinery is not affected by the fact that he does not own the machinery furnished. It is sufficient if it is used by such employer. The duties which an employer owes to his servants, and which he is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed; and to make such provisions for the safety of employées as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by an employer to a servant, so as to avoid responsibility for the injury caused to another servant by his omission.²⁸

§ 3676(2). South Carolina

The jury are instructed that, where a master allows an independent contractor to erect and use appliances on his premises for the purpose of carrying on the work of such independent contractor, and adopts and uses such appliances and structures, or acquiesces in the use of such appliances and structures by his servants while they are engaged in his work, then such master makes such appliances and structures his own, and is just as responsible for their safety while they are being used by his servants as he would be if he had erected them himself.²⁹

The jury are instructed that, where an independent contractor erects certain appliances and structures on the premises of another for the purpose of carrying on the work he is engaged in, and a master who is also carrying on work there adopts and uses such appliances, or consents to and acquiesces in the use of them by his servants while they are engaged in his work, such master makes

²⁷ *Duerst v. St. Louis Stamping Co.*, 63 S. W. 827, 163 Mo. 607.

²⁸ *Higgins v. Williams*, 45 P. 1041, 114 Cal. 176.

²⁹ *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

such appliances and structures his own while his servants are using them, and is just as responsible for their being kept in good repair while being so used as he would be had he erected them himself.³⁰

The jury are instructed that where an independent contractor erects structures and appliances on the premises of another for the purpose of enabling him to carry on his work, and joins such appliances and structures to those of a master who is also engaged in carrying on work there, and such appliances and structures are used in common by this independent contractor and by this master and his servants, such master, while the appliances and structures which were built by the contractor are being used by him and his servants in his work, becomes responsible for their safety and good repair; and if he negligently fails to keep them in a reasonably safe condition, and by reason of this a servant of his, while in the performance of his work, is injured, such master is responsible for such injuries.³¹

The jury are instructed that, where a master adopts and uses the structures and appliances which have been built for the use of another, or where he consents that his servants, while in the performance of his work, shall use them, then he makes himself responsible for such appliances being kept in a reasonably safe condition; and if he negligently fails to do so, and one of his servants, while engaged in the master's work, is on this account injured, such master is responsible for such injuries.³²

The jury are instructed that, where an independent contractor erects appliances and structures on the premises of another for the purpose of enabling him to carry on his work, and, after his contract is over, goes away and leaves such appliances and structures on such premises, and one who is to carry on work there, as a master, adopts them as his own, or permits and consents and acquiesces in the use of such appliances and structures by his servants while they are engaged in his work, he thereby makes them his own, and is just as responsible for their being kept in a reasonably safe condition as he would be if he had erected them himself.³³

The jury are instructed that if, after an independent contractor has quit his job, and left the premises where he had been at work, a master adopts and uses the appliances and structures which this independent contractor had erected, or permits and acquiesces in the use of them by his servants while they are in the performance of his work, then such appliances and structures, to all intents and

³⁰ *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

³¹ *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

³² *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

³³ *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

purposes, become the appliances and structures of the master; and if, after this, he negligently fails to keep and maintain them in a reasonably safe condition, and by reason of such failure one of his servants, while in the performance of his duties, is injured, such master is responsible for such injuries.³⁴

§ 3677. Right of master to rely on guaranty of third person

You are instructed that, where a breach of the duty of defendant to furnish a reasonably safe and suitable oil for the use of its servants in lubricating the cars down in the mine has occurred, protection or excuse cannot be had by showing only a contract or guaranty respecting the matter by some third person. A reliance upon such contract or guaranty does not necessarily show the exercise of the degree of care required; but it is for you to say whether, under the facts and circumstances and considering the nature of the substance being furnished and the danger incident to its use, if unsafe, other and further inspection should have been made before sending the oil down into the mine.³⁵

§ 3678. Discretion of master in determining character and kind of appliances to be used

The court instructs the jury that it is a rule of law that railway companies have and must exercise much judgment and discretion in determining the kind and character of the appliances which they adopt, and there is a large field where their decision of doubtful questions in the affirmative or negative cannot be held to disclose any want of ordinary care; therefore, the defendant cannot be held liable in this case merely because of the fact that the hose which burst was a spliced hose.³⁶

§ 3679. Duty with respect to furnishing best or most improved appliances

§ 3679(1). Delaware

You are instructed that such tools and appliances need not be the latest, the most improved, nor the best; but they should be reasonably safe and adapted to the nature of the work to be done.³⁷

§ 3679(2). North Carolina

You are instructed that the only evidence of negligence in this case, if any, to be considered by the jury upon the first issue is the failure of defendant to have a spring of additional width or height, and, unless you find by the greater weight of the evidence that such

³⁴ *Rinake v. Victor Mfg. Co.*, 36 S. E. 700, 58 S. C. 360.

³⁵ *Hailey-Ola Coal Co. v. Parker*, 122 P. 632, 32 Okl. 642, 40 L. R. A. (N. S.) 1120.

³⁶ *Shandrew v. Chicago, St. P. M. & O. Ry. Co.* (C. C. A. Minn.) 142 F. 320, 73 C. C. A. 430.

³⁷ *Coughlan v. Philadelphia, B. & W. R. Co.*, 67 A. 148, 6 Pennewill, 242.

spring would have prevented the injury, and that the defendant, in the exercise of ordinary care ought to have provided the same, you are instructed to answer the first issue, "No." It was not the duty of the defendant to furnish the best or most improved machine that could have been gotten or devised, but only such as was in general and approved use at the time, and the failure of defendant to have any particular appliances or devices on this machine is not actionable negligence. The basis of defendant's negligence in this case, if any, depends upon whether it exercised that degree of care which a reasonably prudent man would have exercised in the same situation.³⁸

§ 3679(3). Virginia

The court instructs the jury that it is the duty of the railroad company to exercise reasonable care for the safety of its employes, but it is not bound to provide the latest inventions or the most newly discovered appliances. It is not bound to use more than ordinary care, no matter how hazardous the business may be in which the employé is engaged.³⁹

§ 3680. Appliances in ordinary use

The court instructs the jury that an employer who uses apparatus which is in common and ordinary use in the line of business in which he is engaged cannot be held liable for an accident which might have been prevented by the use of different apparatus.⁴⁰

§ 3681. Liability to servant whose duty it is to inspect or repair alleged defective appliance

§ 3681(1). Minnesota

The court instructs the jury that, if you find from the evidence that plaintiff and fellow workers on the car in question were in the defendant's employ as car repairers with the duty to repair defective cars upon the repair tracks and that it was part of the duty of plaintiff and his three associates to repair said car by fitting a door on said car from a supply of secondhand doors kept near by, that if the car door selected was not in proper condition to be used in said car it was the duty of plaintiff and his associates to repair the same and make it fit for use, and if you further find that said door fell while being placed in said car, because of a defective hanger thereon, you are instructed that defendant is not liable.⁴¹

§ 3681(2). Missouri

The court instructs the jury that if you believe from the evidence in this case that it was the plaintiff's duty as a blacksmith

³⁸ *Ainsley v. John L. Roper Lumber Co.*, 81 S. E. 4, 185 N. C. 122.

³⁹ *New York, P. & N. R. Co. v. Wilson's Adm'r*, 64 S. E. 1060, 109 Va. 754.

⁴⁰ *Haines v. Coastwise Steamship & Barge Co.*, 177 P. 648, 104 Wash. 685.

⁴¹ *Bauer v. Great Northern Ry. Co.*, 150 N. W. 394, 128 Minn. 146.

in the employ of the defendant to repair and keep in order tools used by him in work performed by him, and if you further believe from the evidence that the tool used by plaintiff at the time of his accident was defective, and was allowed to become so by plaintiff, or if you find that plaintiff negligently and carelessly failed to repair and trim said tool, if you find that it could have been repaired and trimmed, then the plaintiff is not entitled to recover, and your verdict must be for the defendant.⁴³

§ 3681(3). North Carolina

You are instructed that, if you find from this testimony that this plaintiff had control of that machine room, that he was there in absolute control of all that machinery, and find that being so, that it was his duty to report any defect to the superintendent, then the court charges you, if there was a defect, that it was his duty to do so, and if he did not, he could not recover.⁴³

§ 3681(4). Virginia

The court instructs the jury that, where by the terms of the employment a brakeman is charged with the duty of inspecting the appliances which he is using, he cannot recover for injury sustained because of defects in such machinery or appliances if he neglects his duty in that regard, and if the defects are such as are discoverable by proper inspection.⁴⁴

The court instructs the jury that, under the rules of the ——— Railway Company in evidence before it, it was the duty of the plaintiff to make such reasonable inspection of the brakes as would discover open and obvious defects, and report the same to the conductor, and, if plaintiff failed to do so, he cannot recover for an injury resulting from such defect in the brake.⁴⁵

§ 3682. Duty to improve machine furnished to servant

You are instructed that whatever the jury may believe from the testimony of the plaintiff's witnesses that the condition of the leather or drum setting machine was on the day that the plaintiff's intestate went to work for the defendant, the defendant owed the plaintiff no duty to change or to improve that condition of the machine, the plaintiff's intestate took the machine as it was at that time, whether good, bad, or indifferent, and the only duty which the defendant owed to the plaintiff's intestate was to warn him of any dangers in connection with the use of that machine which were not obvious.⁴⁶

⁴³ *Modlagl v. Kaysing Iron & Foundry Co.*, 154 S. W. 752, 248 Mo. 587.

⁴⁴ *Nixon v. Buckeye Cotton Oil Co.*, 94 S. E. 410, 174 N. C. 730.

⁴⁵ *Southern Ry. Co. v. Childrey*, 74 S. E. 221, 113 Va. 376.

⁴⁵ *Southern Ry. Co. v. Childrey*, 74 S. E. 221, 113 Va. 376.

⁴⁶ *Shea v. American Hide & Leather Co.*, 109 N. E. 158, 221 Mass. 282.

You are instructed that, when the defendant hired the plaintiff's intestate to work on the leather or drum setting machine, it was under no obligation to make the machine a better one or to change it in any other way. The plaintiff's intestate took it as it was. It was only in case there was some risk in connection with the use of the machine which was not obvious that any duty was thrown on the defendant, and the duty thrown upon him in such a case was to give a warning.⁴⁷

§ 3683. Method of tempering tools

You are instructed that, if the jury find from the evidence in this case that on the ——— day of ———, the defendant was doing certain construction work in ———, and that at said time and place the plaintiff was in the employ of defendant, but was not defendant's foreman, and was not intrusted by defendant with the duty of tempering or sharpening tools; and if the jury further find from the evidence that on said day in the course of the discharge of his duties as the servant of defendant it became necessary for plaintiff to remove a certain bushing from a valve, and that, in order to properly do said work, it was necessary for him to use a hammer and chisel; and if the jury further find from the evidence that when plaintiff attempted to use said chisel, as he was holding the same in his left hand with the sharp end of the chisel on said bushing, he struck the same with the hammer which he held in one hand, said chisel broke, and that a piece of said chisel was thereby caused to fly into plaintiff's right eye and to injure the same so as to destroy the sight of said eye; and if the jury further find from the evidence that said chisel had been tempered by one ———, and that said ——— at the time he tempered said chisel was a foreman employed by defendant and was intrusted by the defendant with the duty of tempering and sharpening such tools as were furnished by defendant for plaintiff's use in discharging his duty as defendant's servant, and that in tempering said chisel said ——— used what is known as common coal instead of using blacksmith's coal in making the fire in which to heat said chisel while tempering said chisel; and if the jury further find from the evidence that the use of blacksmith's coal was necessary for said purpose, in order to properly temper said chisel, so as to make it reasonably safe and suitable for the purpose for which it was intended, and that the use of common coal, instead of blacksmith's coal, for said purpose, caused said chisel to be brittle so that it would be likely to break off when it was struck with a hammer when being used in the ordinary manner; and if the

⁴⁷ *Shea v. American Hide & Leather Co.*, 109 N. E. 158, 221 Mass. 282.

jury further find from the evidence that said chisel at the time it was furnished by defendant to plaintiff, for his use (if you find from the evidence that it was so furnished by defendant), was, by reason of common coal instead of blacksmith's coal having been used in tempering said chisel, not reasonably safe for the use for which it was intended and to which plaintiff was applying it; and if you further find from the evidence that the defendant knew, or by the exercise of ordinary care would have known, of the said condition of said chisel before furnishing it to plaintiff, and that defendant was guilty of negligence in using common coal instead of blacksmith's coal in the tempering of said chisel, and that defendant was guilty of negligence in furnishing said chisel, so tempered, to plaintiff for said work; and if the jury further find from the evidence that as a direct result of the negligence of defendant, as aforesaid (if you find it was so negligent), said chisel was caused to break and injure the plaintiff; and if the jury further find from the evidence that at the time of and prior to his injury plaintiff was exercising ordinary care for his own safety—then the plaintiff is entitled to recover.⁴⁸

§ 3684. Particular defective appliances

§ 3684(1). Mississippi

The court charges, for plaintiff, that if the shoe was defectively and insecurely fastened upon the leg of the log loader, and plaintiff in the discharge of his duty was compelled to step on it, and in so doing he acted with as much care as any ordinarily prudent man would have acted, and the said fastening of the shoe caused it to turn up or down or sideways, or to tilt, and this caused plaintiff to fall and lose his leg, then he is entitled to recover, regardless of every other fact in the case, unless they believe that he knew of the danger, or could by the exercise of ordinary care have known it.⁴⁹

§ 3684(2). Missouri

The court instructs the jury that if you find from the evidence that plaintiff was employed by defendant to care for the horses in its charge and possession, and was ordered by defendant's foreman to transfer certain horses in its barn from one pen to another therein through an alley alongside of said pens, and that the floor of said alley was in a dilapidated and defective condition, and the surface thereof so uneven that the gate to said pen into which said horses were to be driven could not be opened fully, but, when opened so far as said floor would allow, projected into said alley

⁴⁸ *Sterling v. Parker-Washington Co.*, 170 S. W. 1156, 185 Mo. App. 192.

⁴⁹ *W. C. Wood Lumber Co. v. Davidge*, 49 So. 610.

so that the horses in passing from one pen to the other would likely run behind and against said gate, and that, by reason thereof, said floor and gate were not reasonably safe and sufficient; that said conditions were known to defendant, or had existed for such length of time that defendant, by the exercise of reasonable care, would have known of and could have repaired the same, and that on account of the said condition of the said gate and alley the said horses in passing through said alley ran behind or against said gate and threw the same upon and against plaintiff while in the performance of his said duty, and he was injured thereby, without negligence on his part directly contributing thereto, then your findings shall be for the plaintiff.⁵⁰

§ 3684(2). North Carolina

The jury are instructed that, if the jury should find by the greater weight of the evidence that lug hooks were at the time of the injury used by railroads, doing like work, such as moving heavy timbers, then it was the duty of the defendant to furnish the foreman with lug hooks: and should you further find, by the greater weight of the evidence, that the timber which the plaintiff was handling was such timber, because of weight, length, ground, and surroundings, such as would lead a man of ordinary prudence to see it was safer to use lug hooks than to use his hands, then failure of defendant to provide and have them for use would be negligence, and should the jury find that this negligent act was the proximate cause of the injury, they should answer the first issue "Yes."⁵¹

§ 3685. Scaffolds

§ 3685(1). Missouri

The jury are instructed that it was the duty of the defendant to exercise ordinary and reasonable care to provide a reasonably safe place for the plaintiff to do the work which he was engaged to perform. And if you find that plaintiff was employed by the defendant, and directed to go on top of the elevator in question, and do the work he was engaged in at the time of his injury, then it was the duty of the defendant to have exercised ordinary and reasonable care proportionate to the danger in providing for him a reasonably safe staging or platform on which to do the work; and if you find that it failed in this by omitting to have the boards or planks composing the staging or runway nailed or otherwise properly secured, and that in consequence thereof plaintiff, without fault on his part, and in the exercise of ordinary care, was in-

⁵⁰ *Buckner v. Stockyards Horse & Mule Co.*, 120 S. W. 766, 221 Mo. 700.

⁵¹ *Rushing v. Seaboard Air Line Ry. Co.*, 62 S. E. 800, 149 N. C. 158.

jured, then he is entitled to recover in this action; and you will so find.⁵²

The jury are instructed that it was the duty of the defendant to use ordinary care to furnish for the use of plaintiff and his fellow workmen a scaffolding that was reasonably safe for the purpose for which it was intended and used; and if you find that the defendant negligently failed to perform this duty, and furnished a scaffolding that was unsafe, that defendant's foreman in charge of the men and the work knew of the unsafe condition of said scaffolding, and that with such knowledge upon the part of the said foreman the said foreman further negligently failed to either remedy the defect or warn the plaintiff of the danger of going upon said scaffolding, and that the plaintiff, while in the exercise of ordinary care, and without negligence upon his part, and without knowledge of the unsafe condition of the scaffolding, went upon said scaffolding in the performance of the duty assigned him, and by reason of the defect therein was thrown to the ground and injured, then the plaintiff is entitled to recover.⁵³

The jury are instructed that, if you find that the staging or runway on which plaintiff was injured was constructed before he was sent up there to work, then it is immaterial as to who or which one of defendant's employes constructed it, as it would then be the duty of the defendant in such case to have exercised reasonable care to have prepared there a staging or runway that was reasonably safe for plaintiff to work upon.⁵⁴

§ 3685(2). Oregon

You are instructed that, if the defendant in this case furnished the plaintiff in this case a scaffolding to do his work which met the requirements of this law, as I have just read it to you, then in that respect it performed its duty towards him, and there is no negligence in the case, and your verdict must be for the defendant. If it furnished this place for him, but the plaintiff, without the knowledge of the defendant, selected instead this temporary scaffolding for his own purpose, when this other permanent scaffolding was furnished by the defendant as the one which the plaintiff was to use in performing his duties as an oiler, and as I have just said, this other temporary staging was used without the knowledge of those in charge of the work of the defendant, then the plaintiff cannot recover in this case; but, if this temporary staging was used by the oiler with the knowledge of the defend-

⁵² Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255, 140 Mo. 1.

⁵³ Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255, 140 Mo. 1.

⁵⁴ Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255, 140 Mo. 1.

ant company, and it was done habitually to such an extent that the defendant company knew that their oilers were using it habitually and permitted them to use it, then it was the company's duty to put it in the condition which this law passed for the safety of employes required it to be in—that it should be so constructed as to bear four times the maximum weight to be sustained by it. If the defendant company failed to perform this duty which is by the statute enjoined upon it to perform, it was negligent without any other question in the case. This law was passed for the protection of employes and the public, and its requirements must be met, and failure to do what the statute says must be done constitute negligence in and of itself.⁵⁵

§ 3685(3). Washington

You are instructed that if you find from the evidence that the plaintiff was employed by the defendant as a carpenter to assist in the shingling of a hotel of the defendant at or near ———, and if you find that it was reasonably necessary, in order to perform the said work of shingling the said hotel building, to have a scaffolding constructed along the said building for the use of the plaintiff and other employes of the defendant in doing said work, and that the defendant did furnish a scaffolding for the said purpose, and that the materials which were used in the construction of the same were determined by the defendant, and that the method or form of construction of the said scaffolding was determined by the defendant, and the scaffolding was erected in conformity therewith, and that the work of erecting the said scaffolding was under the immediate supervision and control of the defendant's foreman, and that the defendant's foreman directed the work of constructing the said scaffolding, and if you further find from the evidence that the defendant failed to exercise reasonable care in furnishing a safe and sufficient scaffold for the use of the plaintiff and other employes of the defendant in the shingling of the said hotel buildings, or that the defendant furnished a scaffold for the use of the said plaintiff and other employes of the defendant in doing the said work that was different from the ordinary and usual scaffold constructed and used for the purpose, and was constructed in an unusual manner, and that the same was not reasonably safe for the use of the plaintiff and other employes of the defendant in doing the said work of shingling the said hotel building, and that by reason thereof plaintiff, while in the exercise of ordinary care, and while acting as an ordinarily prudent person, and without fault or negligence on his part, and without knowledge on his part

⁵⁵ Dickerson v. Eastern & Western Lumber Co., 155 P. 175, 79 Or. 281.

that the said scaffold was unsafe, was injured while engaged at the said work of shingling the said hotel building for the defendant, then your verdict should be for the plaintiff.⁵⁶

§ 3686. Ladders

§ 3686(1). Kentucky

The jury are instructed that it was the duty of the defendant, or its servants having the matter in charge, to use ordinary care to provide plaintiff with a ladder reasonably safe for use in the work of installing and taking out telephones in its service; and if the jury believe from the evidence that defendant, or its servants having the matter in charge, negligently provided plaintiff with a ladder which was defective and not reasonably safe for use in such work, and that the ladder, while being used by plaintiff, by reason of its defective condition, if such was its condition, broke or came apart and thereby caused plaintiff to fall to the ground and break his leg, they should find for the plaintiff the damages he sustained thereby, unless they believe from the evidence that at the time of receiving his injuries plaintiff knew of the defective condition of the ladder, and that it was not reasonably safe for use, if such was its condition, or its defective and unsafe condition was so patent or obvious as to be seen by or known to a person of his experience and understanding in time to have prevented his injuries, in which latter event they should find for the defendant.⁵⁷

§ 3686(2). Texas

You are instructed that, if you believe from the evidence that ———, the vice president of defendant, fastened the ladders together on the day of the injury just as he had fastened them for the same purpose for three seasons, and that he believed at the time he so fastened them on the day of the injury that he was fastening them in a safe and proper manner, and that they would hold together, and further believe from the evidence that a reasonably prudent person, under the same circumstances, would have fastened the ladders together for said purpose as said ——— fastened them, then, and in that event, you will find for the defendant.⁵⁸

§ 3687. Defective rope

You are instructed that the defendant was not bound to supply D. and his fellow workmen with appliances which were absolutely safe under any strain they might see fit to subject them to, but

⁵⁶ *Morran v. Chicago, M. & P. S. Ry. Co.*, 126 P. 73, 70 Wash. 114.

⁵⁷ *East Tennessee Telephone Co. v. Jeffries*, 154 S. W. 1112, 153 Ky. 133.

⁵⁸ *Planters' Gin Co. v. Washington* (Civ. App.) 132 S. W. 830.

only such as were safe when used in a reasonable, careful, and prudent manner, and subject to such strain as they might reasonably be expected to be subjected to in doing the work for which they were supplied in such reasonably careful and prudent manner; and if you find from the evidence that the anchor rope which broke, causing D.'s death, was strong enough to resist such strain which might be put upon it in the work for which it was supplied, when used in a reasonably careful and prudent manner, and that at the time it broke, by reason of the number of men called in to assist in the work by L., D., or his fellow workmen, all of whom were hauling upon the fall line of the tackle which said anchor rope was supporting, said rope was being subjected to an extraordinary and abnormal strain, and such as could not have been, in the exercise of ordinary care and prudence, anticipated by the defendant that the said rope would be subjected to, then your verdict must find the defendant not guilty.⁵⁹

The court instructs the jury that, if you find from the evidence that the anchor rope which broke, causing D.'s death, was of sufficient strength to bear the strain put upon it in the performance of the work of loading bridge piles by the force of men provided by the defendant for doing said work, and that said force of men was sufficient, under ordinary conditions, to do said work, and that during the performance of said work, and just before the said rope broke, such men, finding that by reason of a pile becoming fixed on the skids, or meeting either some obstacle during the process of hauling it up on the skids onto the car they were unable to raise said pile, called in a number of bystanders to assist them in raising said pile, and that, by reason of said additional force of bystanders hauling on the tackle supported by said anchor rope, a great and excessive strain was put on said rope, causing it to give way, and leading to the accident resulting in D.'s death, then you are instructed that the defendant would not be liable for an accident resulting from such men so calling in an additional force of bystanders, and through their assistance placing an excessive and abnormal strain on said rope, and your verdict herein must find the defendant not guilty.⁶⁰

§ 3688. Protective appliances

You are instructed that, when you come to consider this case, your first inquiry will be whether this was a dangerous employment, one involving danger to the servant engaged in it. Then your next inquiry will be whether the providing of regulation gloves and mask is a practical provision in the employment in

⁵⁹ Hunt v. Kille (C. C. A. Ill.) 98 F. 49, 38 C. C. A. 641.

⁶⁰ Hunt v. Kille (C. C. A. Ill.) 98 F. 49, 38 C. C. A. 641.

which the plaintiff was engaged. Whether it is practical to use them, and whether the use of them will or will not impair the efficiency of the servant. And a further question, of course, for you to determine would be whether if he had been provided with these appliances that would have protected him against the injury which he received.⁶¹

§ 3689. Appliances to prevent inhalation of poisonous substances

The court instructs the jury that if they find from the evidence that the defendant, the ——— Railroad Company, is and has been since the autumn of ——— a corporation duly incorporated under the laws of ———; and further find that during said period the defendant was a common carrier by railroad, engaged in carrying passengers and freight from the state of ——— into the state of ———; and further find that during the period of several months prior to the ——— day of ———, the plaintiff, ———, while in defendant's employ, and under the direction of the defendant, its officers and agents, had been operating and using a painting machine, commonly called a "gun," as is described by the witnesses, and operated by the use of air pressure, for the purpose of repainting engines of said defendant company; and further find that said painting machine, while so used by the plaintiff, was dangerous, because it threw off, scattered, and disseminated into the air material in the form of spray, if the jury so find, which was poisonous or deleterious or harmful to the person operating said gun, if the jury so find, and that the said plaintiff was obliged, in the operation of said machine, to breathe said harmful or deleterious material; and further find that there was in existence and known to the defendant an aspirator, or nose guard, or other appliance, which was then and there readily obtainable by the defendant, by which to successfully lessen or avoid the danger to the plaintiff of the deleterious or harmful spray thrown out and disseminated into the air by said gun, and that the plaintiff did not know that the inhalation or breathing of said material was harmful or injurious, and did not know while using said gun that there was an appliance to be used to protect him from the danger in using said gun; and further find that the defendant railroad company, or its officers or agents, knew of said appliance and was negligent in failing to provide such appliance for the use of the plaintiff in such work, if they find it did not provide said appliance; and further find that the plaintiff, while doing the work at the times and places aforesaid, breathed and inhaled and took into his system, for said period of several months, so much of said deleterious or poisonous

⁶¹ *Heiser v. Shasta Water Co.*, 143 P. 917, 71 Or. 566.

or harmful spray that as a result thereof the plaintiff, on or about —, or after —, was injured and damaged in his health; and further find that the engines, or some of them, which the plaintiff painted during said several months by the use of said painting machine or gun, were engines of the defendant regularly used by it for the purpose of carrying and transporting passengers and freight to and from the city of —, in the state of —, from and to points in the state of —, and that the said injury to the plaintiff's health was due, in whole or in part, to the negligence of the defendant in failing to provide such appliance for the use of the plaintiff—then the plaintiff is entitled to recover in this action, and the verdict of the jury must be for the plaintiff.⁶²

§ 3690. Duty to guard dangerous machinery

§ 3690(1). California

You are instructed that, in order to recover, the plaintiff was called upon to prove: First, that the mangle in question was not safe, or was defective, and that sufficient appliances thereon were not provided in order to protect the plaintiff as an operator on the same; second, that the defendant either knew of the defect and the lack of the safety appliance, or as a reasonably prudent and careful person, under the same circumstances and conditions as are here shown, should have known the condition of the mangle and as to its safety and appliances or lack of appliances, as the case may be; third, that the employé was injured, and that the defective machine contributed to the injury, the measure of plaintiff's damages being stated in another instruction.⁶³

§ 3690(2). Indiana

You are instructed that defendant was not required to furnish the best possible guard that could be obtained for the purpose of guarding the knives on its buzz plane; it was only required to furnish a guard that was reasonably adapted to cover the exposed portions of the knives and to protect the person using it from injury when said guard was used in an ordinarily prudent and careful manner.⁶⁴

You are instructed that the defendant was not bound to guard against dangers and injuries in the use of said buzz plane that could not reasonably have been anticipated. It was, however, bound to furnish a guard that was sufficient in its character and would prevent plaintiff from sustaining an injury that might reasonably

⁶² Baltimore & O. R. Co. v. Branson, 98 A. 225, 128 Md. 678.

⁶³ Perry v. Angelus Hospital Ass'n, 156 P. 449, 172 Cal. 311.

⁶⁴ Amen v. Standard Steel Car Co. (App.) 123 N. E. 7.

be anticipated by the defendant when said guard was adjusted with ordinary care by the operator.⁶⁵

You are instructed that the defendant is not liable by reason of the fact that the machine in question was a dangerous one and that there was likelihood of injury to employes working thereon, providing you find that the guard used and placed thereon by it was such as might reasonably be expected to prevent injury when used in the usual and ordinary manner such a machine was intended to be used, and the plaintiff himself must have been injured by reason of the fact that such machine was not properly and sufficiently guarded within the rules I have given you.⁶⁶

You are instructed that the defendant claims that at the time in question there was a guide or fence on said machine which could be so placed by the operator of said machine as to act as a guard to the knives thereof. Now, as to such guide or fence, I instruct you that, if the defendant furnished some other device on said machine to be used by its employes operating the same as a guard for said knives, then such employes would have the right to use the device furnished by the defendant for such purpose, and the defendant if it did furnish some other device as a guard would be required to furnish one that was sufficient for such purpose if it could be furnished without interfering with the proper operation of said machine.⁶⁷

You are instructed that the defendant claims that at the time in question there was a guide or fence on said machine which could be placed by the operator of said machine as to act as a guard to the knives thereof. Now, as to such guide or fence, I instruct you that if the defendant did not use or furnish the same as a guard, or if it did not require its employes operating said machine to use it as a guard, but furnished another device to be used as a guard, such employes would have the right to use such device furnished for a guard if it was furnished, and under such circumstances the defendant would not be heard to say that such guide should be used as a guard.⁶⁸

You are instructed that the defendant claims that there was on said machine at the time in question a fence or guide which could be adjusted by the operator thereof, and that the plaintiff could and should have adjusted said guide or fence so as to leave no more of said knives exposed than was necessary to cut the material being used. In determining the plaintiff's conduct in this regard you have the right to take into consideration the way such machine was

⁶⁵ *Amen v. Standard Steel Car Co.*
(App.) 123 N. E. 7.

⁶⁶ *Amen v. Standard Steel Car Co.*
(App.) 123 N. E. 7.

⁶⁷ *Jeffersonville Mfg. Co. v. Holden*,
102 N. E. 21, 180 Ind. 301.

⁶⁸ *Jeffersonville Mfg. Co. v. Holden*,
102 N. E. 21, 180 Ind. 301.

usually and ordinarily operated, the device which was furnished, if there was one to cover the portion of the knives between the material and the edge of the table and any other facts or circumstances in the case, bearing thereon.⁶⁹

§ 3690(3). Iowa

You are instructed that it is the law of this state that it shall be the duty of the owner, agent, superintendent, or other person having charge of any manufacturing or other establishment where machinery is used, to provide all saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description therein with proper guards, and a failure to do so, is negligence on the part of such owner, agent, superintendent, or other person having charge of such manufacturing or other establishment where the machinery is used.⁷⁰

You are instructed that in this case, if you find that the plaintiff has proven by a preponderance of the evidence that the defendant did own and operate a plant where machinery was used, and that the said ——— was employed therein by the said company for the purpose of working in the plant of said company with, or at, or about a machine where there were set screws and a revolving shaft used in connection therewith, and that said set screws and shaft were unguarded, such conditions existing would constitute negligence on the part of the said defendant company, rendering it liable for any injury to the said ——— resulting from his coming in contact with the said set screws or revolving shaft, if you further find that the plaintiff has proved that the said ——— did not by his own negligence contribute to the said injury, or that the defendant has not proved that the said ——— did assume the risk of such conditions.⁷¹

You are instructed that the owner of premises on which machinery with set screws and revolving shaft is used or operated should avoid danger to his employés working about or with such machinery by guarding the set screws and revolving shaft used therein. The employer is not required, however, to insure his employé an absolutely safe place to work, and the duty to furnish a safe place is performed when the employer has used all reasonable care and diligence to make the place safe; but such reasonable care and diligence would require the employer to fully comply with the requirements of the law.⁷²

⁶⁹ *Jeffersonville Mfg. Co. v. Holden*, 102 N. E. 21, 180 Ind. 301.

⁷⁰ *Stephenson v. Sheffield Brick & Tile Co.*, 130 N. W. 586, 151 Iowa, 371.

⁷¹ *Stephenson v. Sheffield Brick & Tile Co.*, 130 N. W. 586, 151 Iowa, 371.

⁷² *Stephenson v. Sheffield Brick & Tile Co.*, 130 N. W. 586, 151 Iowa, 371.

§ 3690(4). Missouri

The court instructs the jury that, if you find from the evidence that on or about ———, the plaintiff was in the employ of the defendant as a carpenter's helper, and was engaged in removing blocks from a saw, where they were being cut by the defendant, or one of its employés, and that the saw was so constructed on a table that when pushed back from the operator it extended back under the table, and if you further find from the evidence that the table and saw were so constructed or arranged that when the blocks were cut they sometimes fell under the table, and that it was part of plaintiff's duties to pick up the blocks which fell under the table, and if you further find from the evidence that on said date plaintiff reached under the table to get blocks which had fallen under it, and that his hand came in contact with the saw and injured his hand, and that when reaching under the table plaintiff exercised ordinary care for his own safety, and if you further find from the evidence that the saw under the table was so situated that there was danger of plaintiff's hand coming in contact with it in reaching under the table to get the blocks which fell under it, and that the saw was so located that it was practicable to guard it without interfering with its operation, and that while plaintiff was picking up blocks under the table his hand came in contact with the saw and was injured, and that plaintiff's hand would not have been injured if the saw had been guarded, if you find the saw could have been guarded without interference with its operation, then the defendant is guilty of negligence in failing to guard the saw, or if you find from the evidence that the defendant or its foreman knew or by the exercise of ordinary care could have known that the blocks which were being cut would fall under the table, and that plaintiff's duties required him to pick up the blocks which fell under the table, and that in picking up the blocks which fell under the table, if you find plaintiff's duties required him to pick them up, his hand was apt to come in contact with the saw, and if you further find from the evidence that, if the top of the table had been extended or the end closed up, blocks could not have fallen under the table, and thereby avoided the necessity of plaintiff's reaching under the table, and if you further find from the evidence that it was negligence on the part of the defendant in failing to extend the top of the table, or close up the end of the table, so that blocks could not fall under it, then the defendant would be guilty of negligence, and if you further find from the evidence that the plaintiff was injured as a direct result of either of such acts of negligence on the part of the defendant, if you find the defendant guilty of either of such acts of negligence, then your verdict will

be for plaintiff for whatever damages he sustained, if any, as a direct result of such negligence.⁷³

§ 3690(5). *Oklahoma*

The court instructs the jury that the statutes of this state require owners and operators of factory machinery to properly guard the same for the purpose of preventing injury to their employes, and if you should find from the evidence in this case, by a preponderance thereof, that the plaintiff, while working in the employ of the defendant company, was injured because of the failure of the defendant to provide the machinery from which the plaintiff's injury, if you believe from the evidence he was injured, was caused, with proper safety appliances, then in that event, if the failure of the defendant was the cause or contributing cause of the said injury, the defendant is liable, and your verdict should be for the plaintiff, for such damages as in your judgment will compensate him for the injury he has suffered, not to exceed, however, the amount sued for.⁷⁴

§ 3690(6). *Oregon*

The court instructs the jury that the laws of this state require that all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of such machinery permits. It will therefore be your duty to determine, first, whether or not the gearing in which plaintiff claims he was injured, accordingly as it was located, was dangerous, within the meaning of the laws of this state. The law, although it requires in positive terms that all dangerous machinery must be fully covered and protected to its fullest extent, fails to say what machinery is dangerous or what character of protection is necessary in order to fulfill the requirement to the fullest extent, etc. These matters are left to the courts and juries to determine under the well-recognized general rules of law pertaining to this subject. The question as to whether or not this gearing, as it was situated, in reference to its surroundings, was or was not dangerous within the meaning of the law, is a question of fact for you to determine, the same as any other fact in this case. The defendant in this case was bound to cover and protect only such machinery as a reasonably careful and prudent man, with full knowledge of the situation before an accident occurred, and one who would himself be liable for damage in case of error in that regard, would consider dangerous. A machine might be a dangerous machine in one location and not dangerous at all in another location, or dangerous under certain surroundings, and not dangerous in others; and what would be a covering and protection in one case would not be suffi-

⁷³ *Wagner v. Gilsonite Const. Co.*,
220 S. W. 890.

⁷⁴ *Bartlesville Zinc Co. v. James*,
166 P. 1054.

cient in another, and, if remotely situated, it might not be required to be covered at all. Therefore it is for you to determine from the evidence in this case whether or not a reasonably careful and prudent man, with full knowledge of the situation before the accident occurred, would have considered this a dangerous machine, or dangerous to the defendant's employes. Now, if you find it was dangerous, you must then determine whether it was securely covered and protected to the fullest extent that its proper operation permitted. Even if it were dangerous, yet if it were securely covered and protected to the fullest extent that its proper operation permitted, that is, to the extent that an ordinarily careful, prudent, and experienced man, with full knowledge of the situation, and who himself would be liable in damage in case of error would have considered as sufficiently complying with the law before the accident and the plaintiff met with the injury complained of without any fault or negligence on the part of defendant, then the plaintiff, of course, cannot recover in this action.⁷⁵

§ 3691. Care required as to electrical appliances and safeguards against electricity

§ 3691(1). Arkansas

You are instructed that if you believe, from the evidence, that the defendant negligently constructed and maintained electric wires in its mine, and negligently failed to safeguard said wires, and that said wires carried a dangerous current of electricity, and that deceased in the performance of his duty was likely to come in contact with said wires, and you further believe from the evidence that said defendant, by the exercise of ordinary care and caution, could have rendered said wires so carrying such dangerous current of electricity reasonably safe by insulation, or by protecting said wires, if they could not be insulated, so that its employes would not, in the discharge of their duty, come in contact with same, and that it, in the manner alleged in the complaint failed to do so, then such failure was negligence.⁷⁶

§ 3691(2). Missouri

The court instructs the jury that if you shall find and believe from the evidence that on the —— day of ——, plaintiff was in the employ of the defendant, and, while engaged in his usual and ordinary duties, was engaged in painting certain poles erected by defendant, and upon which were attached certain guy wires which carried or supported the trolley wires which carried the electric power for the operation of its street cars through the streets of

⁷⁵ *Ramaswamy v. Hammond Lumber Co.*, 152 P. 223, 78 Or. 407.

⁷⁶ *Central Coal & Coke Co. v. Burns*, 215 S. W. 265, 140 Ark. 147.

——, that said guy wires are not intended to be and are not usually charged with electric currents of dangerous character; but are usually and generally free therefrom, that on said —— day of ——, the guy wire which was attached to the pole on which plaintiff was employed as aforesaid, if you so find from the evidence, by and through any carelessness or negligence of the defendant, its agents or servants, and without notice or warning to plaintiff, became or was highly and dangerously charged with an electric current which escaped from such trolley wire, if you find from the evidence that said guy wire was so charged by electricity escaping from the trolley wire as aforesaid, that while plaintiff was so engaged in painting said pole, and without negligence on his part directly contributing thereto, as defined by these instructions, his left arm came in contact with said guy wire, and as a direct result thereof his body came in direct contact with such electric current, and that in direct consequence thereof he was greatly shocked and caused to fall from said pole to the sidewalk, and injured, then your verdict must be for the plaintiff.⁷⁷

The court instructs the jury that if they believe from the evidence that on the —— day of ——, the plaintiff —— was engaged in the line of his duty as a lineman for the defendants; and in the performance of such duty was engaged in the work of replacing a small transformer with a larger transformer to meet increased service on defendants' pole at the northwest corner of —— and —— streets in the city of ——, and was engaged in said work with other workmen under the supervision and control of defendants' foreman and subject to his orders and control, and if you believe from the evidence that the second bottom cross-arm on said pole and the pins on the north end thereof were in a defective and unsafe condition for linemen working thereon, and that at said time such condition of the same was known, or by the exercise of ordinary care could have been known, by the defendants, and if you believe that, from the nature and character of the work, the plaintiff did not have the opportunity, time, or means to discover the condition of said cross-arm, then your verdict must be for the plaintiff, provided you further find and believe from the evidence that the plaintiff was in the exercise of ordinary care at that time and received damages as the result thereof.⁷⁸

§ 3691(3). Texas

You are instructed that if you find, from the evidence, at the time and place as alleged by plaintiff he was the servant of the defendant, and that as such servant plaintiff was directed, by some

⁷⁷ Thorp v. Metropolitan St. Ry. Co., 177 S. W. 851.

⁷⁸ Rutledge v. Swinney, 169 S. W. 17, 261 Mo. 128.

one having authority to so direct him, to repair certain wires, being part of the electric lighting system of defendant as alleged, and if you believe that, while in the act of taking hold of an arc wire of said system as alleged, he received a severe electrical shock causing him severe and permanent injuries, as alleged by him, and if you believe from the evidence that defendant during, before, or at said time had caused or permitted the arc wires of said electric lighting system to become charged with electricity, and if you further believe that in doing said repair work by plaintiff he was exercising ordinary care for his own safety, and if you further believe that in permitting said arc wire to be charged with electricity at said time, if it was, the defendant was guilty of negligence, as that term is defined, and the defendant had not used ordinary care in permitting said arc wire to be charged with electricity at said time, and that but for such negligence of the defendant, if any, plaintiff would not have been injured, then you will find for the plaintiff.⁷⁹

You are instructed that, if you believe from the evidence in this case that at the time alleged defendant city was operating its light plant for pecuniary profit, that at said time it had permitted its arc wires to become charged with a dangerous current of electricity by coming in contact with a live primary wire, and if you further find that its engineer or superintendent in charge of its power plant failed to watch the indicator or device at said power plant provided for showing a connection or contact of said live primary wire with said arc wire or other wire or object, and if you find that the permitting of said wires to become so connected, if they did, or the failure of said engineer, if any, to watch and discover the said connection, if any, were either or both negligence, and that when plaintiff took hold of said arc wire, and as the proximate result of the negligence in the respect aforesaid, if any, he was injured in any or either of the respects as alleged by him, then you will find for the plaintiff.⁸⁰

§ 3691(4). Virginia

The court instructs the jury that if they believe from the evidence that the lightning arresters installed by the defendant in its office at ———, where the plaintiff was employed, were devices which, when in proper condition, would have afforded reasonable protection to persons performing the duties of telephone operators in said office, from the dangers arising from atmospheric or other excessive or dangerous currents of electricity, finding access to the said telephone lines from any source which the said defendant, in the exercise of ordinary care, would have reasonably anticipated, and

⁷⁹ City of Greenville v. Branch
(Civ. App.) 152 S. W. 478.

⁸⁰ City of Greenville v. Branch
(Civ. App.) 152 S. W. 478.

that such lightning arresters were devices which were customarily employed by companies maintaining and operating telephone lines under similar circumstances to those of the case at bar, for the purpose of affording to their telephone operators such protection as aforesaid, and if the jury further believe from the evidence that the lightning arresters mentioned in the evidence were defective and that defendant negligently permitted them to remain in such defective condition, and while the plaintiff was engaged in the performance of his duties as a telephone operator in said office, a bolt of atmospheric lightning, or other excessive and dangerous current of electricity finding access to the said telephone line from a source which the said defendant, in the exercise of ordinary care and prudence, would reasonably have anticipated under the circumstances, by reason of such defective condition, entered the said telephone office and inflicted upon the said plaintiff the injuries complained of in the declaration, then they must find for the plaintiff.⁸¹

§ 3692. Safety devices for elevators

§ 3692(1). Missouri

The court instructs the jury that under the pleadings and evidence in this case it was the duty of the defendant to have had the elevator opening in the shipping room, mentioned in the evidence, provided with inclosing railing or gate to effectually bar said opening, for the prevention of accidents therefrom, and to keep such opening closed by such railing or gate when such opening was not being used, and that a failure to do so, if the defendant did so fail, was negligence upon the part of the defendant. And the court further instructs the jury that if the defendant did provide such railing or gate, and, by its officers or agents authorized to direct and control said railing or gate as to its being open or closed, caused the same to be kept open when said elevator was not being used, then such providing of said gate or railing was no compliance with the ordinance read in evidence, and the defendant was guilty of negligence in that regard.⁸²

§ 3692(2). Oregon

You are instructed that there was passed by the people of the state of — an initiative law, which became effective on proclamation of the Governor, on —, and was the law at the time the accident complained of herein occurred, to wit, —, and I will read you a portion of said law which says: "And generally all owners having charge shall use every device, care and precaution which it

⁸¹ Atlantic Coast Line R. Co. v. Newton, 87 S. E. 618, 118 Va. 222.

⁸² Wendler v. People's House Furnishing Co., 65 S. W. 787, 165 Mo. 527.

is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device and without regard to the additional cost of suitable material or safety appliances and devices." Now, put in a little different form, this act means every owner of any device which involves danger to persons using it, or being conveyed by it, shall use every care and precaution practicable for the protection and safety to persons, limited only by the necessity of preserving the efficiency of the device or machine; and that must be done without regard to the expense of it. So far as that law is concerned, therefore, you should investigate and find out as a matter of fact whether or not the defendant in this case could have used any device or protection so as to have prevented the accident complained of, and still have permitted a proper and efficient use of the elevator; and the question of the additional cost is not material. If in this case you should find that the defendant could have used some device or some protection so as to have prevented this accident, and at the same time have permitted an efficient operation of the elevator, then the defendant in the case is liable under the law referred to. In other words, a person operating a device which involves danger to those who operate it, or to those who may use it, must at his peril adopt every device for the safety of the people who use it; and if the owner or person operating it does not do so he must respond in damages in case of an injury.⁸³

§ 3693. Duty of railroads

§ 3693(1). United States

You are instructed that a railway company is bound to use ordinary care to furnish safe machinery and appliances for use by its employes in operating its road; and, if ordinary and reasonable care is not exercised by the company to do this, it would be responsible to its servants for the injuries caused to them by such neglect. By ordinary care is meant such as an ordinarily prudent man would use under the same circumstances. It must be measured by the character and risks of the business; and when the person whose duty it is to repair the appliances and machinery of the business knows, or ought to know, by the exercise of reasonable care, of the defects in the machinery, the company is responsible for his negligence if he fails to repair it.⁸⁴

§ 3693(2). Alabama

The court charges the jury that if they are reasonably satisfied from the evidence that the plaintiff's injuries were caused by rea-

⁸³ *Suey v. Benson Hotel Co.*, 179 P. 239, 91 Or. 395.

⁸⁴ *Texas & P. Ry. Co. v. Elliott* (C. A. Tex.) 71 F. 378, 18 C. C. A. 139.

son of the defective condition of the handle of the lever of the car, in that said handle was weak and insufficient for the service, and that it was made of cedar, and if the jury are further reasonably satisfied from the evidence that this defective condition had not been remedied, owing to the negligence of the defendant, and that defendant knew of such defect, in a time reasonably sufficient to remedy the same, then they must find for the plaintiff, unless the evidence reasonably shows to the jury that the plaintiff's injuries were the result of his negligence and that his negligence proximately contributed to his injuries.⁸⁵

§ 3693(3). Iowa

The court instructs the jury that the defendant is not bound to equip its cars with the best or latest appliances, but it is defendant's duty to furnish appliances such as reasonably prudent men provide under similar or like circumstances. It is for you to say from the evidence which has been introduced upon the trial whether or not, under the circumstances and conditions disclosed by the evidence, the defendant, in the exercise of reasonable and ordinary care and diligence, should have had this car equipped with a sand box or sand equipment so that sand could have been put upon said track by the motorman, or should, on the night in question and before the injury, have in some way caused sand to be put upon the track at the approach to said barn. If you find from the evidence that the defendant should have done so, and that the injury to the plaintiff was caused as the direct and proximate result of defendant's failure to do so, and that plaintiff was not himself guilty of contributory negligence, as explained elsewhere in these instructions, then the plaintiff is entitled to recover in this action; otherwise not.⁸⁶

§ 3693(4). Kentucky

The court instructs you that it was the duty of defendant, at the time and place complained of by plaintiff, to have its freight cars, mentioned to you in evidence, equipped with automatic couplers and with pin lifters or levers extending out from the side of each car so that plaintiff could uncouple and couple same without going between them, and to have and maintain said appliance in a proper and workable condition, and if you shall believe from the evidence that said appliances were not in a proper and workable condition, and were defective, and unworkable, and plaintiff was unable to uncouple said cars by reason thereof, and plaintiff signaled the engineer in charge of defendant's engine and train on the oc-

⁸⁵ Southern Ry. Co. v. McGowan, 43 So. 378, 149 Ala. 440.

⁸⁶ Doran v. Waterloo, C. F. & N. Ry. Co., 147 N. W. 1100; 153 N. W. 225, 170 Iowa, 614.

casion complained of by plaintiff, to stop same, and that same was stopped, and after being so stopped it was or became necessary for plaintiff to go between said cars to uncouple same, and while so attempting to uncouple same the engineer in charge of said engine, without any signal from plaintiff and without any signal or warning to plaintiff, negligently started said engine and train, and by reason of these things, and as the direct and proximate result thereof, plaintiff was caught under the wheels of one of said cars and injured, then the law is for the plaintiff, and you will so find. But unless you shall so believe from the evidence, then the law is for the defendant, and you will so find.⁸⁷

§ 3693(5). *Missouri*

The court instructs you, gentlemen of the jury, that the law imposes upon the defendant the duty to provide reasonably safe cars for the purposes for which they are designed, and that when cars shall be disabled, unsafe, or dangerous, to give proper warning or notice of such unsafe or dangerous condition to such employes as may be charged with their handling, and that among other considerations for the imposition of this duty is the protection of their employes engaged in handling and operating them from unnecessary danger of injury or death, and that any failure upon the defendant's part to comply with this duty is negligence, as matter of law, on defendant's part, whether such want of compliance is with respect to cars owned by defendant or owned by other parties, if defendant shall have them on their road, to be handled and operated by their employes.⁸⁸

§ 3693(6). *Oklahoma*

You are instructed that it was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work, reasonably safe appliances and machinery with which to work, and a reasonably safe track over which the cars were to be hauled, and a failure to furnish such a place, appliances, and track, if there was such a failure, was negligence on the part of the defendant, and if the injuries complained of were the result of such failure, your verdict should be for the plaintiff, unless you shall find that he assumed the risk of injury on account of such failure.⁸⁹

You are instructed that before you can find for the plaintiff in this case you must find from a preponderance of the evidence that the defects, or some of the defects complained of in connection with the braking apparatus of the car, actually existed; second, that the

⁸⁷ *Nashville, C. & St. L. Ry. v. Henry*, 164 S. W. 310, 158 Ky. 88.

⁸⁸ *Rodney v. St. Louis S. W. Ry. Co.*, 28 S. W. 887, 127 Mo. 676.

⁸⁹ *Chicago, R. I. & P. Ry. Co. v. Rogers*, 150 P. 1132, 60 Okl. 249.

defects were of such a character as could have been seen and known by the agents and employes of the company whose duty it was to examine and inspect the same in the exercise of reasonable care and diligence upon their part in making such inspection or examination; third, that such defects must have been of such character as that it could have been reasonably foreseen that some injury would result to a person operating said brakes while the car was in motion; and, fourth, that such defects were the proximate cause of the death of the deceased. If the plaintiff has failed to establish all of these matters by a preponderance of the evidence, then she cannot recover.⁹⁰

You are instructed that, if you find from a preponderance of the evidence that the defendant, the ——— Railroad Company, had the deceased in its employ as a brakeman, and that in the course of his employment he went upon a certain car of said company known as ——— to operate the brake thereon, and that such car, or the braking appliances thereon, had been permitted to become defective and out of repair in the manner set forth in the petition, and that such defects were of such character as that it could reasonably have been foreseen that some injury would result to a person operating the braking appliances, and that such defects actually caused the deceased to fall from the car, and that the plaintiff himself was in the exercise of due care for his own safety, and did not, by his own carelessness, contribute to the accident which caused his death, then your verdict should be for the plaintiff.⁹¹

You are instructed that in this case the law imposes upon the defendant company the positive duty to have used reasonable care in seeing that the derrick and boom pole and the U-bolt, and other attachments of the wrecking machinery were so constructed as to have been in a reasonably safe condition, and it was the positive duty of the defendant company to see that the machinery and appliances used were sound, and the failure of the company to provide sound machinery to do the work of clearing away the wreck and to provide reasonably safe equipments for that purpose, taking into consideration the character of the work to be performed by its employes while engaged in the service of the company, would be negligence, under the law, on the part of the defendant.⁹²

§ 3693(7). Texas

The jury are instructed that, even if you should find that the stirrup of the car was a little loose and had a play at the bottom

⁹⁰ Ft. Smith & W. R. Co. v. Knott, 159 P. 847, 60 Okl. 175.

⁹¹ Ft. Smith & W. R. Co. v. Knott, 159 P. 847, 60 Okl. 175.

⁹² Missouri, O. & G. Ry. Co. v. Davis, 154 P. 508, 54 Okl. 672.

of something like half an inch to an inch, still you would not be authorized to find in favor of plaintiff unless you further find that in permitting the stirrup to be in that condition the defendant company did not exercise that degree of care that a person of ordinary prudence would have exercised in that matter under all the circumstances shown by the evidence.⁹³

§ 3694. Same—Defective draw bar or drawhead

The jury are instructed that if you believe from the evidence that while plaintiff was in the defendant's employ, and in the discharge of duties imposed upon him by the defendant, by virtue of such employment, and without knowledge of any defect or unsafe condition of cars which he was handling, and while exercising caution and prudence in the discharge of said duty, he had his arm crushed and broken by and between the deadwood of one car and the truss pin of another, occasioned by such truss pin and deadwood meeting, which resulted from a defective drawbar or drawhead, rendering the car unsafe; and if you further believe such defect was not obvious to one exercising the duties of switchman, and that said car was not marked in any way so as to convey to the employés of defendant the information that it was in unsafe condition, or to put them upon inquiry as to its true condition—then you will find the issues for the plaintiff.⁹⁴

§ 3695. Same—Air brakes

The jury are instructed that, if you find from the evidence that the defendant company sent the engine in question out on the road and furnished the same to be operated by its trainmen, with the automatic air brake cut out of the engine, or so arranged that it would not operate on the engine, and that the engine had only straight air working on it, with which to stop or control the movement of the engine and cars while switching, and if you find that only one character of stop could be made with the straight air on the engine in question, and that such stop was made by applying all the air and all the braking power on the engine, and that the same made and did cause the engine and cars to be stopped with unnecessary and great and sudden violence, and that the same was dangerous to the trainmen, while working with the cars, in the performance of their duties in switching, and if you find that with the automatic air brake, if the same had been working on the engine, a service application of the air brake on the engine could be made, and that such application of the air would cause the en-

⁹³ St. Louis Southwestern Ry. Co. of Texas v. Neef (Civ. App.) 138 S. W. 1168.

⁹⁴ Rodney v. St. Louis S. W. Ry. Co., 28 S. W. 887, 127 Mo. 676.

engine and cars to stop slowly or gradually, and without a sudden or violent stop or jerk, and without danger to the brakemen while performing their duties in switching, and if you find that the defendant company was guilty of negligence in so sending out the engine and in furnishing the same to be used by its trainmen, in such condition, if it was in such condition, and if you find that the engineer stopped the engine and cars by applying the full braking power of the straight air appliance, and that thereby the cars were stopped suddenly and violently, and with a dangerous jerk of the cars, and if you further find that the defendant company should reasonably have foreseen that some one of its train crew would likely be injured, as the plaintiff was injured, by reason of such condition of the air brake appliance on the engine, and if you find that the plaintiff was thrown from the car, by reason of the violent and sudden stopping and jerk of the car, if any, and was injured, then the defendant company would be liable; and if you so find you will find for the plaintiff, as explained to you, or unless you find that he assumed the risk of the danger, if any, of the engine being equipped with only straight air, and not with the automatic air, as will now be explained.⁹⁵

§ 3696. Defective hand car

You are instructed that it was the duty of the defendant to have exercised ordinary care to furnish to the plaintiff a reasonably safe and suitable car to be used by him in the performance of his duty, and that it was the duty of said defendant, before said car was delivered to the plaintiff, to have caused the same to be examined to ascertain its condition, and that the plaintiff had a right to assume that the defendant had performed its duty in these respects, and was under no obligation to inspect the car for the purposes of ascertaining whether or not the defendant had performed its duty in these respects.⁹⁶

§ 3697. Duty of railroad company to inspect cars of other roads

The court instructs the jury that, as to foreign cars coming on defendant's line of road, it owed to its employes engaged in the operation of same the duty to use ordinary care to inspect and discover any defects in the "dog" of the braking wheel, and, if any defects were found therein which rendered it not reasonably safe for the use of its employes in using same, to use ordinary care to repair same.⁹⁷

⁹⁵ *Texas & P. Ry. Co. v. Matkin* (Tex. Civ. App.) 142 S. W. 604.

⁹⁶ *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Tex. Civ. App.) 180 S. W. 300.

⁹⁷ *St. Louis Southwestern Ry. Co. of Texas v. Downs* (Tex. Civ. App.) 153 S. W. 714.

The court instructs the jury that, if you find that plaintiff has shown by a preponderance of the evidence that the "ratchet dog" on the brake wheel in question had too much play, was loose, insecure, out of repair, and not reasonably safe for the use of brakemen in setting the brake on the car in question; and if you find that such defective condition of the "ratchet dog," if any, would have been discovered by a reasonable inspection thereof within a reasonable time to have repaired same by using ordinary care before plaintiff was injured, if he was; and if you find an ordinarily prudent person would have reasonably anticipated that some brakeman in its employ would likely be injured in attempting to set the brake with the dog in such defective condition, if you have found it was defective; then, if he has further shown, by a preponderance of the evidence, that the defendant failed to use ordinary care to inspect and discover the defect, if any, in the dog, within a reasonable time to have repaired same by the use of ordinary care before plaintiff was injured, if he was; and if you further find that as the direct and proximate result of such defective condition of the dog, if you have found it to be defective, when the plaintiff attempted to set the brake on said car, the dog flew out of the ratchet and caused plaintiff to fall and receive injury—you will find for the plaintiff.⁹⁸

The court instructs the jury that if you find that the dog in question was not defective, or if you find it was, but that defendant used ordinary care to inspect said car, and failed to discover same, then plaintiff cannot recover.⁹⁹

The court instructs the jury that the defendant did not insure safety of the braking appliance on said car, but only owed to plaintiff (the duty) to use ordinary care to inspect, and discover any defect therein; and, if it used such care to inspect and discover same, then the plaintiff cannot recover, although the ratchet dog was loose, had too much play, and was defective and out of repair.¹

§ 3698. Duty of master under federal Safety Appliance Act

§ 3698(1). Iowa

You are instructed that under the law the defendant was bound to furnish to the plaintiff a locomotive boiler, at the time in question, which was safe to be used, both as to the boiler and as to its appurtenances, and to keep and maintain the same in such condi-

⁹⁸ St. Louis Southwestern Ry. Co. of Texas v. Downs (Tex. Civ. App.) 153 S. W. 714.

⁹⁹ St. Louis Southwestern Ry. Co.

of Texas v. Downs (Tex. Civ. App.) 153 S. W. 714.

¹ St. Louis Southwestern Ry. Co. of Texas v. Downs (Tex. Civ. App.) 153 S. W. 714.

tion at all times so as not to expose the plaintiff to any hazard or risk.²

§ 3698(2). Missouri

The court instructs the jury that, if you find from the evidence that on the ——— day of ———, the defendant was a common carrier, engaged in interstate commerce by railroad, and while so engaged in interstate commerce it used on its line of railroad a locomotive engine and tender attached thereto, No. ———, in moving interstate traffic, and that said tender attached to said engine was equipped with a coupler designed to couple automatically by impact, and to be uncoupled without the necessity of men going between the end of said tender and cars, and that on the said ——— day of ———, and prior thereto, said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars, and you find from the evidence that said tender was not provided with secure grabirons or handholds in the end of said tender for greater security to men in coupling and uncoupling said tender, and that the pin-lifting rod and the ladder and the perpendicular handhold on the rear corners of said tender and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal security as grabirons or handholds placed in the end of said tender for greater security to men in coupling and uncoupling said tender, and you further find from the evidence that on said date in the town of ———, at the point mentioned in evidence, the plaintiff was in the employ of the defendant, and was in performance of his duties working in interstate commerce for defendant in coupling said tender to cars, and was between the end of said tender and cars, and while in the exercise of ordinary care was, by reason of the fact that said coupler would not work or accomplish the purpose for which it was designed, and would not couple automatically by impact, and could not be uncoupled without the necessity of men going between the end of said tender and the end of cars (provided you so find), and because of the failure of the defendant company to provide said tender with secure grabirons or handholds in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), and because of the fact that the pin-lifting rod and the ladder and the perpendicular handholds on the rear corners of said tender, and the steps or stirrups on said tender mentioned in evidence did not afford the same or equal se-

² Thornton v. Minneapolis & St. L. R. Co., 175 N. W. 71, 187 Iowa, 1158.

curity as grabirons or handholds placed in the end of said tender for greater security to men in coupling and uncoupling said tender (provided you so find), run against, upon, and over by said tender and engine, and injured, then your verdict will be for the plaintiff on the first count of his petition.³

§ 3698(3). Virginia

The court instructs the jury that if they believe from the evidence that the car and engine between which plaintiff was hurt were each provided with standard automatic couplers which would couple automatically by impact when the knuckles were open and were provided with levers by which the knuckles could be thrown open without going between the cars, and that these couplers were in good working order, and that there was no defect, just prior to the accident in the operation of the couplers, and that there is no coupler known which will couple by impact while the knuckles are closed, or one closed and the other partly closed, then the jury should find their verdict for the defendant.⁴

The court instructs the jury that, if they believe from the evidence that the engine of the defendant was not equipped with a coupler which would couple automatically by impact and which could be coupled to the car without the necessity of the plaintiff going between the ends of the engine and the car to make the coupling at the time of the accident, and that the failure to have the engine so equipped proximately caused the injury to the plaintiff, they should find for the plaintiff, unless they believe that the plaintiff was guilty of contributory negligence.⁵

The court instructs the jury that the law is not complied with by merely furnishing couplings which will couple automatically by impact after they have been fixed and made ready to be coupled by employes going between the ends of the engine and car. Nor is the mere fact that the railway company provides couplers proper in their material and construction which are of standard make and are modeled and constructed so as to be capable of coupling by impact sufficient. The couplers must be so constructed and attached and kept so attached that they will when properly operated and given a reasonable trial actually and in fact couple automatically by impact without the necessity of the employes going between the ends of the engine and car to effect a coupling.⁶

§ 3699. Duty of telephone company

You are instructed that it was the duty of the telephone company to exercise ordinary care to provide a reasonably safe place

³ *Moore v. St. Joseph & G. I. Ry. Co.*, 186 S. W. 1035, 268 Mo. 31.

⁴ *Chesapeake & O. Ry. Co. v. Arlington*, 101 S. E. 415, 126 Va. 194.

⁵ *Chesapeake & O. Ry. Co. v. Arlington*, 101 S. E. 415, 126 Va. 194.

⁶ *Chesapeake & O. Ry. Co. v. Arlington*, 101 S. E. 415, 126 Va. 194.

in which its employes were required to work, and to provide such employes with reasonably safe appliances to do the work exacted of them, and to exercise the same care to keep such places where said employes were required to work in a reasonably safe condition, and to keep said appliances also in a reasonably safe condition, and a servant has a right to assume that such place has been provided, and that such reasonably safe appliances have been furnished wherever and with which he is required to work, unless there are defects and dangers in such places, or in such appliances, which are discernible by ordinary observation, and unless the servant has knowledge of the fact that such place where he is required to work is unsafe, or that such appliance is unsafe.⁷

§ 3700. Duty of operator of mines

§ 3700(1). Alabama

The jury are instructed that, if the jury believe from the evidence that the car that knocked the prop down was defective, and too wide to pass by said prop in safety, and the defect in the car was the proximate cause of the death of plaintiff's intestate, then your verdict must be for the plaintiff, if you further believe from the evidence that said defect arose from, or had not been discovered or remedied owing to, the negligence of defendant or some one intrusted by it with the duty of seeing that its ways, works, machinery, or plant were in proper condition.⁸

The jury are instructed that, if the jury believe from the evidence that the post or prop that was knocked down, causing the rock to fall and kill ———, was too close to the room track to permit cars to pass in safety, this was a defect in the ways, works, machinery, or plant of defendant; and if such defect had not been discovered or remedied, owing to the negligence of defendant or some one intrusted by it with the duty of looking after its ways and works, and such defect was the proximate cause of the death of plaintiff's intestate, then your verdict must be for the plaintiff.⁹

§ 3700(2). Missouri

The court instructs the jury that if you believe and find from the preponderance or greater weight of the evidence in this case that the cable and wires mentioned in evidence were held in position in the terminal box mentioned in evidence by means of wooden clamp or clamps in said box, and that said clamp or clamps had been burned and charred by the fire mentioned in evidence, and had by reason thereof become defective and insufficient to hold

⁷ *Southwestern Telegraph & Telephone Co. v. Sanders* (Tex. Civ. App.) 138 S. W. 1181.

⁸ *Cahaba Southern Mining Co. v. Pratt*, 40 So. 943, 146 Ala. 245.

⁹ *Cahaba Southern Mining Co. v. Pratt*, 40 So. 943, 146 Ala. 245.

said cable and wires in position with the aid of hook and fastening on the messenger wire mentioned in evidence, and were insufficient to prevent the wires from slipping and passing through said terminal box; and if you further believe from the evidence that on or about ———, plaintiff was in the employ of the defendant at its said mine as a pump man, and that on or about said ——— day of ———, defendant ordered and directed plaintiff to aid and assist in placing the wires extending beyond the terminal box and down toward the shaft, as mentioned in the evidence, over or attach same to the hook mentioned in evidence as being attached to said crab mentioned in evidence, and that, while plaintiff was aiding and assisting in said work, and attempting to place the wires over or attach same to the hook, if the jury believe he was so aiding and assisting in said work, and so attempting to place or attach said wire, said clamp or clamps in said terminal box failed to secure or hold in position said cable and wires therein, with such assistance as said hook on said messenger wire afforded, and that by reason of the charred and insecure condition, if same was insecure and charred, of said clamp or clamps, said wires slipped and passed with great force and speed across plaintiff's left hand, and the fingers thereon, and caught plaintiff's left hand and the fingers thereon between the wires and said terminal box, and thereby and by reason thereof caused three of plaintiff's fingers to be cut off and the little finger on his left hand to be lacerated, bruised, and injured; and if the jury further believe from the evidence that the defendant, before ordering and directing plaintiff, if the jury believe he was ordered and directed, to aid and assist in the aforesaid work and in placing said wires or attaching the same to said hook, knew, or could have known by the exercise of ordinary care, that said clamp or clamps in said terminal box had been burned, charred, and injured by said fire in time to have repaired the same, and that defendant negligently failed and omitted to reasonably inspect said clamp or clamps in said terminal box, and failed to exercise reasonable care to repair and render reasonably safe said clamp or clamps, if the jury believe said clamp or clamps were defective and unsafe by reason of their burned and charred condition, and that such negligence, if any, was the cause of the injuries to plaintiff, if any, as shown by the evidence—then the jury will find the issues for the plaintiff and assess his damages at such sum as the jury may believe from the evidence will reasonably compensate plaintiff for the injuries suffered, if any, not, however, to exceed the sum of \$———. ¹⁰

¹⁰ *Lawbaugh v. McDonald Mining Co.* (App.) 202 S. W. 617.

§ 3700(3). Oklahoma

You are instructed that the operator of a coal mine is not an insurer of the lives of the men employed by him or it. The operator is required only to exercise ordinary care in providing the men working for him a safe place to work and with safe appliances with which to do the work, and by "ordinary care" I mean such care as a reasonably prudent man would use in the conduct of his own business under like circumstances.¹¹

§ 3701. Same—Duty to furnish safe and suitable oil

You are instructed that the defendant, in order to be relieved from liability for injuries received by its employes from the use of defective materials, is not required to furnish the best materials known, or to subject such as he does supply to an analysis, to determine what hazard may be incurred in their use; but the defendant is only required to use ordinary care in the purchase of suitable materials for the purposes for which said materials are intended, and in the use of such materials to follow the ordinary usage of the business as conducted by prudent men. You are further instructed that if a coal company purchase a lot of oil from a reputable manufacturer under a warranty that it is a noninflammable lubricating oil, and after a large portion of said oil has been used without an accident or explosion from becoming ignited, one barrel of such oil becomes ignited, and is found to be inflammable, then the jury may take into consideration all of such facts and circumstances in determining whether or not the defendant company was guilty of negligence in the use of said oil in its mine.¹²

The jury is instructed that it is the duty of a master to use reasonable care to see that appliances and materials furnished for use by its servants are reasonably safe and suitable appliances and materials for the use and purposes for which they are intended, and this includes the necessity of using the same degree of care in the matter of observation and inspection to discover the character of the appliances and materials so furnished. And this reasonable care varies according to the danger to be avoided and according to the character of the appliance or material so furnished. So in the matter of furnishing oil for the use of its servants in lubricating the cars down in the mine, in this case, the defendant company was bound to use reasonable care to inspect and ascertain what sort of oil was furnished, and to use the same care to furnish a reasonably safe and suitable oil; and the jury are to determine what would be the reasonable care the company

¹¹ *Hailey-Ola Coal Co. v. Parker*, 122 P. 632, 32 Okl. 642, 40 L. R. A. (N. S.) 1120.

¹² *Hailey-Ola Coal Co. v. Parker*, 122 P. 632, 32 Okl. 642, 40 L. R. A. (N. S.) 1120.

should exercise in respect to the inspection and use of this oil, and whether what was done by the company, if anything, in this respect, was the exercise of the reasonable care a reasonably prudent man would have exercised in such a case.¹³

4. *Methods of Work*

§ 3702. Duty of master in general

§ 3702(1). Michigan

The court instructs the jury that the master is not liable for any negligence with respect to the methods of work, when he furnishes the proper appliances and proper tools and has pointed out the safe method for those who work at that employment, and they do not follow the method, but use one of their own.¹⁴

§ 3702(2). Oregon

You are instructed that the law also provides that if a master directs his servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of the injury to the servant, the master is guilty of actionable negligence.¹⁵

§ 3702(3). Texas

You are instructed that, if you believe from the preponderance of the evidence that the plaintiff was engaged in fastening or tightening a nut upon the steam shovel of the defendant about the _____ day of _____, and while so engaged the defendant's agents and servants in charge of said steam shovel caused the machinery to move, and that the act of moving the machinery, if it was moved, was negligence, and that said negligence caused plaintiff's foot to be injured as alleged in his petition, then you will find for the plaintiff, unless you find for the defendant under other portions of this charge.¹⁶

§ 3703. Delegation of duty

I instruct you that it is the duty of the master to exercise reasonable and ordinary care to adopt safe rules and methods of work, and that this is a personal duty which the master owes to its servant, and which cannot be delegated or transferred to another in such manner as to relieve it, the master, from responsibility thereof.¹⁷

¹³ *Halley-Ola Coal Co. v. Parker*, 122 P. 632, 32 Okl. 642, 40 L. R. A. (N. S.) 1120.

¹⁴ *Poirier v. Bartlett Lumber Co.*, 148 N. W. 750, 182 Mich. 678.

¹⁵ *Prement v. Wells*, 133 P. 647, 65 Or. 336.

¹⁶ *Texas & P. Ry. Co. v. Bursey* (Civ. App.) 192 S. W. 809.

¹⁷ *Fonts v. Southern Pac. Co.*, 150 P. 215, 30 Cal. App. 633.

§ 3704. Use of improper and unusual methods of work as ground of liability

Assumption of risk of customary methods of work, see post, § 3728.

The court instructs the jury that, if you believe from a preponderance of the evidence (by which is meant the greater weight of credible testimony) that the plaintiff was injured while he was in the employ of the defendant, while at work as skidway man and in the line of his duties as such, on or about —, in —, and that plaintiff's said injury, if any, was caused by a log which was being "snaked" in by a team driven by —, another employé of the defendant engaged in the execution of said work, being pulled against the end of a log upon the skidway and thus causing the other end of the log so struck to strike plaintiff's leg and injure him, and that the said —, instead of following the customary and proper road or passageway which had been cut out and marked out for following when so hauling the logs from the woods, he turned his team out of that usual and proper road or passageway, and thus jerked the log which he was "snaking" into and against the south end of a log already upon the skid, and thus caused the other end of that log to be suddenly and swiftly swung towards plaintiff, who was standing near the opposite end of the skidway, so that his left leg was struck with great force and he was knocked down and injured; and further you find from a preponderance of the evidence that the said — in so "snaking" in said log and not following the usual passageway which had been provided for hauling logs (if you find such was the fact) was negligent, bearing in mind the definition of "negligence" as hereinafter given you, then such negligence of said employé, — (if you find he was so negligent), is chargeable to the defendant, and in case you find that there was such negligence on the part of said —, and further you find that the injury thereby caused plaintiff, if you find that he was then and there injured, was proximately caused by such negligence, if any, bearing in mind the definition of "proximate cause" as hereinafter given you, then you will return a verdict for the plaintiff. And in this connection you are instructed that the term "negligence" in law means the failure to exercise that degree of care which persons of ordinary prudence would exercise under the same or like circumstances. And "ordinary care" is such care as an ordinarily prudent person would use under the same or like circumstances.¹⁸

You are instructed that if, from a preponderance of evidence, you believe that G. was intrusted by the defendant with the power to manage, control, and direct B. and the other men in the bridge

¹⁸ Kirby Lumber Co. v. Bratcher (Tex. Civ. App.) 191 S. W. 700.

gang in the performance of their work; and that, in virtue of such power, the said G. ordered the said B. and three other men to carry an iron guard rail from the bridge in the manner alleged in plaintiff's petition; and that in attempting to carry the guard rail as directed, that said B. was thrown from the bridge, and killed, in the manner alleged in plaintiff's petition; and the manner in which G. directed the rail to be moved, if he gave any direction, was an improper and unusual method of moving the rail; and that it was attended with unusual danger and hazard; and that it was negligence to so order its removal; and that such negligence, if any, directly caused the death of B.; and that the plaintiff has been damaged by the death of B.—then your verdict should be for plaintiff, unless you further find that B. was guilty of contributory negligence, or assumed the risk, as hereinafter charged.¹⁹

§ 3705. Presumption of knowledge by master of customary method of work

The jury are instructed that, if you believe from the evidence there was a custom in the mine of defendant not to start the cable for ——— minutes after it had been stopped, and the custom had been of long standing in the mine, defendant would be presumed to have knowledge of it, and would be bound by such custom.²⁰

§ 3706. Failure to furnish sufficient men to enable work to be done with safety

§ 3706(1). Delaware

You are instructed that it is the duty of the master to see that the number of servants engaged upon any particular work is sufficient to secure the reasonable safety of each one of them.²¹

You are instructed that, if you are satisfied that death resulted in this case, from the mere fact that the crew of the shifting crane was not sufficient to procure the reasonable safety of the workman, the company would be liable; but if the deceased saw and knew of such inadequacy, and continued to work without objection, or if a part of the crew were temporarily absent in an emergency not reasonably to be anticipated by the master, the defendant would not be liable.²²

§ 3706(2). Missouri

The court instructs the jury that if you believe from the evidence in the case that the defendant failed to furnish a sufficient number of men to do with reasonable safety, the work in which

¹⁹ Galveston, H. & S. A. Ry. Co. v. Bonnet (Tex. Civ. App.) 38 S. W. 813.

²⁰ Sturm v. Consolidated Coal Co., 93 N. E. 345, 248 Ill. 20, 21 Ann. Cas. 99.

²¹ Coughlan v. Philadelphia, B. & W. R. Co., 67 A. 148, 6 Pennewill, 242.

²² Coughlan v. Philadelphia, B. & W. R. Co., 67 A. 148, 6 Pennewill, 242.

plaintiff was engaged at the time of the accident in question, taking into consideration the kind of work in which he was then engaged, and the kind of appliances which were furnished by defendant with which to do said work, and if you further believe from the evidence in the case that such failure upon the part of the defendant was "negligence," within the meaning of that term, as hereinafter defined, and if you further believe from the evidence in the case that the accident occurred and plaintiff was injured by reason of such negligence, then plaintiff is entitled to recover, and it is your duty as jurors to return a verdict in his favor, provided you find that at the time of said accident he was not himself guilty of negligence which directly contributed thereto. By the term "negligence" as used in these instructions, is meant the failure to exercise such care and prudence as an ordinarily careful and prudent person would exercise under the same or similar circumstances.²³

§ 3706(3). Virginia

The court instructs the jury that, if you believe from the evidence that the plaintiff's decedent at the time of the accident was engaged in painting the trestle of the defendant in the performance of his duties, and that while so engaged the defendant company attempted to move the swinging scaffold, and in doing this the agents of the defendant began to move the ladder towards the back of plaintiff's decedent, and that deceased was struck and thrown from the trestle solely as a result of the negligence of the foreman, if you believe the act of the foreman was negligence, in ordering the ladders to be moved by an insufficient force to handle and control them, and that said foreman had the supervision of said work, and was the superior to said decedent, or had the right, or was charged with the duty, of controlling and directing the general services and the immediate work of the decedent and the other men engaged in said work, and thereby the accident resulted without negligence of the said decedent, you must find for the plaintiff.²⁴

§ 3707. Method of handling explosives

The court instructs the jury that if they believe from the evidence that it is dangerous to thaw frozen dynamite by an open fire, and that the method of thawing dynamite by an open fire is not reasonably safe, and that such dangers could be avoided or greatly reduced by the use of appliances and methods which were within easy reach of the master, and that the existence of such danger and

²³ *Medley v. St. Louis & S. F. Ry. Co.*, 114 S. W. 1013, 215 Mo. 567.

²⁴ *Chesapeake & O. Ry. Co. v. Newton's Adm'r*, 85 S. E. 461, 117 Va. 260.

the means of avoiding it or greatly reducing it were known to the master, or by the exercise of reasonable care and diligence on his part could have been known to him, then it was a duty that the master owed his servants to adopt such methods and use such appliances as were reasonably safe, and any other methods which were not reasonably safe will not excuse the master for injuries to the servant resulting therefrom.²⁵

The court instructs the jury that the degree of caution, care, and diligence exacted by the law of the defendant company, in providing appliances, methods of work, and means of safety for the employes in thawing dynamite, was only ordinary and reasonable care, caution, and prudence in providing and adopting reasonably safe appliances and methods in thawing said dynamite. Therefore, if the jury shall believe from the evidence that the method of thawing dynamite by the defendant company, at the time the injury occurred from the explosion complained of, was the method of thawing dynamite before an open fire, in the open air, and if the jury shall further believe from the evidence in this case that the method of thawing dynamite was reasonably safe, then the court instructs the jury that the defendant company was not negligent in using that mode of thawing dynamite, and the jury will find for the defendant.²⁶

§ 3708. Care required while moving heavy objects at an elevation

Bearing carefully in mind the foregoing instructions, if you believe from the evidence that the plaintiff, while in the employment of the defendant in the capacity of a laborer, was placed by S., defendant's foreman, at work winding up a rope on the windlass to a derrick, and that, while the plaintiff was so engaged, the said S. directed or caused two of plaintiff's coservants, A. and H., to go up and remove some ropes and blocks, commonly called "snatch blocks," from the top of said derrick, and that while the said H. and the said A. were so removing said ropes and snatch blocks, and plaintiff was so winding the rope on said windlass, one of said blocks fell, and injured plaintiff, you will find for the plaintiff, if you further believe from the evidence that in so directing and causing said H. and A. to so remove said ropes and blocks from the top of said derrick while plaintiff was at work beneath, winding said windlass, the said S. failed to exercise ordinary care for plaintiff's safety, and that this failure on the part of said S. to exercise ordinary care caused plaintiff's injury, and further believe

²⁵ *Bertha Zinc Co. v. Martin's Adm'r*, 22 S. E. 809, 93 Va. 791, 70 L. R. A. 999.

²⁶ *Bertha Zinc Co. v. Martin's Adm'r*, 22 S. E. 809, 93 Va. 791, 70 L. R. A. 999.

from the evidence that plaintiff himself, at the time he was injured, was exercising ordinary care for his own safety.²⁷

You are instructed that if you should believe from the evidence that the said S. did not direct or cause the said A. and H. to go up and remove said ropes and blocks from the top of said derrick while plaintiff was at work beneath, winding said windlass, but that one L., who was in the employment of defendant at the time, so directed or caused the said H. and A. to do said work, while the said S. was not personally present, and had not directed said work to be so done, you will find for defendant, unless you should find for plaintiff, under paragraph — of this charge. In this connection, however, you are instructed, that if you believe from the evidence that the said S. directed said work to be done in said manner, under said circumstances, and that, in so doing, he failed to exercise ordinary care for plaintiff's safety, and that plaintiff was injured by reason thereof, without any fault on his part helping to cause his injury, the defendant would be liable in damages to the plaintiff even though you should believe from the evidence that the said S. was not personally present when said work was being actually done. In this connection, you are further instructed that if you should believe from the evidence that the said L. delivered to the said H. and A. the direction to do said work at said time under said circumstances, but that he did so as the mouthpiece of the said S., or with the knowledge and approval of said S., then this would be the same as if the said S. himself, in person, had so directed said work to be done. In other words, the acts of the said L. would in such a case, in law, be the act of the said S.²⁸

§ 3709. Railroad operations

You are instructed, if you find from the evidence that this car was moving at — or — miles an hour, and the foreman ordered him to get off the car and open the switch and get back on the car without stopping, the car going at the rate of — or — miles an hour, or if the foreman stood by and acquiesced in his doing so, and allowed the plaintiff, according to custom, to jump off and get back on the car while going — or — miles an hour, and made no effort to have the car stopped for the plaintiff to get on, that that would be negligence.²⁹

²⁷ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

Stewart, 42 S. W. 241, 17 Tex. Civ. App. 59.

²⁸ *Sherman Oil & Cotton Co. v.*

Stewart, 42 S. W. 241, 17 Tex. Civ. App. 59.

²⁹ *Ware v. Southern Ry. Co.*, 95 S.

E. 921, 175 N. C. 501.

§ 3710. Duty to give warning signals in operation of engines and cars**§ 3710(1). Alabama**

The jury are instructed that, if they believe from the evidence that the engineer was taking his signals from the plaintiff in this cause, and did not see any signals given by ———, then the plaintiff in this cause cannot recover on account of any alleged negligence of ——— in giving the signals.³⁰

§ 3710(2). Arkansas

You are instructed that the undisputed evidence in the case shows that no danger or alarm signals were given, either by bell or whistle, after passing over the street crossing some distance below where plaintiff was injured, until just before the time plaintiff was struck, and you are further instructed that, if you believe from the evidence that reasonable prudence would have required that danger or alarm signals should have been given, then you are instructed that the failure of the engineer in charge of the engine which struck plaintiff to give such alarm was negligence on his part, and that, if you believe from the evidence that such failure to give signals was the proximate cause of plaintiff's injury, then your verdict will be for the plaintiff.³¹

§ 3710(3). California

The jury are instructed that if they believe from the evidence that the defendant exercised ordinary and reasonable care in warning the said ——— of the approach of its train, then your verdict must be for the defendant.³²

§ 3710(4). Kentucky

The court further instructs you that it was the duty of the defendant company, by and through its officers, agents, or employes, to give to those in charge of the train upon which the said ——— was engineer reasonable warning of the presence of the work train of the defendant upon its main track at the time in question by placing torpedoes upon its track or by flagging, or both, or in some other reasonable manner while such train was a sufficient distance from said work train as would have enabled those in charge of such moving train to have stopped the same by the exercise of ordinary care in time to have avoided the collision with said train; so, therefore, if you shall believe from the evidence that the officers, agents, or employes of the defendant failed to give such reasonable warning to the engineer, or other person, in

³⁰ Huggins v. Southern Ry. Co., 41 So. 856, 148 Ala. 153.

³¹ St. Louis, I. M. & S. Ry. Co. v.

Cabiness, 168 S. W. 1116, 113 Ark. 599.

³² Williams v. Southern Pac. Co., 160 P. 660, 173 Cal. 525.

charge of the train upon which said ——— was employed either by placing upon the track torpedoes or by flagging for a sufficient distance from said work train as would have enabled said engineer or other person in charge of said moving train, by the exercise of ordinary care and precaution, to have stopped the same in time to have avoided said collision, and that as the result of such failure, if any, the collision occurred, and said ——— was killed, then in that event you should find for the plaintiff. But, unless you shall so find and believe from the evidence as above required, you should find for the defendant.³³

The court instructs the jury that it is admitted by the pleadings herein that ———, the superintendent of defendant's road, was in a position to see and did see the engineer running the train onto the switch, and that said ———; superintendent, could have signaled to the engineer to stop the train from running against the cars that injured plaintiff; and if the jury believe from the evidence that the defendant's engineer, agents, or employes directing or controlling the movements of its engine and train knew, or by the exercise of ordinary care could have known, and reasonably anticipated, the presence of plaintiff between the two cars, where he was injured, at the time said engine and train were backing, under the directions and signals from Superintendent ———, upon the switch or siding and into or against the cut of cars standing thereon, between two of which plaintiff was injured, then the defendant is chargeable with negligence, and the jury will find damages for plaintiff; and, unless the jury so believe from the evidence, they will find for defendant.³⁴

The court instructs the jury that, if they believe from the evidence that plaintiff's intestate was killed by one of defendant's freight trains moving over defendant's tracks in the yards at ———, and that, at the time he was killed, he was on defendant's tracks in said yard in the usual course of his employment, and that defendant's agents and servants in charge of the train that killed him, if it did so kill him, negligently failed to ring the bell or give other signals of its approach, or negligently failed to stop said train after they saw his peril, or after they might have seen it by the exercise of ordinary care, they should find for the plaintiff, unless they believe from the evidence that deceased, by his own negligence, contributed to such an extent to the injury that caused his death that, but for his negligence, it would not have happened, and, in that event, plaintiff cannot recover, unless de-

³³ Louisville & N. R. Co. v. Holloway's Adm'r, 173 S. W. 343, 163 Ky. 125.

³⁴ McKee v. Cincinnati, F. & S. R. Co., 171 S. W. 425, 161 Ky. 711.

fendant's agents in charge of said train knew, or could have known by the exercise of ordinary care, of the peril in which deceased's negligence, if he was negligent, had placed him, and thereafter failed to observe ordinary care to avoid the injury and death that followed.³⁵

The court instructs the jury that it was the duty of the company's employes, in charge of the engine which struck and injured the plaintiff to maintain a lookout ahead and give warning of its approach and be in a position to control its movements; and if you believe from the evidence that the employes in charge of the yard engine made a backward movement of said engine, and failed to maintain a lookout ahead of same as it moved backward in said yard, or failed to give reasonable warning of its approach to plaintiff by ringing its bell or blowing its whistle, and because of its failure to do so in any one or all of these respects the plaintiff went upon the track and was struck and injured, and was at the time exercising ordinary care for his own safety, then you will find a verdict for the plaintiff.³⁶

You are instructed that, if you believe from the evidence in this case that the defendants ——— and ——— caused, suffered, or permitted several or any cars to run over the defendant's track without any person or persons in a position on said cars to give warning of their approach and to control their movements, and that said cars ran against or over ——— and killed him, then this was negligence, and you will find for the plaintiff against all the defendants, ——— Railway Company, ———, and ———, unless you shall believe from the evidence that the plaintiff himself was guilty of contributory negligence as set out and defined in instruction No. ———, and that but for his negligence it would not have happened, then in the latter event you will find for the defendants.³⁷

The court instructs the jury that if they believe from the evidence that in ———, while plaintiff was in the service of defendant as a railway engineer on one of its trains of cars operated on its track near ———, acting at the time under orders from the defendant or its agents, the superiors to said plaintiff, and in line of his duty, the engine he was operating, owing to the negligence of the defendant or its said agents, was on the point of coming in collision with another locomotive, or train, coming from the opposite direction, and that by reason of the danger impending from such a colli-

³⁵ Louisville & N. R. Co. v. Taylor's Adm'r, 166 S. W. 199, 158 Ky. 633. In this case the servant had his back to a section of track undergoing repairs and the train came upon him from the rear.

³⁶ Cincinnati, N. O. & T. P. Ry. Co. v. Richardson, 154 S. W. 403, 152 Ky. 814.

³⁷ Cincinnati, N. O. & T. P. Ry. Co. v. Mullane's Adm'r, 152 S. W. 555, 151 Ky. 499.

sion, which was imminent, the plaintiff jumped off of his locomotive to the ground to escape the impending danger, and by reason thereof he was injured, the jury will find for the plaintiff in damages as herein-after set out.³⁸

§ 3710(5). *Missouri*

The court instructs the jury that if you find and believe from the evidence that plaintiff, on the ——— day of ———, was in the employ of the defendant as a switchman, and that, while in the performance of his duties and in the exercise of ordinary care, he was engaged in the work of adjusting a knuckle on the west end of a stationary car upon the coal track mentioned in evidence, and stepping out from the track, and that while so engaged the defendant company and its agents and servants in charge of the engine and cars mentioned in evidence negligently backed the cars from a stationary position, without having received any signal from the plaintiff, against and upon plaintiff, thereby causing him to be caught between the cars mentioned in evidence and injured, then your verdict will be for the plaintiff; provided you further find and believe from the evidence that an ordinarily prudent person in the exercise of ordinary care would not have moved said cars from a stationary position west of the switch mentioned in evidence without a signal from the plaintiff, and provided you further find from the evidence that plaintiff did not know, and, in the exercise of ordinary care, could not have known, that the cars which struck him were being moved toward the stationary car upon the coal track mentioned in the evidence.³⁹

The court instructs the jury that if you find from the evidence in this case that on the ——— day of ———, in the city of ———, defendants were engaged in operating the railroad cars, and pots mentioned in evidence, and that plaintiff and S. were then in the employ of defendant, and that said S. was then and there authorized by defendant Foundry Company then and there to operate said cars and pots and to instruct, that is to say, to direct or order plaintiff where, when, and how he should perform his duties to said defendant, and that he then and there so instructed plaintiff to then and there adjust one of said pots upon one of said cars, and thereby required and caused plaintiff then and there to go upon said track between two of said cars and adjust said pot, and that said S. then and there, by the exercise of ordinary care, could have discovered that said cars were then about to move and were likely, by reason thereof, to strike and injure plaintiff, and then and there negligently failed to warn plaintiff and countermand

³⁸ *Louisville & N. R. Co. v. Lynch*,
126 S. W. 362, 137 Ky. 690.

³⁹ *Hulse v. St. Joseph Ry. Co.*, 214
S. W. 150.

said instruction, if any, and thereby negligently required plaintiff to remain on said track between said pots, and then and there negligently caused and permitted said cars suddenly to move violently along and over said railroad track, and that defendants, by said negligence, if any, then and there directly and proximately caused and permitted plaintiff to be struck by one of said cars and plaintiff's left leg to be crushed between the wheels of said car and one of the rails of said track and the iron column mentioned in evidence, and plaintiff thereby to be injured and damaged, and that defendants by the exercise of ordinary care could have warned plaintiff and countermanded said instruction and thereby averted said injury, if any, then you will find for plaintiff and against both defendants, unless you further find that plaintiff was guilty of negligence and thereby directly and proximately contributed to cause himself to be injured.⁴⁰

§ 3710(6). Texas

You are instructed that, if plaintiff went in between the cars to manipulate the couplers between said cars, under the directions of the conductor, to uncouple two of the cars, and the coupler and attachments thereto were so out of order that the same would not uncouple without the necessity of the plaintiff going in between said cars and manipulating the coupler or its attachments with his hands, and that plaintiff signaled the servants operating the train to move it in one direction, and instead of so moving the train in the direction that plaintiff's signal indicated, the same should be moved, the servants operating the train moved it in the opposite direction, suddenly and unexpectedly to plaintiff, and the wheel of one of the cars caught the foot of the plaintiff and injured it, and that the allowing of the couplers to be out of order, if this was so, and the moving of the train in the opposite direction to that indicated by the signal of the plaintiff, if this was a fact, was negligence and the proximate cause of the injury, and (if) you fail to find that plaintiff assumed the risk you will find for plaintiff and assess his damages, unless you find for the defendant under some other charge herein given you.⁴¹

You are instructed that, if you believe from the evidence that the defendant's employes in charge of the extra train, or any of them, had that train on the main track in the position you may find it was, or that such employes or employe failed to flag the regular freight train in charge of plaintiff, or to give any signal or warning of the location of said extra train on the main track, or that such employes or employe failed to line up the switch or sid-

⁴⁰ *Morin v. Rainey* (App.) 207 S. W. 858.

⁴¹ *Pecos & N. T. Ry. Co. v. Chatten* (Civ. App.) 185 S. W. 911.

ing for said regular freight train, then, if you further believe from the evidence that such conduct on the part of such employés, or any of them, in any or all of the particulars above submitted, was negligence towards plaintiff, that is, a failure to exercise towards him such care as ordinarily prudent persons would have exercised under the same or similar circumstances, and that such negligence, if any, was a proximate cause, as before defined, of alleged injuries to plaintiff, then he is entitled to recover, and, if you so find, return your verdict in his favor.⁴³

You are instructed that the burden is upon the plaintiff to prove the facts necessary to entitle him to recover, as above submitted to you by the court, and, unless such facts are proved by a preponderance of the evidence, to be considered by you in its entirety, then return your verdict in favor of the defendant. If you do not believe from the evidence that the employés, or any of them, in charge of the extra train, under and in view of the attendant circumstances, failed to exercise such care as an ordinarily prudent person or persons would have exercised under the same or similar circumstances, in having the extra on the main track in the position you may find it was, or in failing to flag or signal or warn the regular freight train in charge of plaintiff of the location of the extra on the main track, if they did so fail, or in failing to line up the switch or siding for said regular freight train, if they did so fail, or if you do not believe that the employés in charge of said extra train, or any of them, could, in the exercise of ordinary care, as before defined, reasonably have foreseen a collision and injury to plaintiff, or a like injury, as a natural and probable result of having the extra on the main track in the position you may find it was, or as a natural and probable result of failing to flag or signal or warn the regular freight train of the location of the extra on the main track, if they did so fail, or as a natural and probable result of failing to line up said switch or siding for the regular freight train, if they did so fail, then, in either or both of these alternative events, return your verdict for the defendant.⁴³

§ 3710(7). *Virginia*

The court instructs the jury that, if you believe from the evidence that the plaintiff, without negligence on his part, was in a position which made injury to him a necessary consequence of a movement backward of the engine, and that the engineer knew, or by the exercise of ordinary care ought to have known, of the plaintiff's position and its danger to him, then it was the duty of the

⁴³ *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

⁴³ *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

engineer to exercise ordinary care to warn the plaintiff before attempting to back his engine, unless the plaintiff knew of such attempt; and, if you believe from the evidence that the engineer negligently failed to exercise such care, and that such failure was the proximate cause of plaintiff's injury, then the plaintiff is entitled to recover.⁴⁴

§ 3710(8). *West Virginia*

The court instructs the jury that, if they believe from the evidence in this case that there was no light displayed on the rear of the tender of the engine that struck and injured the plaintiff, and that it had been prior to that time the custom of the defendant to have lights displayed on the rear of the tenders of engines under such circumstances running backward over the yard of the defendant at night, and that the plaintiff knew of such custom, then the plaintiff had the right to assume that no engine would be run backward over said yard at night, under such circumstances, without such light being displayed; and, if the jury further believe from the evidence that the absence of such light from the tender of said engine was the proximate or contributing cause of plaintiff's injury, then the jury shall find for the plaintiff, if you further believe from the evidence that no more than a reasonable time had elapsed between the time when plaintiff quit work and the time of his injury.⁴⁵

§ 3711. *Same—Kicking or shunting cars*

The court instructs the jury that if you find and believe from the evidence that ———, ———, and ——— are all the minor children of ———, deceased, and that at the time of his death he left no wife surviving him, and that plaintiff is the appointed curator of the estate of said children; and if you find from the evidence that said deceased was in the employ of defendant in its switching yards in ———, on or about ——— day of ———, and while so employed was ordered by signal of the foreman under whom he was working to couple up the ——— cars attached to engine with cars on track No. ———, and was signaled by said foreman that said ——— cars would be "shoved in" on track No. ———, for the purpose of making such coupling; and if you find that said deceased did, in obedience to said signal, prepare to make such coupling, and that it became necessary for him to go (and he did go) in upon defendant's said track No. ——— to adjust the coupling device of the cars already on said track on account of such device being out of working order (if you find it was out of

⁴⁴ *Norfolk & P. B. L. R. Co. v. Sturgis*, 85 S. E. 572, 117 Va. 532.

⁴⁵ *Easter v. Virginian Ry. Co.*, 86 S. E. 37, 76 W. Va. 383.

working order); and if you find that it was the custom then and there when cars were signaled to be "shoved in" to keep them attached to and under the control of the engine, and not to let the cars to be coupled come together until signaled to do so by the switchman actually making the coupling, and that said — then and there relied upon said custom, and defendant's servants then and there failed and neglected to observe same, and, without giving said — any warning, negligently kicked or shunted the — cars down upon said track No. — and cut them loose from the engine so that they ran down uncontrolled upon said — while he was on the track aforesaid (if you find he was), and thereby crushed his body and inflicted upon him injuries from which he died soon thereafter—then your verdict must be for the plaintiff, unless you further believe and find from the evidence that plaintiff was guilty of contributory negligence, or that he assumed the risk of being so injured, as defined by the other instructions.⁴⁶

§ 3712. Method of stopping trains

§ 3712(1). Minnesota

The jury are instructed that if you find from the evidence that the plaintiff was, just before the accident, in the line of his duty on the ladder next to the caboose attached to this train, and if you further find that the engineer in charge of the train unnecessarily applied to the train a stop called a dynamiter, unnecessarily and unusually sudden and severe, by which the plaintiff was violently thrown from his position to the ground and under the wheels of the car, and thereby caused the injury he complains of, and if you further find that the plaintiff was not himself negligent in the premises in the position which he assumed, or in anything he did or omitted to do with reference to his position there, then the plaintiff should recover, and your verdict should be for the plaintiff.⁴⁷

§ 3712(2). Texas

The jury are instructed that, in passing on whether or not the engineer was negligent in the manner in which he stopped said engine, you will look to all the evidence in the case, and if you find that a competent engineer, and one of ordinary care and prudence, would not have stopped said engine in the manner as he did, then he would be guilty of negligence in stopping said engine as he did; but if you find that a competent engineer, and one of ordinary care and prudence, would have stopped said engine in the manner

⁴⁶ *Taber v. Missouri Pac. Ry. Co.* (Mo.) 186 S. W. 688.

⁴⁷ *Owens v. Chicago Great Western Ry. Co.*, 128 N. W. 1011, 113 Minn. 49.

as he stopped it, then he would not be guilty of negligence in so stopping it.⁴⁸

§ 3712(3). Virginia

The court instructs the jury that Flagman ——— was in the exercise of reasonable and ordinary care in attempting to signal train ——— to stop with a red lantern alone immediately preceding the collision, if he had stopped the same train at ——— a short time before with the same lantern, provided the weather conditions, such as fog and light, were practically the same at both places at the time the red lantern was used to stop the train, provided the same was swung and used as a danger signal should have been swung or used.⁴⁹

§ 3713. Duty of railroad company to watch out for employees on track

§ 3713(1). United States

The jury are instructed that if the jury believes from the evidence that it was necessary or usual, within the knowledge of ———, the engineer, for the plaintiff to walk on, along, or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine, and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution, and his failure so to do was the proximate cause of the accident, then they must find for the plaintiff.⁵⁰

§ 3713(2). Alabama

The jury are instructed that, if you believe from the evidence that B. had charge or control of the car, which ran over and injured the plaintiff, and that B., while letting said car down grade, was guilty of negligence in failing to keep a proper and sufficient lookout upon the track in front of the car, and that such failure was the proximate cause of the injury complained of, you must find for the plaintiff, unless you further believe from the evidence that the plaintiff was guilty of negligence that proximately contributed to his injury.⁵¹

⁴⁸ Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

⁴⁹ New York, P. & N. R. Co. v. Wilson's Adm'r, 64 S. E. 1060, 109 Va. 754.

⁵⁰ Norfolk & W. Ry. Co. v. Earnest,

33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

⁵¹ Louisville & N. R. Co. v. Thornton, 23 So. 778, 117 Ala. 274.

§ 3713(3). *Idaho*

You are further instructed that it is the duty of defendant, in operating its said train and cars over the track, to use reasonable care to keep a lookout ahead, and if said defendant and its employés in charge of the said train by keeping a lookout could have seen the said dozer upon the track and the plaintiff thereon in ample time to have stopped the said train, or to have reduced the speed of the train so as to make an easy coupling, but notwithstanding such facts failed to keep such lookout, or keeping such lookout failed to reduce the speed of the train so that an easy coupling might be made, and that by reason thereof the train struck the dozer with great and unusual force and violence, jarring and knocking the plaintiff off of the said dozer, then the defendant was guilty of negligence.⁵²

§ 3713(4). *Kentucky*

You are further instructed that, if you believe from the evidence that the engineer in charge of said train at the time complained of had received and understood a signal of caution which indicated that employés were on the track ahead, as described in the evidence, and, further, that it was the duty of said engineer after receiving said signal, if he did so receive it, to keep a reasonable, careful lookout for said employés and to keep his engine and train under reasonable control until said employés were passed, and that said engineer failed to manage and operate his said engine and train in that prudent and cautious manner that an ordinarily prudent person would have operated same under like or similar circumstances, and that as a result of the failure, if any, to so manage and operate said train, the plaintiff was injured, then the law is for the plaintiff, and you will so find.⁵³

§ 3713(5). *Utah*

The jury are instructed that it was the duty of the defendant in the running of its engine to keep a reasonably careful lookout and watch for appearance of persons upon its track, and, when observed and seen, to warn them of its engine's approach by sounding the engine whistle, or ringing its bell, or other suitable signal of warning; and if, after doing so, the person so upon its track fails to heed the signal and remains thereon, then it would become the further duty of the defendant to make reasonable efforts to stop its engine, providing it could do so without danger to the persons upon it or injury to its engine, and thus avoid injury to the person upon its track; and if the defendant should fail to perform this duty, and should wantonly and carelessly run its engine upon

⁵² *Kinzell v. Chicago, M. & St. P. Ry. Co.*, 190 P. 255.

⁵³ *Illinois Cent. R. Co. v. Evans*, 186 S. W. 173, 170 Ky. 536.

or into such person, injuring him, it would be guilty of negligence.⁵⁴

§ 3714. Mining operations

You are instructed that, if you believe from the evidence that the motorman, ———, or his helper on the motor, did, on the occasion of the decedent's death, in operating the motor and cars, give to the decedent the customary signal of their approach, and shall further believe from the evidence that there was a rule of the defendant which permitted the motorman, after giving such signal, to run the motor and cars through the trapdoor without previously stopping unless the trapper signaled to the motorman to stop, that such rule was known, or, by the use of ordinary care, could have been known, to the decedent, and that following the giving, if any, of such customary signal of the approach of the motor and cars, the decedent failed to signal the motorman to stop the motor and cars, and by reason of such failure, if any, the motorman was caused to run the motor against the trapdoor and upon the decedent, when he would not otherwise have done so, you should in that event find for the defendant.⁵⁵

The jury are instructed that, if you believe from the evidence that the decedent, ———, on the occasion of his death, while acting in the discharge of his duties as trapper in the defendant's mine and using ordinary care for his own safety, was killed by the negligence, if any, of the defendant's servant, ———, in running or driving one of its motor cars through the trapdoor of which the decedent was trapper, if he did so run or drive it, without giving the decedent the customary signal of the coming of the motor, if there was a failure to give such signal, or by failing, if he did so fail, to obey a rule of the defendant, if there was such rule, which permitted him, in approaching the trapdoor, to rely upon the decedent's opening it for the motor, unless signaled by the decedent to stop it before reaching the trap door, then the law is for the plaintiff, and you should so find. But, unless you believe as predicated in this instruction, you should find for the defendant.⁵⁶

5. Duty of Master to Warn or Instruct Concerning Dangers Connected with Work

§ 3715. Duty in general

§ 3715(1). Alabama

The court charges the jury that, unless there was danger or reason to believe that there was danger in using the lamp or fan in the

⁵⁴ *Coates v. Union Pac. R. Co.*, 87 P. 670, 24 Utah, 304.

⁵⁵ *Linard's Adm'r v. Interstate Coal Co.*, 169 S. W. 1006, 160 Ky. 598.

⁵⁶ *Linard's Adm'r v. Interstate Coal Co.*, 169 S. W. 1006, 160 Ky. 598.

drum of the boiler, there was no duty on the defendant to warn
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§ 3715(2). *Arkansas*

You are instructed that, if you find it was part of plaintiff's duty to assist in moving the truck of lumber near the machines to be unloaded, and while in the performance of it he was in the exercise of ordinary care for his own safety, and in assisting put his foot in the spoke of the wheel of the truck in the exercise of such care, and that defendant's servant or servants knew, or by the exercise of ordinary care ought to have known, that his foot was on the truck, and that after he had notified those in charge of the truck load of lumber, who were pushing the same from behind that he was ready to help move the load forward, the said truckers carelessly and negligently pulled and jerked the truck backwards instead of forwards, whereby plaintiff's foot was caught, pressed up against the body of the truck, and injured, then, unless the plaintiff assumed the risk of his injury, your verdict will be for the plaintiff.⁵⁸

The jury are instructed that, if you find from the evidence that the plaintiff, while in the performance of his duty, placed his hand upon a piece of timber, then upon the roll, for the purpose of removing the same therefrom, and exercising due care for his own safety, and that an employé of the defendant then in charge of the manipulation of the roller, without notice to the plaintiff suddenly reversed said roller, causing another timber to be jammed against said timber upon which the plaintiff's hand was resting, thereby causing the injury herein complained of, the plaintiff will be entitled to recover for said injury.⁵⁹

§ 3715(3). *California*

You are instructed that, if you believe from the evidence that the method adopted for unloading the shafting or bar, mentioned in the evidence, from the car, was a perilous one, and that the perils of the method so adopted were known to defendant's foreman before or at the time of the accident, and believe that the plaintiff did not know and in the exercise of reasonable care should not have known of such peril, then it became the duty of such foreman or boss to notify the plaintiff thereof; and if you believe from the evidence that plaintiff was injured solely by reason of such failure of duty to notify the plaintiff, then in that case I instruct you that your verdict must be against the defendant and for the plaintiff.⁶⁰

⁵⁷ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

⁵⁸ *Wisconsin & Arkansas Lumber Co. v. Heegel*, 177 S. W. 29, 118 Ark. 601.

⁵⁹ *Poinsett Lumber & Mfg. Co. v. Traxler*, 175 S. W. 522, 118 Ark. 128.

⁶⁰ *Fonts v. Southern Pac. Co.*, 159 P. 215, 30 Cal. App. 633.

§ 3715(4). Delaware

You are instructed that, where the employment is dangerous it is the duty of the master to warn and instruct his servant as to its dangerous character, if, by reason of inexperience or ignorance the servant is unacquainted with such danger. And even if the servant be experienced, it is the duty of the master to warn him of any special and extraordinary danger connected with the particular employment, if the same was unknown to the servant, and could not be seen or known by the reasonable use of his senses and the exercise of due care.⁶¹

§ 3715(5). Iowa

You are instructed that it is the duty of the master to use reasonable care to warn and apprise the servant of any new or unexpected or unseen danger which may be known to the master and which is unknown to the servant, if he has reasonable ground to believe the same is unknown to the servant, and the same cannot be ascertained by the servant in the exercise of ordinary prudence. If the master sends the servant into a place of danger, which danger is not known or apparent, open, or obvious to the servant, then the servant has a right to rely and believe in the absence of knowledge to the contrary that the master is sending him into a safe place, and he is not required, in the exercise of ordinary care, to go out of his way to search for hidden dangers or inquire of the master as to its safety. If you believe from a preponderance of the evidence that when the plaintiff left the smoke box described in the evidence, and went below to perform other duties, a portion of the rivets holding the parts of said smoke box together were uncut, and that such remaining rivets were cut during his absence and without his knowledge, thus rendering the box unsafe to bear plaintiff's weight thereon, and the said foreman, ———, knowing that plaintiff was ignorant of the fact that said rivets had been cut, or having reasonable grounds for believing him ignorant thereof, sent him to perform a task which required him to intrust himself upon the box in question, without warning him of the danger which he would thus encounter, and plaintiff, acting as a reasonably prudent man under the circumstances, obeyed the order and was injured by the falling of the box, then you will find that defendant was negligent.⁶²

You are instructed that, if you believe from the evidence that defendant's foreman, ———, told plaintiff to go up and adjust the rope without warning him of the danger of getting upon said

⁶¹ *Selninski v. Wilmington Leather Co.*, 83 A. 20, 3 Boyce, 288.

⁶² *Jacobson v. United States Gypsum Co.*, 130 N. W. 122, 150 Iowa, 330.

smoke box in its then condition, yet the plaintiff cannot recover unless you further find that the said ——— knew that plaintiff did not know that all the rivets had been cut, or had reasonable ground for believing that plaintiff did not know such fact. Or if you believe from the evidence that the smoke box in question fell because of pressure applied by plaintiff in such a way as to tend to push the smoke box off of the bracket upon which it was resting, as he was pulling on the hook attached to the rope suspended from the beam above, in an effort to pull the hook down to attach it to the rope plaintiff had adjusted on the smoke box, and you further believe that such source of danger was as open to the observation and knowledge of plaintiff as it was to defendant, then plaintiff cannot recover.⁶³

§ 3715(6). Kentucky

You are instructed that, if you believe from the evidence that the work which the plaintiff was doing brought him into a place of danger from the movement of the traveling crane, then it was the duty of the defendant to exercise ordinary care to avoid injuring him, and that duty included the duties of having a lookout kept for him and to give him reasonable and timely warning of the movement of the crane. If you believe from the evidence that the defendant failed to observe any one or more of those duties, and that by reason of that failure, if there was any, the crane ran upon the plaintiff and he was thereby injured, then the law is for the plaintiff, and you should so find. But unless you so believe from the evidence, then the law is for the defendant, and you should so find.⁶⁴

§ 3715(7). Michigan

You are instructed that, if the boy was in close proximity, where he might get in front of the machine, and it was apparent to defendant and she did not warn him, why, then, it might possibly be carelessness on her part, according as you view the entire situation, what she did, what she was doing, and anything that might engage her attention in taking care of her machine on account of her taking her machine around the tree. All these circumstances you must consider.⁶⁵

The court instructs the jury that it is claimed that the employer was negligent in not warning the plaintiff. There appears to be no evidence in this case that the defendant, or any person working for the defendant, who would be in the position of a vice principal,

⁶³ *Jacobson v. United States Gypsum Co.*, 130 N. W. 122, 150 Iowa, 330.

⁶⁴ *Bradas v. Henry Voght Mach. Co.*, 194 S. W. 1044, 175 Ky. 803.

⁶⁵ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

knew that the plaintiff or his associates were doing the work in the manner in which they were doing it, nor that they would be liable to do it in that way. There is nothing to connect the defendant at all with the improper method or unsafe way in which this work was being done, and it would not be the duty of the employer to warn the plaintiff against a practice which was safe, and which the employer, according to the testimony, would have reason to believe was being followed, and, no knowledge having been brought to the employer, or defendant that the practice followed was unsafe, he could not be under any obligations to warn the plaintiff.⁶⁶

§ 3715(8). Texas

You are instructed that, if you believe that the plaintiff was not familiar with the work that he was performing, and did not understand the danger of his position, if any, and that the loosening of the nut on the U-bolt, if it was loosened, caused the machinery to move, thereby injuring him, and that the plaintiff had not been warned of the danger, if any, and that the defendant was negligent in not having warned him under the circumstances, then in that event you will find for the plaintiff.⁶⁷

§ 3716. Duty as dependent upon knowledge or means of knowledge of servant

§ 3716(1). Arkansas

You are instructed that when the servant, by reason of his youth or inexperience, is not aware of, or does not appreciate, the danger incident to the work he is employed to do, or the place he is engaged to occupy, he does not assume the risks of his employment until the master apprises him of the danger. It is the duty of the master to first give him such instruction and caution as would, in the judgment of men of ordinary minds, understanding, and prudence, be sufficient to enable him to appreciate the danger, and the necessity for the exercise of due caution, in order to do the work safely with proper care on his own part. If, however, the danger was of such a character as to be obvious and apparent to any person of the age and intelligence of the employé, having the use of his faculties, even without previous experience, then the risk of injury from such apparent danger would be one of the risks assumed by him and the master would not be required to give him warning thereof.⁶⁸

⁶⁶ Poirier v. Bartlett Lumber Co., 148 N. W. 750, 182 Mich. 678.

⁶⁷ Texas & P. Ry. Co. v. Bursey (Civ. App.) 192 S. W. 809.

⁶⁸ Holmes v. Bluff City Lumber Co., 133 S. W. 819, 97 Ark. 180.

§ 3716(2). California

The court instructs the jury that, if you find from the evidence in this case that the plaintiff, while working in the clinker pile, knew or could have ascertained by the ordinary use and exercise of his natural senses that the clinkers were hot, I instruct you that defendant was under no duty to inform plaintiff that said clinkers were hot, and defendant is not guilty of negligence in failing to so inform him.⁶⁹

§ 3716(3). Delaware

You are instructed that the duty upon the master to warn and instruct the servant regarding the dangers incident to the servant's employment, is not an absolute and unqualified one. The master is not required to instruct the servant as to those dangers which are matters of common knowledge, or which can be readily seen by common observation. Warning and instruction are not required where it does not appear that the servant could have been told anything that he did not already know. But whether the plaintiff was instructed and warned or not, if he knew the danger to which he was exposed, or in the exercise of reasonable care might have known it, considering his apparent intelligence and experience, then he assumed the risk and would not be entitled to recover.⁷⁰

§ 3716(4). Oklahoma

You are further instructed that as to such dangers as are patent and obvious to a person of ordinary intelligence and experience and that are known to the employé, or that ought to have been known to him in the exercise of ordinary care, the master is under no obligation to warn him against them.⁷¹

§ 3716(5). Texas

You are instructed that, if you believe that the plaintiff fell and was injured while attempting to remove a hand car from the track in front of an approaching train, and if you find that plaintiff and those with him on said hand car discovered said train approaching when it was at a distance from them of ——— or ——— yards, or something like that distance, and that at such distance plaintiff and those with him had ample time in which to remove said hand car from the track before the train reached said point, then you are instructed that defendant cannot be held liable for any failure on the part of any one to give them warning or notice of the approach of said train.⁷²

⁶⁹ *Pre v. Standard Portland Cement Co.*, 100 P. 122, 9 Cal. App. 591.

⁷⁰ *Selninski v. Wilmington Leather Co.*, 83 A. 20, 3 Boyce, 288.

⁷¹ *St. Louis & S. F. R. Co. v. Long*, 187 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

⁷² *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

You are instructed, however, that if at the time of employment an employé knew of the dangers and the extent thereof incident to an occupation and employment in which he is employed, or if while in the service he acquired such knowledge, or in the ordinary discharge of his own duties he must necessarily have acquired such knowledge as to the danger and extent of same, incident to such work, the employé assumes the risk and danger of such work and the employer is not liable, although the employé is not warned or instructed by the employer as to the nature and extent of such danger.⁷³

§ 3717. Duty as dependent on whether servant engages to work generally or to do some specific work

You are instructed that, when a servant engages himself in any specific work, the master has the right to presume that the servant has the knowledge, experience and skill necessary for the performance of the work so undertaken, in a reasonably safe and proper manner, in the absence of knowledge to the contrary. And especially has the master the right so to presume if the servant represents or holds himself out to the employer as experienced in such work.⁷⁴

You are instructed that this rule does not apply when the servant was engaged to work generally, and while so engaged, and without seeking or holding himself out, to be experienced and skilled in a specific and particular work, is sent by the master to perform such specific and particular work. In other words, the phrase "engages himself in any specific work" implies a seeking and acceptance by the servant of some specific and particular kind of work, and is not met by a case where the servant, without his seeking, is sent by the master from one employment to some other and different employment.⁷⁵

§ 3718. Duty with respect to minors and inexperienced employees

§ 3718(1). Alabama

The court charges the jury that it is the duty of a master who knowingly employs a youthful and inexperienced servant and subjects him to the control of another servant, to see that he is not employed in a more dangerous position than that for which he was employed, and to give him such warning of his danger as his youth or inexperience demands.⁷⁶

⁷³ *Missouri Valley Bridge & Iron Co. v. Ballard*, 118 S. W. 93, 53 Tex. Civ. App. 110.

⁷⁴ *Selninski v. Wilmington Leather Co. (Del.)* 83 A. 20, 3 Boyce, 288.

⁷⁵ *Selninski v. Wilmington Leather Co. (Del.)* 83 A. 20, 3 Boyce, 288.

⁷⁶ *Alabama Steel & Wire Co. v. Wrenn*, 34 So. 970, 136 Ala. 475.

§ 3718(2). Arkansas

You are instructed that in this case the only negligence charged against the defendant is that he failed to give the plaintiff proper warning, information, and instructions to enable him to appreciate and use due care to avoid the dangers to which he was exposed by virtue of his occupation. If you find from the evidence that plaintiff by reason of his youth and inexperience was not aware of and did not appreciate the danger to which he was exposed, and that the master or his foreman did not use reasonable care and prudence in warning and instructing him in relation thereto, and the failure to give such warning and instruction was the proximate cause of plaintiff's injury, then you should find for the plaintiff and assess his damages as hereinafter directed.⁷⁷

You are instructed that if defendant, by its authorized agent, ordered plaintiff into a place of danger to aid in disconnecting wires from a pole, and plaintiff by reason of youth and inexperience did not know of and appreciate the danger of the situation, and defendant knew this, or ought in the exercise of ordinary care on its part to have known it, then it was defendant's duty to warn him of his danger, so that, as far as might be by proper care on his part, plaintiff could perform his duty in safety to himself. If the defendant failed in this respect and plaintiff, while exercising due care for his own safety, by such failure suffered the injuries sued for, then plaintiff should recover in this action.⁷⁸

You are instructed that, if defendant's foreman ordered plaintiff into a place of danger, to aid in fixing the belt, and plaintiff by reason of youth and inexperience did not know of and appreciate the danger of the situation, and defendant knew this, or ought in the exercise of ordinary care on its part to have known it, then it was defendant's duty to warn him of his danger, so that, as far as might be by proper care on his part, plaintiff could perform his duty in safety to himself. If the defendant failed in this respect, and plaintiff, while exercising due care for his own safety, by such failure suffered the injuries sued for, then plaintiff should recover in this action.⁷⁹

§ 3718(3). California

You are instructed that where a master employs a servant to do dangerous work, or to do work that must necessarily require him to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance, or want of capacity, may fail to appreciate the danger surrounding him at such work,

⁷⁷ *Holmes v. Bluff City Lumber Co.*, 133 S. W. 819, 97 Ark. 180.

⁷⁸ *North Arkansas Telephone Co. v. Steiner*, 129 S. W. 810, 95 Ark. 275.

⁷⁹ *St. Louis Stave & Lumber Co. v. Sawyers*, 119 S. W. 830, 90 Ark. 473.

it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same without first giving him such full and complete instructions as will enable him to fully and completely comprehend them, and to do the work safely, and with proper care on the servant's part.⁸⁰

§ 3718(4). *Delaware*

You are instructed that, where an unskilled servant is directed by the master to perform dangerous work, with which he is not acquainted and where the dangers are latent—that is, not manifest or apparent—it is the duty of the master to instruct such servant as to his duties and to give warning respecting the danger.⁸¹

You are instructed that, should you be satisfied from the evidence in this case that ——— was ignorant of the duties of a brakeman, and without any instruction or warning, under the orders of the company, was using this rope in uncoupling the yard crane and tender, in the exercise of due care upon his part, and that his death resulted under such circumstances, the defendant would be liable.⁸²

§ 3718(5). *Oregon*

The jury are instructed that, if you should find that the employment of plaintiff around said tank was one involving any peculiar labor, or that there was connected with the same any particular causes of danger of which the plaintiff was ignorant by reason of his inexperience, if you should find that he was inexperienced in said work, it was the duty of the master to instruct him upon those subjects and inform him what it was he needed to be watchful of in the discharge of his duties; and, if the master neglected these things, he is held chargeable for the injuries that result from that neglect. Therefore, if you should find that the work around said tank was dangerous, for the reasons alleged in said complaint, and that plaintiff did not know of said danger, as alleged in the complaint, and that said danger, if there was any, was not obvious, and that the defendant was negligent in not warning him, as alleged in plaintiff's complaint, then he is entitled to recover, even though you should find that plaintiff was injured by the act of his fellow servant, ———.⁸³

§ 3718(6). *Tennessee*

The jury are instructed that, if the proof shows that the plaintiff was an unskilled workman, and that the work of adjusting

⁸⁰ *Clark v. Tulare Lake Dredging Co.*, 112 P. 564, 14 Cal. App. 414.

⁸¹ *Coughlan v. Philadelphia, B. & W. R. Co.*, 67 A. 148, 6 Pennewill, 242.

⁸² *Coughlan v. Philadelphia, B. & W. R. Co.*, 67 A. 148, 6 Pennewill, 242.

⁸³ *Elliff v. Oregon R. & Nav. Co.*, 99 P. 76, 53 Or. 66.

these upright columns with a jack and piece of timber was dangerous, and required a skilled mechanic to perform, and the defendant company knew of these dangers, that the plaintiff had no experience in this kind of work, that he was ignorant of the dangers, and the proper way in which to do it, and if no notice of these dangers was given to the plaintiff, and no instructions given him as to how to do the work, which, if they had been given him and followed, would have prevented the accident; or if wrong instructions were given by the defendant, or by a superior servant, as to the way in which this particular work should have been done, and if plaintiff was injured while doing said work by reason of the negligence of the defendant in failing to warn him of the danger, or give him proper instructions, or by giving him wrong instructions, then the plaintiff would be entitled to recover.⁸⁴

The jury are instructed that, where there are several ways in which to do a particular piece of work, or where there is more than one way in which to do it, the owner has a right to say how the work shall be done, and will not be held responsible in damages for injuries resulting to his workmen, simply because he did not adopt the safest and best way to do the work. But if the master adopts a dangerous and hazardous way of doing the work, when there was a reasonably safe way known to him, and if the master knows of the danger, and the servant does not know of it, it is the duty of the master to inform the servant of the danger; and if the work is dangerous, and requires skill in its performance, and unskilled men are selected to do it, it is the duty of the master to instruct the servant as to the work to be done.⁸⁵

§ 3718(7). Utah

I charge you, gentlemen of the jury, that one who employs a minor to work with dangerous machinery or in dangerous places is bound to anticipate that such minor will exercise only such judgment, discretion, and care as is usual among children of the same age, capacity, and experience under similar circumstances, and is bound to use ordinary care, having regard to the age, capacity, and experience of such minor to protect such minor from dangers incident to the situation in which he is placed; and as a reasonable precaution in the exercise of such care in that behalf, it is the duty of the employer to so instruct such employé concerning the dangers, both latent and obvious, connected with his employment, which dangers, because of the youth or inexperience of such employé, he may not comprehend or appreciate, so that such employé by the exercise of such care as ought to reasonably be ex-

⁸⁴ Tennessee Coal, Iron & R. Co. v. Jarrett, 82 S. W. 224, 111 Tenn. 565.

⁸⁵ Tennessee Coal, Iron & R. Co. v. Jarrett, 82 S. W. 224, 111 Tenn. 565.

pected of one of his age, capacity, and experience, may guard against and avoid injuries arising therefrom. The instruction or warning which such employer is bound to give to such employé must be such as to enable a person of his age, capacity, and experience in the business to intelligently appreciate the nature of the dangers attending the performance of his duties; and, if such employer fails or neglects to discharge any of these duties of instructing and warning such employé, and by reason of such neglect or failure the employé does not understand and appreciate such dangers, and is injured by reason thereof while in the exercise of ordinary care on his part, then such employé cannot be held to have assumed the risk, and the employer would be liable.⁸⁶

§ 3719. Same—Knowledge by master of incapacity of infant

The court instructs the jury that an infant over the age of ——— years is presumed to have the capacity to understand and be sensible of danger, and that, if the plaintiff in this case relies on the incapacity of the deceased to understand and appreciate the danger of the work in which he was engaged, the burden is on the plaintiff to prove such incapacity by a preponderance of the evidence sufficient to satisfy the minds of the jury, and the plaintiff must further prove by a preponderance of the evidence, not only that ———, the deceased, was incapable of understanding and appreciating the danger, but also that such incapacity was known or should have been known by the defendants; and, if the size and appearance of said ——— was such as to indicate that he was a full-grown man, then the defendants would not be charged with constructive notice of such incapacity, and actual notice of the same must be shown to have been given to said defendants.⁸⁷

§ 3720. Duty with respect to elevators and elevator shafts—Duty to warn as to removal of elevator

The court instructs the jury that if you find and believe from the evidence that on or about the ——— day of ———, the defendant was engaged in business in ———, and maintained and carried on its business in a certain warehouse building at ——— street in said city and state; that plaintiff was engaged in said building as the employé of defendant; that defendant used, operated, and controlled in its business in the building above referred to a certain electric power elevator in a certain elevator shaft; that said shaft extended from the basement of said building up through the first floor to the upper floors of said building; that de-

⁸⁶ *Stam v. Ogden Packing & Provision Co.*, 177 P. 218, 53 Utah, 248.

⁸⁷ *Reid v. Medley's Adm'r*, 87 S. E. 616, 118 Va. 462.

defendant failed to exercise ordinary care to provide light for said first floor sufficient to render the same a reasonably safe place in which to work, and failed to employ and maintain in charge of the operation of said elevator on said first floor a competent person who had the proper knowledge of all the parts of the machinery for the working of said elevator, but instructed its various servants and agents in said building to operate and run said elevator in the course of their work in and about said building; and that these servants were not competent persons for operating said elevator, as above set out, and did not have a proper knowledge of the machinery for the working of the same; and that defendant was aware thereof. And if you further find that defendant provided for said elevator shaft on said first floor a certain gate and provided also a rope and hook whereby said gate might be raised and left suspended, and instructed its servants and agents that, when they were upon the upper floors of said building and desired to use said elevator in the course of their work and found said elevator then at some lower floor, they should pull the cable of said elevator and thus draw the same up to the floor where they then stood, and that defendant negligently and carelessly failed to provide any signal reasonably sufficient to give warning of the removal of said elevator to other servants of defendant who might be using said elevator on some other floor. And if you further find and believe from the evidence that on the said day plaintiff in due course of his employment ran said elevator from the fourth floor to the first floor of said building, raised and suspended said gate on said hook, and walked from the elevator into the north room of said first floor for the purpose of carrying certain freight from said first floor to said fourth floor by means of said elevator, that while he was so engaged, if you so believe, the said servants and agents of defendant, in accordance with defendant's directions, as aforesaid, if you find they were so directed, raised said elevator from said first floor to one of said upper floors, that on account thereof the said elevator shaft at said first floor remained open and unguarded, and that by reason of the failure of defendant to exercise ordinary care to provide a signal (if you find such to be the fact) or to instruct its servants and agents in such cases to give a signal sufficient to warn plaintiff of the removal of said elevator, if you so find, defendant's servants and agents failed to give plaintiff a sufficient warning of the removal of said elevator; that plaintiff thereafter returned to said elevator shaft and because of the aforesaid carelessness and negligence of defendant, if you find it was careless and negligent in the respects aforesaid, and as a direct result thereof plaintiff was caused to fall from said first

floor into said elevator shaft and to strike the floor of said basement, and that as a direct result thereof and while he was in the exercise of ordinary care for his own safety, he was injured—then your verdict will be for the plaintiff.⁸⁸

§ 3721. Duty in operation of mines

§ 3721(1). Utah

You are instructed that, if you find by a preponderance of the evidence in this case that, at the time the plaintiff was injured he had no knowledge or notice that coal was then upon the extension chute, and that by the exercise of reasonable care he could not have known such fact, and that the defendants had knowledge of such fact, and, with full opportunity to warn plaintiff of such fact, failed and neglected to so warn him, and should you further find that a reasonably prudent person situated as were the defendants in this case under all of the surrounding circumstances disclosed by the evidence would have given such warning, then your verdict must be in favor of the plaintiff, unless you further find that plaintiff assumed the risk, or was himself guilty of contributory negligence, or that he met with the injuries by him complained of as the result of the negligence of a fellow servant or fellow servants of plaintiff.⁸⁹

§ 3721(2). Virginia

The court tells the jury that if you believe from the evidence that the roof over the working place of plaintiff was dangerous, and that same could have been discovered by plaintiff by the exercise of ordinary care on his part, and you further believe from the evidence that plaintiff failed to use ordinary care, and was injured by reason of such failure, you will find for the defendant. But if you believe from the evidence that plaintiff did use ordinary care, and you further believe from the evidence that it was not the duty of plaintiff to inspect the roof over his working place by sounding the roof with some instrument, and that the danger, if any, was not open and obvious, and that plaintiff did not know of said danger, if any, but the defendant did know of said danger, or could have known of said danger by proper inspection, and that the plaintiff was injured because the defendant failed to warn him of said danger, you will find for the plaintiff, and assess such damages as you believe he is entitled to recover under the evidence.⁹⁰

⁸⁸ *Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998, 202 Mo. App. 660. The court says this instruction is lengthy and awkward, but not fatally bad.

⁸⁹ *Dimmick v. Utah Fuel Co.*, 164 P. 872, 49 Utah, 430. This was not prejudicial to defendant, who was complaining.

⁹⁰ *Darby Coal Mining Co. v. Shoop*, 83 S. E. 412, 116 Va. 848.

§ 3722. Duty with respect to use of explosives

The court instructs the jury that, before using a high dangerous explosive, it is the duty of the master to ascertain and make known to his servants the dangers to be reasonably apprehended from its use, and the proper method of manipulating it with reasonable safety; and the ignorance of the master as to the dangers to be apprehended from its use, or the proper methods of manipulating it, will furnish no excuse when the master, by the exercise of reasonable diligence, could have obtained such knowledge.⁹¹

§ 3723. Care required in blasting operations—Duty to warn as to unexploded charges

The jury are instructed that, if you believe from a preponderance of the evidence that the plaintiff was an employé of ——— and ———, or either of them, and was working at a place where blasting was being done with dynamite, and that on or about ———, the said ——— and ———, or either of them, acting by and through one ———, or other employés, bored a number of holes and placed dynamite therein and attempted to explode the dynamite in all of said holes, and that the dynamite in one or more of said holes failed to explode; and if you further believe from a preponderance of the evidence that while said unexploded dynamite was still in the hole or holes the plaintiff returned to his work at or near the place where such unexploded dynamite was, and that while he was at work at or near the same said dynamite exploded and injured him as alleged in his petition; and if you should further believe from a preponderance of the evidence that the defendants ——— and ———, or either of them, failed to exercise ordinary care to ascertain whether all of said dynamite was exploded, or that they or either of them failed to exercise ordinary care to prevent the plaintiff from returning to said place where said unexploded dynamite was, and that, as the proximate result of such failure to exercise ordinary care in the respects mentioned (if there was such failure), the plaintiff was injured; or if you should believe from a preponderance of the evidence that, while unexploded dynamite was still in said hole or holes, the defendant ——— told the plaintiff in effect that the dynamite was all exploded and directed him to return to work, and that the said plaintiff, acting upon such statement and direction of said ——— (if such statement was made or direction given), returned to work at or near the place where said unexploded dynamite was and that, after he returned and started to work (if he did), the dynamite ex-

⁹¹ *Bertha Zinc Co. v. Martin's Adm'r*, 22 S. E. 869, 93 Va. 791, 70 L. R. A. 999.

ploded and plaintiff was injured as alleged in his petition; and if you should further believe from the evidence that, in so informing plaintiff that all the dynamite was exploded and directing him to go to work (if such statement was made or direction given by him), the said ——— was guilty of negligence, as that term is elsewhere defined in this charge; and should further believe from the evidence that such neglect (if any) was the proximate cause of the plaintiff's injuries (if he was injured)—then in either of said events you will return a verdict for the plaintiff against the defendant or defendants whose negligence you may find and believe from the evidence proximately caused plaintiff's injuries, unless you find for the defendants under other issues submitted to you.⁹²

§ 3724. Warning against danger of flying fragments of steel or iron

The court instructs the jury that, if they believe from the evidence that at the time of the injury complained of to the plaintiff he did not understand and appreciate the danger of fragments of steel or iron flying in his eyes from the passing of the train mentioned in the evidence, through inexperience or from any other cause, and that the defendant, its officers or agents superior in authority to plaintiff, knew this, or by the exercise of ordinary care ought to have known it, it was their duty to have warned and instructed him of the danger, if any, so as to make him fully understand and appreciate the danger, if any, and if the jury believe from the evidence that the defendant, its officers or agents superior in authority to plaintiff, failed to so warn or instruct him of the danger, if any, and that plaintiff, whilst exercising ordinary care for his own safety, was injured by a fragment of metal flying in his eye, thrown from the passing train mentioned in the evidence, then the law is for the plaintiff, and the jury should so find; and, unless you so believe, you ought to find for the defendant, unless you find for the plaintiff under instruction No. ———.⁹³

§ 3725. Warning against rolling stones

The jury are instructed that, if the defendant placed a gang of hands on the side or bench of the side of the embankment above the plaintiff and other laborers, who were breaking up stones beneath, and if he directed the gang of hands to clear the place of all surface stones in order to prepare for another blast by dynamite, and if you believe from the evidence that the stones when so loosened would roll down the embankment to the level where the hands were at work, and the defendant knew of this fact, it would be the duty

⁹² Farmers' Gin & Milling Co. v. Jones (Tex. Civ. App.) 147 S. W. 668.

⁹³ Louisville & N. R. Co. v. Long, 172 Ky. 436, 189 S. W. 435.

of the defendant to see to it that sufficient warning or notice was given to the laborers below that a stone was going to be loosened, to enable them to escape to a place of safety, and failure to do this would be negligence; and if the jury shall find this case to be as above, and that defendant failed to give the warning of the removal of the stones for a sufficient time to enable the plaintiff to escape, the jury should answer the first issue "Yes"; if the jury should not so find, they will answer the first issue "No."⁹⁴

6. *Assumption of Risk*

§ 3726. Risks naturally and ordinarily incident to employment

§ 3726(1). *United States*

The jury are instructed that assumption of risk means that one who enters a dangerous employment assumes the hazards which attend that employment, which ordinary foresight and reasonable prudence cannot anticipate, and yet are likely to occur.⁹⁵

§ 3726(2). *Alabama*

The court charges the jury that the plaintiff, in accepting employment from the defendant, assumed all the risk necessarily incident to the work in which he was engaged, and the defendant in this case was not an insurer of the absolute safety of the plaintiff.⁹⁶

The court instructs the jury that, if you believe from the evidence that ——— stepped upon the footboard of a moving engine, and that he immediately slipped and fell under the footboard, and that thereby he received the fracture of the skull producing his death, then the defendant is not liable in this action, and your verdict should therefore be for the defendant.⁹⁷

The court charges the jury that the employer does not insure his employes against risks, and risks incidental to the business the employer does not assume, and these risks must be borne by the employe himself.⁹⁸

§ 3726(3). *Arkansas*

The court instructs the jury that when a man enters the service of another, he is deemed in law to have assumed all the risks of injury which are ordinarily incident to the employment in which he is engaged; and if he is injured by an accident which is ordinarily incident, and liable to occur in such service, then the mas-

⁹⁴ *Turrentine v. Wellington*, 48 S. E. 739, 136 N. C. 308.

⁹⁵ *Puget Sound Electric Ry. v. Harigan* (C. C. A. Wash.) 176 F. 488, 100 O. C. A. 104.

⁹⁶ *Jones v. Union Foundry Co.*, 55 So. 153, 171 Ala. 225.

⁹⁷ *Louisville & N. R. Co. v. Young*, 168 Ala. 551, 53 So. 213.

⁹⁸ *Williams v. Anniston Electric & Gas Co.*, 51 So. 385, 164 Ala. 84.

ter is not liable. But such servant does not assume the risk of any injury which may occur from the negligence of the master or of his fellow servants.⁹⁹

§ 3726(4). California

You are instructed that an employer is not bound or under obligation to indemnify his employes for losses suffered by said employes in consequence of the ordinary risks of the business in which they are employed; and that if you believe from the evidence that the injuries sustained by said — were sustained in consequence of the ordinary risks of the business in which he was employed at the time of his injuries, there is no obligation on the part of the defendant to indemnify said — or his heirs at law for the injuries sustained by said —, and your verdict must be for the defendant.¹

You are instructed that an employe assumes all the ordinary risks of his employment, and if he willfully encounters dangers that are known to him, or are notorious, the master is not responsible.²

I instruct you that by the term "risks of the business" is meant such risks as the employe is as likely to know as the master, and which are the natural and ordinary incidents of the work the employe agrees to do, and which are liable to happen in the performance of such work.³

§ 3726(5): Delaware

You are instructed that a servant assumes all the ordinary and apparent risks of his employment, however dangerous such employment may be. He also assumes all risk and danger of which he has knowledge, or might have knowledge by the reasonable exercise of his faculties.⁴

§ 3726(6). Indiana

I instruct you that, if the employment upon which the plaintiff's decedent entered for the defendant as one of its trackmen was one involving hazard or danger to the decedent from the operation of trains upon defendant's railroad, then, as one of the terms of his employment, the decedent will be held in law to have assumed and taken upon himself the risk and hazard of injury to himself from those dangers that were ordinarily and usually incident to the employment in which he was engaged. Among the

⁹⁹ *St. Louis, I. M. & S. Ry. Co. v. Coke*, 175 S. W. 1177, 118 Ark. 49.

¹ *Polkinghorn v. Riverside Portland Cement Co.*, 142 P. 140, 24 Cal. App. 615.

² *Rogers v. Ponet*, 132 P. 851, 21 Cal. App. 577.

³ *Pre v. Standard Portland Cement Co.*, 100 P. 122, 9 Cal. App. 591.

⁴ *Coughlan v. Philadelphia, B. & W. R. Co.*, 67 A. 148, 6 Pennewill, 242.

risks which he so assumed was the risk of injury by being struck by trains passing the place of his work on said railroad in either direction without notice and at any reasonable rate of speed, if said trains were operated in an ordinarily prudent manner.⁵

You are instructed that the defendant owed the decedent no duty to run its west-bound train on its north main track nor on any particular schedule. It had the right to operate trains in either direction upon either track, and the decedent had no right to assume that the west-bound train would be operated upon the north main track. This would be true although the defendant usually and ordinarily did run its west-bound trains on said north main track.⁶

You are instructed that, if the decedent knew that the defendant was liable at any time to run a west-bound train over the east-bound track, then he had no right to presume that the defendant would not so run a west-bound train over the east-bound track; and if he had such knowledge he would assume the risk of injury occasioned by the running of such train westwardly on the east-bound track in a reasonably careful manner; yet, under such circumstances, he would not assume the risk of the running of such train westwardly over the east-bound track in a negligent and careless manner.⁷

§ 3726(7). Iowa

You are instructed that, where the servant is engaged in work the very nature of which contemplates the rendering of the place where he is working unsafe, then he assumes the hazard arising from the unsafety resulting as an incident of the work undertaken.⁸

§ 3726(8). Kentucky

You are further instructed that when plaintiff's decedent entered the service of the defendant he assumed all the ordinary risks incident to his employment as trapper; and if you shall believe from the evidence that his death was caused by the ordinary risks of the employment, which he had assumed, and not by reason of the negligence of the defendant as set out in instruction No. — —, then the law is for the defendant and you should so find.⁹

§ 3726(9). Oklahoma

You are instructed, gentlemen of the jury, that under the law every employé assumes the risk and hazard of injury resulting

⁵ *Pennsylvania Co. v. Stalker*, 119 N. E. 163, 67 Ind. App. 329.

⁶ *Pennsylvania Co. v. Stalker*, 119 N. E. 163, 67 Ind. App. 329.

⁷ *Pennsylvania Co. v. Stalker*, 119 N. E. 163, 67 Ind. App. 329.

⁸ *Jacobson v. United States Gypsum Co.*, 130 N. W. 122, 150 Iowa, 330.

⁹ *Linard's Adm'r v. Interstate Coal Co.*, 169 S. W. 1006, 160 Ky. 598.

from the ordinary and obvious dangers incident to his employment. And you are instructed, gentlemen of the jury, if you believe from the evidence in this case that the injury to plaintiff was the result of mere accident and misfortune and a part of the risk and hazard incident to the duties to be performed by this plaintiff, and was occasioned without fault or negligence on the part of this defendant, your verdict should be for the defendant.¹⁰

§ 3726(10). Texas

The jury are instructed that an employé assumes such risks as are ordinarily incident to the services he undertakes and such others as he knows of, or by observation in the discharge of his duties would have known of. But the negligence of the employer is not one of the assumed risks, unless the employé knows of such increased risk, or by ordinary care in the discharge of his duties would have known of it. If, with this explanation, the jury believe that the alleged defect or danger complained of by him with reference to the jointer was a risk assumed by him, or, in other words, that such defect or danger was a risk ordinarily incident to his services or one of which he knew, of by the exercise of ordinary care in the discharge of his duties would have known, then he cannot recover. But in determining this matter you may take into consideration whether the plaintiff was experienced or inexperienced in the use of the jointer machine.¹¹

The jury are instructed that assumed risk is the risk ordinarily incident to the employment in which one is engaged, and a servant in the employ of his master assumes the risks arising from defects which are known to him, or which are obvious or discernible by ordinary observation. And in this connection you are instructed that the plaintiff, while in the employ of the defendant telephone company assumed, as a matter of law, all of the risks of injury that were ordinarily incident to the employment in which he was engaged, and if you believe from the evidence that his injuries, if any, grew out of, or were occasioned by, a risk that was ordinarily incident to his employment, then your verdict should be for the defendants. But you are further instructed in this connection that by the use of the expression, "a risk ordinarily incident to the employment," is meant a risk of injury that does not arise or grow out of an act of negligence on the part of the defendants; and that when a risk is created by an act of negligence on the part of the defendants, this is not a risk "ordinarily incident" to the employment.¹²

¹⁰ Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132, 60 Okl. 249.

¹¹ Wichita Falls Motor Co. v. Bridge (Civ. App.) 158 S. W. 1161.

¹² Southwestern Telegraph & Telephone Co. v. Sanders (Civ. App.) 138 S. W. 1181.

You are instructed that, when the plaintiff accepted the position of defendant in which he was working at the time he was injured, he assumed the risks ordinarily incident to the particular position, and that he also assumed that he had the capacity to understand the nature and extent of the service and the ability to perform it; and, if you find from the evidence that the plaintiff was injured without the risk being increased after he had accepted the position he was in at the time he was injured, you will find for the defendant.¹³

§ 3726(11). Utah

The defendant has pleaded that the plaintiff assumed the risk of being injured by the accident in question. Upon this point I charge you that if you believe from the evidence that the peril of falling into the chute or excavation referred to in the evidence was a peril incident to the employment, and was not produced by a want of ordinary care on the part of the defendant, then it is a risk assumed by the plaintiff, and he cannot recover. But if you believe from the evidence that the danger of suffering such an accident was not incident to his employment, and could have been guarded against by the exercise of ordinary care on the part of the defendant, then plaintiff did not assume the risk of such an accident, and if he was injured without fault on his part he is entitled to recover.¹⁴

§ 3727. Open, obvious, or known dangers

§ 3727(1). Arkansas

You are instructed that, if you find that plaintiff had been fully instructed in regard to the danger incident to his employment, and by reason of such warning, or if he otherwise knew and appreciated the danger incident thereto, then he assumed the risk himself and cannot recover.¹⁵

§ 3727(2). California

The court instructs the jury that plaintiff, in working upon said clinker pile, assumed not alone all the risks that he knew, but also all the risks he could have ascertained by the ordinary exercise and use of his natural senses.¹⁶

The court instructs the jury that if you find, from the evidence in this case, that the plaintiff, while working in the clinker pile, knew or could have ascertained by the ordinary use and exercise of his natural senses that the clinkers were hot and would burn

¹³ Gulf, C. & S. F. Ry. Co. v. Kiziah, 23 S. W. 578, 86 Tex. 81.

¹⁴ Downey v. Gemini Mining Co., 68 P. 414, 24 Utah, 431, 91 Am. St. Rep. 798.

¹⁵ Holmes v. Bluff City Lumber Co., 133 S. W. 819, 97 Ark. 180.

¹⁶ Pre v. Standard Portland Cement Co., 100 P. 122, 9 Cal. App. 591.

him if he came in contact with them, then I charge you that plaintiff, in accepting employment to work on said clinker pile, assumed the risk of being burned by said clinkers, and your verdict should be for the defendant.¹⁷

§ 3727(3). Iowa

You are instructed that, if you find from the evidence that plaintiff was in as good a situation to know and appreciate the dangers involved in the work he was doing as was the defendant, and he continued in the work without any objection or protest, then and in that event he assumed the risk arising from doing the work in the way and under the conditions in which it was being done at the time of the accident. Or, if you find from the evidence that at the time plaintiff went upon the smoke box the last time to readjust the rope he either knew or by the exercise of ordinary care could have known that ——— had cut all the rivets, then and in that event he assumed all the risk incident to going upon the smoke box and readjusting the rope after all the rivets were cut.¹⁸

You are instructed that, in determining what the plaintiff did know and appreciate, or should have known and appreciated and the danger confronting him, and in determining what the foreman did know, or as a reasonably prudent man should have known or believed, you should consider all the facts and circumstances surrounding the parties as disclosed by the evidence.¹⁹

§ 3727(4). Michigan

The jury are instructed that it was the plaintiff's duty to exercise care to avoid injury. He was under as great obligation to provide for his own safety from dangers known to him or discoverable by ordinary care on his part as the defendant was to provide for him. It was his duty to learn the danger. He could not go blindly to his work where danger existed. He was bound to inform himself and observe and take such knowledge of danger as could have been obtained by observation. If he failed to do so, the risk was his own. And, although you find that the saw and table referred to were improperly constructed or adjusted, your verdict must be for the defendant, unless you find by a preponderance of the evidence that such defective construction or adjustment would not, by ordinary, careful observation, have been discovered.²⁰

You are instructed that, if you find that, by the exercise of diligence on his part, plaintiff himself should have discovered the

¹⁷ *Pre v. Standard Portland Cement Co.*, 100 P. 122, 9 Cal. App. 591.

¹⁸ *Jacobson v. United States Gypsum Co.*, 130 N. W. 122, 150 Iowa, 330.

¹⁹ *Jacobson v. United States Gypsum Co.*, 130 N. W. 122, 150 Iowa, 330.

²⁰ *Chilson v. Lansing Wagon Works*, 87 N. W. 79, 128 Mich. 43.

condition of the premises at that time (in other words, if his knowledge was such knowledge as the company had, or you might find ought to have had), then it was one of the risks that he took upon himself, because, while it was not a risk, perhaps, that might have been originally embraced in his contract with the company, yet if plaintiff knew, or might have known from looking upon the ground at that time, of the existence of the danger, then, and under those circumstances, the company would not be liable, no matter what you may find upon the proposition with reference to which I have just spoken.²¹

§ 3727(5). *Missouri*

The court instructs the jury that it is the duty of the master to supply to his servants reasonably safe and suitable tools and appliances to enable his servants to discharge their duties with reasonable safety. This duty of the master is discharged if, in the selection of such tools and appliances, it exercises the care of an ordinarily prudent person similarly situated. He is not an insurer of the safety of his servant. The servant assumes all the ordinary and usual risks attending his employment, and if he uses the tools and appliances furnished by the master, knowing them to be dangerous or unsafe for use in the purpose for which they are intended, then the law regards the servant's so doing as a voluntary assumption by him of the increased dangers and risks occasioned by the use of such defective tools and appliances. Hence the court instructs you that, even if you find from the evidence that the plaintiff was injured by reason of the hammer breaking and a piece thereof flying into his eye, yet if you also find and believe from the evidence that said hammer had broken before said accident and injury, and the plaintiff knew this fact, and that he was fully aware of the danger arising from the use of said hammer, then the continuance of the use of said hammer was a voluntary assumption by him of the increased danger and risk, and he cannot recover.²²

§ 3727(6). *Nebraska*

The jury are instructed that, if you find from a preponderance of the evidence that it was dangerous to pour caustic soda into the cylinder while it was in motion, and that this was known to the plaintiff, or that by the exercise of reasonable care on his part he ought to have known that it was dangerous, and with this knowledge he poured the solution in the cylinder while it was in motion at the time he was injured, then it would be your duty to find a verdict for the defendants in the case.²³

²¹ *Balhoff v. Michigan Cent. R. Co.*,
65 N. W. 592, 106 Mich. 606.

²² *Duerst v. St. Louis Stamping Co.*,
63 S. W. 827, 163 Mo. 607.

²³ *Shannon v. Swift & Co.*, 153 N.
W. 505, 98 Neb. 442.

§ 3727(7). North Dakota

You are instructed that the plaintiff assumed the risks naturally and ordinarily incident to the work in which he was engaged at the time of the accident and in the course of his employment. I charge you that he likewise assumed such risks connected with the method of doing the work in the manner in which it was being done at the time he was injured as he knew and appreciated, or in the exercise of ordinary care should have known and appreciated. The plaintiff was required to use reasonable care for his own safety. The law will not permit him to say he did not see that which was obvious, and that he did not know or appreciate things which should be known and appreciated by persons of ordinary intelligence. The plaintiff cannot be permitted to shut his eyes and say he did not see, nor to close his ears and say he did not hear; but I charge you that the plaintiff herein, by his contract of employment with the defendant, did not assume the risks arising from the want of sufficient and skilled labor or from defective machinery or other instruments with which he had to work.²⁴

§ 3727(8). Oklahoma

You are further instructed that if you find that from the evidence in this case that the pit alleged was open, and that the location of the same was known to the deceased, and that said pit was an instrumentality of his employment, then you are instructed that the deceased assumed the risk of the danger connected with said open pit.²⁵

You are instructed that when the plaintiff selected the chain which he was using at the time of the accident, he was charged in law with the assumption of the risk of the injury by reason of all defects therein that were open and obvious to a man of ordinary prudence in a like situation; therefore, if you find that said injuries received by him, if any, were directly caused by risks from said obvious defects of said chain, if any, you are instructed the plaintiff is not entitled to recover any damages because of injuries caused thereby.²⁶

§ 3727(9). Texas

You are instructed that the plaintiff had a right to assume that the building in which he was put to work was safe, and he was not required to inspect the same to ascertain if it were safe, before entering upon his work therein; but if said building fell and injured him by reason of defects therein, and if said defects were

²⁴ *Wylde v. Patterson*, 153 N. W. 630, 31 N. D. 282.

²⁵ *Lusk v. Bandy*, 184 P. 144, 76 Okl. 108.

²⁶ *Dickinson v. Whitaker*, 182 P. 901, 75 Okl. 248.

known to him, or were open and obvious (that is, patent to the view of a person of ordinary prudence, so that in the discharge of his duties he must have known of them), he cannot recover, and if you so believe from the evidence you will find for the defendant.²⁷

You are further instructed that if you believe from the evidence that, when said ——— stepped into said shaft, there was sufficient light in said shaft to render the danger of so doing patent and open to the common observation of persons possessing the experience and discretion to appreciate such a danger, which you believe from the evidence said ——— possessed at the time, then you will return a verdict in favor of the defendant.²⁸

You are instructed that, if the danger to be expected from the caving of the bank was open to the observation of plaintiff, as it was to the foreman, ———, then plaintiff cannot recover, because in such case plaintiff assumed the risk of being injured by the caving of the bank.²⁹

§ 3727(10). Virginia

The court instructs the jury that an employé who knows the unsafe conditions of a place in which he is working, or who by the exercise of ordinary care might know the same, is not compelled to continue his work, but if he does go on with his work in such place under such conditions, he assumes such risks as are ordinarily incident to the service in which he is engaged, and also such risks as become known to him during the progress of the work, or which might have been ascertained by him by the exercise of ordinary care.³⁰

§ 3727(11). Washington

The court instructs the jury that, when the parties do not stand upon an equal footing—that is, where the danger of the place is not obvious and apparent to the servant, or, by the exercise of ordinary care and prudence on his part, would not have become apparent—then the servant has a right to assume that the master has furnished him with a safe place in which to work. But where the dangers incident to the employment are alike open and obvious to the master and servant, or by the exercise of ordinary care and prudence could have been seen and noticed by the servant, then the parties are upon an equality, and the servant assumes the risk, and the master is not liable for the injury to the servant resulting therefrom.³¹

²⁷ Decatur Cotton Seed Oil Co. v. Belew (Civ. App.) 178 S. W. 607.

²⁸ Swift & Co. v. Martine, 117 S. W. 209, 53 Tex. Civ. App. 475.

²⁹ Texas & P. Ry. Co. v. French, 23 S. W. 642, 86 Tex. 96.

³⁰ E. I. Du Pont de Nemours & Co. v. Hipp, 96 S. E. 280, 123 Va. 49.

³¹ Harris v. Brown's Bay Logging Co., 106 P. 152, 57 Wash. 8.

§ 3727(12). *Wisconsin*

The jury are instructed that, if you find that the nearness of this overhead steam pipe to the top of a box car passing under it was a danger to which the plaintiff was exposed in the performance of his duty while braking, and that it was a danger which was known and comprehended by him, or was such an open or obvious danger as that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable and ordinary care to have known and appreciated it, then the law is that the plaintiff assumed the risk of such danger, and that he cannot recover.³²

§ 3728. Same—Risk of customary dangerous method of work

§ 3728(1). *United States*

The jury are instructed that if, while ——— was working in the yard, it was the general and uniform custom to kick cars down to a fieldman, so called, without giving him any notice or warning, and ——— was acting as fieldman, and cars were kicked down to him without giving him notice or warning, and he remained working in the yard while this custom or practice was observed, there can be no recovery for any injury done him because of the kicking of cars to him without giving notice or warning that it was to be done.³³

§ 3728(2). *Texas*

The jury are instructed that, if it was the custom of defendant to make a flying switch with a car on a dark night, when its employes were at work on or near the track over which it was propelled, at the rate of speed of this one, without warning or having a light or lookout upon it, and if plaintiff knew such custom, and if an ordinarily prudent person would under such circumstances have known that it was dangerous to operate the car in that manner, he cannot recover.³⁴

§ 3729. Same—Risks arising in building construction

The court instructs the jury that if they believe from the evidence that the plaintiff had been working on that part of the building where the injury occurred, that in the meanwhile the interior framework of the building had been freshly painted, and that the rods on which the scaffold is alleged to have rested were slippery from the paint, that he knew, or that he was charged with the knowledge, of the danger of using such scaffold under such condi-

³² *Renne v. United States Leather Co.*, 83 N. W. 473, 107 Wis. 305.

³³ *Chicago, M. & St. P. Ry. Co. v. Voelker* (C. C. A. Iowa) 129 F. 522, 65 C. C. A. 226, 70 L. R. A. 264.

³⁴ *Galveston, H. & S. A. Ry. Co. v. Fendleton*, 70 S. W. 996, 30 Tex. Civ. App. 431.

tions, and that while the plaintiff was working on the scaffold, or while he was preparing to move the same, the scaffold slipped on the rods and fell or caused the plaintiff to fall, then under such circumstances, if the jury believe that as a result of the painting of such rods the plaintiff was injured, the defendant is not liable and the plaintiff cannot recover in this action.³⁵

The court instructs the jury that the defendant is not liable for the injury he sustained if the injury was due to a risk of which the plaintiff knew, or by the exercise of ordinary care might have known; therefore, if the jury believe from the evidence that the plaintiff knew, or by the exercise of ordinary care might have known, that the rods on which the top timber of the scaffold on which he was working rested were freshly painted and made slippery by the fresh paint, he assumed the risk of the top timber slipping off the rods, and he cannot recover.³⁶

§ 3730. Same—Risks from machinery

§ 3730(1). Delaware

You are instructed that, if the defendant furnished for plaintiff a machine, reasonably safe and adapted to the purposes for which it was used, and the dangers incident to the operation of the machine were of a patent character, and obvious to the mind of a person of average intelligence, judgment and understanding, and the plaintiff possessed such average intelligence, judgment and understanding, or had knowledge of such dangers, then he assumed all the risks incident to the work he was engaged in at the time of his injuries, and the defendant would not be liable. The plaintiff was bound to see any patent and obvious defects of the machine with which he was working at the time he was injured, and he assumed all patent and obvious risks incident to his employment.³⁷

You are instructed that if the plaintiff was of such age, apparent intelligence, experience, and maturity of judgment that he could have known of the danger incurred by him while working at the machine with the hood in the condition testified to, he took upon himself and assumed all the patent and obvious risks incident to his employment. And if all the perils and risks incident to the use of the fleshing machine upon which the plaintiff was injured, were open and obvious, and could be readily observed by a person possessing average intelligence and judgment, by the

³⁵ E. I. Du Pont de Nemours & Co. v. Hipp, 96 S. E. 280, 123 Va. 49.

³⁶ E. I. Du Pont de Nemours & Co. v. Hipp, 96 S. E. 280, 123 Va. 49.

³⁷ Seininski v. Wilmington Leather Co., 83 A. 20, 3 Boyce, 288.

ordinary exercise of his senses, then the plaintiff assumed the risks and cannot recover.³⁸

§ 3730(2). *Missouri*

You are instructed that if you believe from the evidence that the machine operated by plaintiff was defective, and by reason of such defect the die head became liable to descend without pressure upon the pedal which tripped it, and that the defendant made such repairs as might have been reasonably expected and designed to correct such defective operation, and that the plaintiff had the experience of several years in the adjustment and operation of said machine, and knew and appreciated the danger attending the descent of the die head, and independently of the pedal, while he was operating the machine, and that he had equal opportunity with the defendant to discover the defective working of said machine, and if you further find that plaintiff learned it was again working defectively, then you will find the issues for the defendant, unless you further find that the plaintiff gave notice to defendant that the machine was again out of repair, and defendant did not repair it.³⁹

§ 3730(3). *Washington*

In relation to the affirmative defense of the defendant company, the court instructs you that an employé when he engages in a particular employment, is presumed to do so with a full knowledge of and the taking of that risk and its ordinary hazards, and that he assumes the risk of all dangers which are open and obvious. It would therefore be the duty of the plaintiff to look at the machinery about which he was employed, and to apprise himself of any danger afforded by it, and which he could have discovered, or ought to have discovered, by a proper examination thereof, or by the use of his sight and other senses; and if he failed during the course of his employment, and while engaged in the use of the grindstone, to apprise himself of the dangers which he ought to have seen, then the plaintiff was not in the exercise of ordinary care and prudence, and it is your duty so to find. The plaintiff assumes the risk of dangers which are open and apparent to his observation. If you find that the defendant company was negligent in maintaining a defective grindstone, but that plaintiff's injury was due to one of those dangers which the law holds him to have assumed, then you should return a verdict for the defendant company.⁴⁰

³⁸ *Selninski v. Wilmington Leather Co.*, 83 A. 20, 8 Boyce, 288.

³⁹ *Shimp v. Woods-Evertz Stove Co.*, 158 S. W. 864, 173 Mo. App. 423.

⁴⁰ *Opsahl v. Northern Pac. Ry. Co.*, 138 P. 681, 78 Wash. 197. This instruction was as favorable to defendant as it could ask.

§ 3730(4). Wisconsin

The jury are instructed that, if the plaintiff knew that there was a rapidly revolving knife or knives at the edge of the lower hopper, that his hand was liable to come in contact therewith in attempting to take hold of the hopper, he must be held to have appreciated the danger and assumed the risk in attempting to do the work, although by the express direction of the defendant.⁴¹

§ 3731. Same—Risk of handling electric wires with naked hands

The court instructs the jury that if they believe from the evidence that the plaintiff was an experienced lineman, working about highly charged wires of the defendant daily and knew how to handle same, and that the foreman, ———, on the occasion of the injury, instructed him to go up the pole, and kill the wire, without any assurance about the current, then they must find for the defendant.⁴²

§ 3732. Same—Risks from railroad operations

§ 3732(1). Iowa

The court instructs the jury that, in addition to a general denial defendant has pleaded that the plaintiff was an experienced fireman in its service, and had knowledge of the construction and equipment of its engines and tenders, and of the manner in which the coal was loaded and piled on said tender, and also had knowledge of the construction and condition of the track over which he was riding at the time of receiving the alleged injuries, and that he remained in its employ without complaint and with knowledge of all these conditions, and assumed whatever risk there was to him arising therefrom. You are instructed that if you find from the evidence in this case that plaintiff was an experienced fireman, and had knowledge, or could have known in the exercise of reasonable care, of the manner in which the tender was constructed and the manner in which it was filled with coal, and that his duties as fireman on said locomotive and tender at times required him to pass over the coal in said tender while the train was moving and measure the water in the tank in said tender, and that he had knowledge, or could have known in the exercise of reasonable care, of the condition of the track and the curves in the track, and appreciated the danger incident to the performance of his duties in connection with the measuring of said water in said tank, and that with such knowledge on his part, and such appreciation of the danger to him in the performance of his duties, he made no complaint with reference to said matters, but continued in the employ of the defendant and

⁴¹ *Horn v. La Crosse Box Co.*, 111 N. W. 522, 131 Wis. 384.

⁴² *Lynchburg Traction & Light Co. v. Gordon*, 96 S. E. 195, 123 Va. 198.

in the performance of said duties, under the conditions with which he was familiar, then and in that event plaintiff, by so continuing in said employment under such circumstances with such knowledge and appreciation of the dangers to him, assumed the risk of danger to himself in continuing in such employment under such circumstances, and in that event he would not be entitled to recover in this case on account of any alleged negligence of the defendant of which he had such prior knowledge and the danger of which he appreciated. But there would be no assumption of risk involved in a charge of negligence of which plaintiff had no knowledge or information, or the dangers of which he did not appreciate prior to the alleged injury. The burden of establishing this defense so pleaded by defendant is upon the defendant, and said defense must be established by a preponderance of the evidence.⁴³

§ 3732(2). Missouri

You are instructed that if plaintiff knew that the car on which he was riding was a bad order car, and knew that the car was marked "bad order," because the load of piling thereon had shifted to the west, and that by reason thereof it was dangerous or liable to shift again if the train was stopped in the usual and ordinary manner in handling cars in said yard, and, notwithstanding such knowledge, he attempted to ride on said car by standing on the boxing and holding to a stake, from which the piling had separated, and that, when the train stopped, his injury was caused by shifting of the load of piling to the east, then you are instructed that he cannot recover in this case, and your verdict must be for the defendant.⁴⁴

§ 3732(3). Oklahoma

The court instructs the jury that, if you believe from the evidence in this case that the proximity of said platform to the track and to the cars as they pass was plain and apparent, and the liability to injury therefrom was manifest, and that deceased knew of such proximity or by the exercise of care to avoid injury to himself might have known it, and with such knowledge or opportunity of knowledge remained in defendant's employ and continued to work in the vicinity thereof without objection or protest and without promise of alteration of the platform, then plaintiff cannot recover in this action.⁴⁵

⁴³ *Scott v. Chicago, R. I. & P. Ry. Co.*, 141 N. W. 1065, 160 Iowa, 306.

⁴⁴ *Hill v. Kansas City Southern Ry. Co.*, 170 S. W. 432, 182 Mo. App. 380.

⁴⁵ *Chicago, R. I. & P. Ry. Co. v. Rogers*, 159 P. 1132, 60 Okl. 249.

§ 3733. Same—Risks incident to coupling cars

§ 3733(1). Delaware

You are instructed that the defendant would not be liable if the danger of the coupling was apparent to a person of ordinary intelligence and care. If ——— at the time of the accident was using the rope and making the coupling without any order to do so, or contrary to the orders given by the company, there can be no recovery. In such case, if ——— saw fit voluntarily to use a dangerous rope and appliances without the order of the defendant, or contrary to the order of the defendant, he would assume all the risks of such misconduct and must take the consequences.⁴⁶

§ 3733(2). Texas

You are instructed that, on the other hand, it was the duty of plaintiff, as a brakeman in the service of the defendant company, to have acquainted himself with the general duties of the position, and he assumed, at his peril, all the risks and dangers naturally and usually incident to his employment as such brakeman, including the risks and dangers of such defect, if any, of the approaches to the road for coupling purposes as were reasonably open to his ordinary inspection and view under the circumstances; and if the testimony shows that there was a hole or excavation as alleged, and the plaintiff either knew of it, or by the use of ordinary care and precaution could have known it, then the law presumes that he assumed the risk incident to the same, and under such circumstances he could not, and is not entitled to, recover damages for injuries received or sustained in making or attempting to couple defendant's cars.⁴⁷

§ 3734. Same—Risks assumed by section men on railroad

You are instructed that this man was one of a number of men who were employed as section men on the railroad. They were engaged in repairing the track, taking out rails, putting in new ones, taking out cross-ties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad track, while the trains were being operated in the usual way—manifestly, a place of danger. A railroad does not suspend the operations of its trains until the track can be put in order, and the proposition to these section men was, "We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourselves to avoid being injured by the trains," and the section men accept the employment upon those terms, and, if an accident occurs and they

⁴⁶ *Coughlan v. Philadelphia, B. & W. R. Co.*, 67 A. 148, 6 Pennewill, 242.

⁴⁷ *Missouri, K. & T. Ry. Co. of Texas v. Kirkland*, 32 S. W. 588, 11 Tex. Civ. App. 523.

are hurt while the trains are being managed and operated in the usual and ordinary way, they can have no just ground of complaint against the railroad, it is not the fault of the railway company.⁴⁸

§ 3735. Same—Risks from mining operations

§ 3735(1). United States

The jury are instructed that one who continues to change the condition of a place in which he works assumes the risk of the changes which are brought about by himself. If the rock fell from the place which ——— himself by his own work rendered dangerous, his widow cannot recover, and that would be so regardless of whether he knew at the time that it was dangerous. The defendant, in addition to introducing evidence to show that the rock fell from the roof in the place where the deceased was working, also offered evidence to show that his attention had been directed to this particular rock, that he was told it was dangerous—it was liable to fall—by more than one witness who testified, and that he ignored that warning. If you believe that to be true, then the plaintiff cannot recover, even though you may find that the rock fell out of the roof of the entry, because in that event he had been warned of this hanging rock and told that it might fall at any time. His attention was directly attracted to it; then he thereby assumed the risk of going under it, whether it was in the place which he was working or whether it was in the main entry. If, however, the rock fell from the roof of the main entry, a place which the law required the defendant to make safe for those passing through it, and the deceased had no knowledge of its unsafe condition and had not been warned of any danger at that point, then the defendant was negligent, and if that negligence in failing to so maintain the passageway in a safe condition was the cause of the death of ———, then the plaintiff has made out a case, and she is entitled to a verdict at your hands for such damages as you believe she has suffered, not exceeding ———.⁴⁹

§ 3735(2). Alabama

The court charges the jury that, if you are reasonably satisfied from the evidence that ——— had actual knowledge of the existing conditions at the time in the mine where he was hurt that would have suggested to a man of ordinary intelligence the perils of the situation, and would have suggested to a man of ordinary intelligence the danger of working under a roof, where the props had been blown out, and where the roof had not been sounded or

⁴⁸ *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A. Ohio) 144 F. 56, 75 C. C. A. 214.

⁴⁹ *Pearson v. Rocky Mountain Fuel Co.* (C. C. A. Colo.) 219 F. 496, 135 C. C. A. 208.

rock quarried, then I charge you that if he did work under such roof with such knowledge, and under such circumstances, and as a proximate result thereof was killed, this plaintiff cannot recover.⁵⁰

§ 3736. Same—Risk of disease

Bearing in mind the ——— paragraph of this charge, you are instructed that if at the time plaintiff began the caisson work he knew of the caisson disease, and that it was a hazard incident to the work he was to perform, or if before he was stricken with the caisson disease, if you believe he contracted the same, he acquired the knowledge from an outside source that such a disease was a hazard incident thereto, or if you believe that in the ordinary discharge of his duties he necessarily acquired the knowledge that such disease was a hazard incident to such employment, you are instructed that plaintiff assumed the risk, and, although you find that defendant was negligent as to warning plaintiff, on such issue defendant is not liable.⁵¹

§ 3737. Same—Rule under federal Employers' Liability Act

§ 3737(1). United States

The jury are instructed that you should take into consideration plaintiff's knowledge of the dangers of the situation derived from his experience, and if you find he was fully informed of the dangers incident to his work your verdict should be for the defendant.⁵²

§ 3737(2). Virginia

The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the ——— Railway at ——— for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the act of Congress approved ———, permits this defense, and the jury should find their verdict for the defendant.⁵³

⁵⁰ Porter v. Tennessee Coal, Iron & R. Co., 59 So. 255, 177 Ala. 406.

⁵¹ Missouri Valley Bridge & Iron Co. v. Ballard, 116 S. W. 93, 53 Tex. Civ. App. 110.

⁵² Central Vermont Ry. Co. v. Bethune (C. C. A. N. H.) 206 F. 868, 124 C. C. A. 528. The only negligence

of the defendant railroad company alleged was in the construction of its track, and consequently the case did not fall within the provisions of the act doing away with the assumption of risk in certain cases.

⁵³ Southern Ry. Co. v. Jacobs, 81 S. E. 99, 116 Va. 189.

§ 3738. Rule as affected by duty of injured servant to inspect

You are instructed that, if you believe from a preponderance of the evidence that it was the duty of the plaintiff as engineer to inspect the — engine No. —, upon which he claims to have been injured for defects and broken parts before attempting to operate same, and if you further believe that the plaintiff could by the use of reasonable diligence have discovered that the balance spring to same was broken and you further find that plaintiff did not inspect said engine for defects and broken parts before attempting to operate same and did not use reasonable diligence to discover whether or not the balance spring was broken, but nevertheless undertook to operate said engine, that then, in that event, the plaintiff assumed the risk of danger and injury incident to him in the operation of said engine with a broken balance spring, and therefore cannot recover.⁵⁴

§ 3739. Unknown risks and latent and invisible defects**§ 3739(1). United States**

The court instructs the jury that as to all and each one of the duties set forth in instruction No. — the plaintiff had the right, in the absence of knowledge or belief to the contrary, to presume and to rely upon the presumption that they had been performed by defendant or its representative with ordinary care; and it was not incumbent upon plaintiff to discover or anticipate and guard against any dangerous condition in said roadbed, tracks, or bridges, which the exercise of ordinary care on the part of defendant would have prevented, unless such condition was either known to plaintiff prior to his alleged injury, or was so open and obvious that it ought to have been known to any one in his situation at the time, had he used his senses. And the court tells the jury that the burden is upon the defendant to prove to the satisfaction of the jury from all the evidence in the case that the plaintiff did in fact have such knowledge, or that the condition of the bridge in question and the danger arising therefrom (if any) was so open and obvious that it ought to have been known to plaintiff had he used his senses.⁵⁵

§ 3739(2). California

You are instructed that in case you find that the roof was defective, and the defect in the condition of the roof was concealed, or if the plaintiff had nothing to do with its construction, and from the character of his employment was not presumed to know of its defective condition, then he cannot be charged with knowledge of

⁵⁴ *Wichita Falls & N. W. Ry. Co. v. Puckett*, 157 P. 112, 53 Okl. 463.

⁵⁵ *Long Pole Lumber Co. v. Gross* (C. C. A. Va.) 180 F. 5, 103 C. C. A. 359.

the existence of such defects simply because he was required to work near such defective roof.⁵⁶

§ 3739(3). Idaho

You are instructed that in this case the plaintiff did not assume the risk of latent and invisible defects caused by the rotten and decayed condition of the pole underground, unless you find that the plaintiff under his employment by the defendant had agreed to do such inspection and thereby assumed such risk himself, or unless such latent and invisible defects would have been discovered by the plaintiff by the exercise of reasonable care, and unless the plaintiff failed to exercise such reasonable care.⁵⁷

§ 3739(4). Indiana

The jury are instructed that it is the duty of a servant to obey the orders and directions of the master, or his duly authorized agent or foreman, and said servant has the right to presume, and to act upon the presumption, in the absence of notice or knowledge to the contrary, that the master or his agent or foreman will not order him into a place of danger, or to perform dangerous work without his notifying him of such danger, and if the master or his duly authorized agent or foreman does order said servant to do certain specified work, then said servant has the right to presume, in the absence of knowledge or notice to the contrary, that it is reasonably safe for him to obey such orders and to perform said work, and that he is encountering no unusual dangers by doing so.⁵⁸

The jury are instructed that, if you find from the evidence that the plaintiff was required, ordered, and directed by the defendant to carry and handle large plates of glass, and that said glass was rotten, defective, and unusually brittle, dangerous, and liable to break in handling, and that the defendant knew, or should have known, such facts, and that the plaintiff was ignorant thereof, and had no notice or warning thereof, and that, while plaintiff was carrying and handling said glass and using due care in the handling of the same and due care for his own safety, the said glass broke on account of its said rotten, defective, and unusually brittle condition, and thereby injured plaintiff, as alleged in the complaint, then I instruct you that the defendant would be liable for such injuries.⁵⁹

⁵⁶ *Ingalls v. Monte Cristo Oil & Development Co.*, 139 P. 97, 23 Cal. App. 652.

⁵⁷ *Ramon v. Interstate Utilities Co.*, 170 P. 88, 31 Idaho, 117.

⁵⁸ *Marietta Glass Mfg. Co. v. Bennett*, 106 N. E. 419, 60 Ind. App. 435.

⁵⁹ *Marietta Glass Mfg. Co. v. Bennett*, 106 N. E. 419, 60 Ind. App. 435.

§ 3739(5). Missouri

The jury are instructed that an employé or servant has the right to assume, in the absence of knowledge to the contrary, that the appliances which he is called upon to use in the performance of his work, are reasonably safe; and, if there are latent defects of which he has no knowledge, or which are not obvious to him while using ordinary care and observation, then he does not assume the risk attendant thereon.⁶⁰

§ 3739(6). Oklahoma

You are instructed that, if you find that said pit was disconnected and was not incident to the discharge of the duties of the deceased, and was not one of the instrumentalities incident to his employment, then the deceased should not assume such risk.⁶¹

§ 3739(7). Oregon

The court instructs the jury that, if the jury believe from the testimony that the plaintiff did not know that Engineer ——— was coming with his engine, and if you further believe that, by the exercise of reasonable care, plaintiff could not have known that ——— was coming with his engine, then this disposes of the question of assumed risk, and you should decide this question in favor of the plaintiff. An employé assumes no risk of which he does not know, or which, by the exercise of reasonable care, he could not have known. However, he is presumed to know all ordinary visible and open risks.⁶²

§ 3740. Risks growing out of negligence of master**§ 3740(1). Arkansas**

You are instructed that, while the servant assumes all the ordinary risks incident to his employment, yet a duty rests upon the company to commit no act of negligence whereby he may suffer injury, and to exercise ordinary care to protect him from danger, and in this case, if you believe that the plaintiff was injured while riding the pilot of one of defendant's engines, by reason of the pilot catching upon a guard rail of the track, caused by the defective condition of the pilot on the engine, and that plaintiff was engaged in the performance of his duty at the time, and that the defendant at the time of the injury knew, or by the exercise of ordinary care in making a reasonably careful inspection of the same could have known, of the condition of said pilot, and that the condition of the same was unknown to the plaintiff, and that the defendant, its agents or servants, thereby failed to exercise ordinary care to pro-

⁶⁰ Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255, 140 Mo. 1.

⁶¹ Lusk v. Bandy, 184 P. 144, 76 Okl. 108.

⁶² Pfeiffer v. Oregon-Washington R. & Nav. Co., 144 P. 762, 74 Or. 307.

tect plaintiff from danger, and that the defective condition of the pilot was the proximate cause of the injury, and that plaintiff was at the time exercising ordinary care for his own safety, and had not assumed the risk, you will be authorized to find for the plaintiff and assess his damages at such a sum as will from the evidence fully compensate him for the injuries received.⁶³

You are instructed that the servant does not, when he enters into the service of another or while he continues in that service, assume the risk of dangers that arise from the negligence of the master, unless he is aware of the negligence and appreciates the danger therefrom, and in this case, unless it appears from the evidence that the plaintiff at the time of the injury knew that the pilot of the engine was defective and appreciated the danger of riding thereon, and thereby elected to take his chances or that the defect in the pilot and the danger from riding thereon was so open, obvious, and imminent that an ordinarily prudent man would not have continued in the work, then the plaintiff cannot be held to have assumed the risk of the injury.⁶⁴

The court instructs the jury that such dangers as are normally and necessarily incident to the occupation are assumed by the employé whether he is aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work, and safe and suitable appliances for the work. These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are plainly observable and knowledge of the defect is not to be presumed.⁶⁵

You are instructed that if you find that the alleged collision between plaintiff's engine and the car on the side switch was the result of the failure of the defendant railway company to exercise reasonable care and precaution to place said car on said side switch and to maintain it in such position as to provide a safe passageway for plaintiff's engine, then plaintiff cannot be charged with having assumed the risk of being hurt by said collision as one of the ordinary risks incident to his employment.⁶⁶

The jury are instructed that, in obeying the commands of the master, the servant does not assume any risks occasioned by the

⁶³ *Arkansas Land & Lumber Co. v. Fitzhugh*, 219 S. W. 1022, 143 Ark. 122.

⁶⁴ *Arkansas Land & Lumber Co. v. Fitzhugh*, 219 S. W. 1022, 143 Ark. 122.

⁶⁵ *St. Louis, I. M. & S. Ry. Co. v. Howard*, 188 S. W. 14, 124 Ark. 588.

This was accompanied by a proper definition of contributory negligence.

⁶⁶ *St. Louis, I. M. & S. R. Co. v. Brogan*, 151 S. W. 690, 105 Ark. 533. This is correct under a statute making railroad companies liable for the negligence of fellow servants.

negligence or carelessness of the master, unless he has knowledge of such negligence or carelessness, and the danger incident thereto.⁶⁷

You are instructed that a person engaged in the service of a railroad company, as a section hand, assumes all the risks ordinarily incident to the business for which he is employed, but he does not assume the risks of the negligence of the master himself, or any one to whom the master may see fit to intrust his superintending authority, unless it be further shown that the servant was not only aware of the negligence, but he also realized the danger to which he was thereby exposed.⁶⁸

§ 3740(2). Illinois

The court instructs the jury that a servant assumes only such risks as are usually incident to his employment, and any extraordinary hazard of which he has notice, or which by the reasonable exercise of his faculties he could have noticed; but he does not assume the risks of danger known to the master, or which by the exercise of reasonable care should be known to the master, or which can be avoided by the master by the exercise of reasonable care, provided such dangers are unknown to the servant, and could not have been known to him by the ordinary exercise of his faculties.⁶⁹

§ 3740(3). Indiana

You are instructed that the plaintiff's decedent, ———, assumed the ordinary risks incident to the service in which he was engaged, after the defendant had used care, diligence, and caution for his safety and protection, commensurate with the danger to be reasonably apprehended from the service; and if the defendant failed to use such care and caution, and an injury resulted therefrom, it is not a risk incident to the employment, and the defendant is liable therefor, unless the danger is open and apparent or the decedent had actual knowledge thereof.⁷⁰

§ 3740(4). Iowa

You are instructed that, while the master is not bound to guard the servant against perils naturally resulting from the very work being performed, he is bound not to enhance those perils by any act or omission of his own. If he is present in person or by his foreman assuming charge and direction of the work and the conduct of the employes, and by his own negligent act or direction creates a new or increased danger which is unknown to the serv-

⁶⁷ Taylor v. Evans, 145 S. W. 564, 102 Ark. 640.

⁶⁸ A. L. Clark Lumber Co. v. Northcutt, 129 S. W. 88, 95 Ark. 291.

⁶⁹ Mann v. Illinois Cent. Traction Co., 86 N. E. 161, 236 Ill. 30.

⁷⁰ Pennsylvania Co. v. Stalker, 119 N. E. 163, 67 Ind. App. 329.

ant, and which otherwise would not have attended the servant's employment, the servant does not assume the risk of injury from such source.⁷¹

§ 3740(5). Missouri

The court instructs the jury that a servant assumes the ordinary risks incident to his employment, but does not assume the risks caused by the negligence of the master, or his failure to perform his duties to his employes, and if in this case you should find that the defendant or any of its officers, agents, or employes were negligent in whole or in part under the requirements set out in these instructions, and that such negligence, if any, directly caused the injury to plaintiff, then plaintiff did not assume the risks arising from such negligence, if any.⁷²

The jury are instructed that the risks assumed by the plaintiff in accepting employment from defendant as conductor of its passenger train were only such as were incident to said employment, and did not include any risks arising from negligence upon defendant's part (if there was such negligence) in failing to use reasonable care and diligence to see that its tracks and bridges were in a reasonably safe condition.⁷³

The jury are instructed that, while a servant, in accepting employment, assumes the ordinary risks incident to it, he does not assume those occasioned by the negligence of the master; and while plaintiff in the present case assumed the ordinary risks incident to the work he was called upon to perform, he did not assume those, if there were any such, arising from the negligence of the defendant.⁷⁴

§ 3740(6). Nevada

The court instructs the jury that a servant of a corporation, or of an individual, does not assume the risk of his employment resulting from the master's failure to perform a duty which he owes to the servant. If the machinery or appliances, or place of employment provided by the master for the servant to use and work with, are dangerous for the servant to use and to work with on account of facts known to the master, or which he could have known by the exercise of ordinary care, it is then the duty of the master to inform the servant of such danger, unless the servant has knowledge of the danger himself, or has had the opportunity of knowing of the danger.⁷⁵

⁷¹ *Jacobson v. United States Gypsum Co.*, 130 N. W. 122, 150 Iowa, 330.

⁷² *Hawkins v. St. Louis & S. F. R. Co.*, 174 S. W. 129, 189 Mo. App. 201.

⁷³ *Copeland v. Wabash R. Co.*, 75 S. W. 106, 175 Mo. 650.

⁷⁴ *Doyle v. Missouri, K. & T. Trust Co.*, 41 S. W. 255, 140 Mo. 1.

⁷⁵ *Cutler v. Pittsburg Silver Peak Gold Mining Co.*, 116 P. 418, 34 Nev. 45.

§ 3740(7). North Carolina

The court instructs the jury that, if you find from the evidence, and by its greater weight as I have defined the same to you, that plaintiff's intestate was injured by the negligent conduct of the defendant company, or its agents or its employes in stopping or attempting to stop its train in such a manner as to violently throw plaintiff's intestate off the train, you should answer this third issue, "No," for this doctrine does not include extraordinary risks which an employé does not assume, and has no application to injuries which an employé may receive from a negligent act of his master or that of another to whom the master had delegated a duty as his employé.⁷⁶

The jury is instructed that, if the jury find from the evidence that the wreck which caused the death of the plaintiff's intestate was solely and proximately caused by the negligence of defendant's servants in not properly applying brakes on cars standing on its main line on a grade, the risk of this negligence was not assumed by the deceased in allowing the caboose in which he was riding to be pushed by the engine, even if the deceased would have escaped injury if the caboose had been behind the engine instead of in front of it.⁷⁷

The jury are instructed that it was the duty of the defendant railroad company to furnish the plaintiff with safe and suitable tools and appliances with which to do the work required of him by the defendant. If you believe from the evidence that defendant failed to perform its duty in furnishing safe and suitable appliances, the plaintiff will not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself was obviously so dangerous that in the careful performance the inherent probabilities of injury were greater than those of safety.⁷⁸

§ 3740(8). Oklahoma

You are instructed that the true rule in this regard is that the servant assumes all the ordinary risks of his employment which are known to him, or which could have been known with the exercise of ordinary care to a person of reasonable prudence and diligence, under like circumstances; and with reference to risks not naturally incident to the occupation, but which may arise out of the failure of the master to exercise due care in the performance of some duty owing by him to the servant, the rule is that the servant does not assume such risks until he becomes aware of such negligence of the master and of the risks arising therefrom, unless

⁷⁶ *Weldon v. Seaboard Air Line Ry.*, 98 S. E. 375, 177 N. C. 179.

⁷⁷ *Horton v. Seaboard Air Line Ry. Co.*, 95 S. E. 883, 175 N. C. 472.

⁷⁸ *Rushing v. Seaboard Air Line Ry. Co.*, 62 S. E. 890, 149 N. C. 153.

the defect and risk are so apparent and obvious that an ordinarily careful person would observe the one and appreciate the other.⁷⁹

The court instructs the jury that the defendant has pleaded in this case that the plaintiff's injury, if he received any, arose from the ordinary risk of his employment, which he assumed in entering upon such employment with the defendant, and in this connection the court tells you that if you believe from all the evidence in this case, by a preponderance thereof, that the failure of the defendant to properly safeguard its machinery near which the plaintiff's work was carried on, if you should find that the machinery was not safely guarded, caused the injuries sued for, then such risk as a matter of law is not assumed by the plaintiff, and the defendant would be liable for any damage occasioned by its failure to properly safeguard such machinery.⁸⁰

You are instructed that the said L., when he entered the service of the defendant, assumed such risks as were ordinarily incident to the work in which he was engaged, but he did not assume any risk which might be caused by the negligence of the defendant; if, therefore, you believe that the accident, which caused the death of the said L. was an accident which could not reasonably have been anticipated or foreseen and thus guarded against by the exercise of ordinary care by the defendant, and was not the result of ordinary negligence on the part of the defendant, its agents or employés, then, in that event, the injury would be one of the risks which the said L. assumed, and in such case it would be your duty to find for the defendant. If, however, you find that the death of the said L. was occasioned by the failure of the defendant company to exercise ordinary care to handle its cars, to exercise ordinary care for the safety of those working in the yards, then, in such case, the said L. would not be held to have assumed the risk, and, if the said L. was in his proper place of duty and was not guilty of contributory negligence as hereinbefore explained, it would be your duty to find for the plaintiff.⁸¹

§ 3740(9). Oregon

The jury are instructed that the plaintiff assumed only the risks of injury that were ordinarily incident to the employment in which he was engaged, and you are further instructed in this connection that by use of the expression "a risk ordinarily incident to the employment" is meant a risk of injury that does not arise or grow out of any act of negligence on the part of the defendant or its servants, and that, whenever a risk is created by an act of negligence

⁷⁹ *Kansas City, M. & O. Ry. Co. v. Costa*, 170 P. 892.

⁸⁰ *Bartlesville Zinc Co. v. James*, 106 P. 1054.

⁸¹ *St. Louis & S. F. R. Co. v. Long*, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1015C, 432.

on the part of a railroad company or its employes, this is not a risk ordinarily incident to the employment. And if any injury came to plaintiff by reason of any negligence of defendant or its employes, otherwise than his own negligence, if any, this would not be a risk which he assumed as incident to his employment.⁸²

You are instructed that a servant in entering the employment of a master assumes the ordinary risks incident to the work contracted to be done, but not such as the master might have avoided by reasonable care.⁸³

§ 3740(10). South Carolina

The court instructs the jury that, if you find that the risk which occasioned an injury, if any, to the plaintiff, was one which arose out of the master's negligence, then it would not be an ordinary risk incident to the work, assumed by the servant. In other words, the servant, when he enters upon the employment of the master, has a right to expect the master to use ordinary care to provide him a safe place for work, and a safe way in going to and from his work; and the master is not allowed, where he fails to use care to provide a safe place and way, to say that his failure was an ordinary risk assumed by the servant.⁸⁴

§ 3740(11). South Dakota

You are instructed that, if you find, by a preponderance of the evidence, that the said defendant was guilty of negligence in failing to furnish safe machinery and appliances and a safe place for the plaintiff to work, or in failing to instruct or warn the plaintiff as to the dangers incident to his employment, if you find there were such dangers, or in failing to inform the plaintiff of a safe method of operating the machine in question, if you find there was a safer way than that in which the plaintiff was directed to operate such machine, then and in that case you would not be justified in finding that the plaintiff assumed the risk occasioned by such negligence of the defendant unless you find that he knew and appreciated the same.⁸⁵

§ 3740(12). Virginia

The jury are instructed that the only risks assumed by the plaintiff on his entering the service of the defendant, and while he continued in its service, were the ordinary risks of such service, and all risks from causes which were known to him, or which were so open and obvious as to be readily discernible by one of his age, experience, and mental capacity, in the exercise of ordinary care.⁸⁷

⁸² Pfeiffer v. Oregon-Washington R. & Nav. Co., 144 P. 762, 74 Or. 307.

⁸³ Prement v. Wells, 133 P. 647, 65 Or. 336.

⁸⁴ Harwell v. Columbia Mills, 98 S. E. 324, 112 S. C. 177.

⁸⁵ Iverson v. Look, 143 N. W. 332, 32 S. D. 321.

⁸⁷ United States Leather Co. v. Showalter, 74 S. E. 400, 113 Va. 479.

§ 3741. Same—Duty of inspection and right of employee to assume that master has done his duty

§ 3741(1). Alabama

The court charges the jury that it was the duty of the defendant to be reasonably prudent and cautious in selecting a handle for the lever of the car, and that when the handle was put in the lever, if plaintiff then and thereafter used it in his duties under his employment, then plaintiff, in using the handle, had the right to assume it was reasonably safe for service, unless he knew it was not so.⁸⁸

The court charges the jury that the plaintiff was under no duty to examine the handle to see if it was all right; but he had the right in law to assume it was fit for service, and could act upon this assumption in using it, unless he knew it was not safe for service.⁸⁹

§ 3741(2). Arkansas

You are instructed that plaintiff had the right to presume that the defendant railway company had discharged its duty towards him by the exercise of reasonable care and precaution for his safety, by so placing the car upon the side switch and so maintaining it in a position that would provide a safe passageway for his engine, and that he cannot be charged with having assumed the risk of being hurt by the collision with said car, unless you find that prior to the time of the alleged collision he actually knew of the dangerous position of the car on the side track, and realized the danger of being hurt by a collision between said car and his engine, and that with such knowledge and appreciation of danger he voluntarily exposed himself to it.⁹⁰

The jury are instructed that a servant is not required to inspect the appliances of the business in which he is employed to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects or that he had the means and opportunity of knowing them will not preclude him from a recovery unless he did in fact know them, or in the exercise of ordinary care ought to have known them. He is not bound to make an examination to find the defects. There is no such legal obligation imposed upon him. That is the duty of the master. The servant is not bound to search for dangers, except those risks that are pat-

⁸⁸ Southern Ry. Co. v. McGowan, 43 So. 378, 149 Ala. 440.

⁸⁹ Southern Ry. Co. v. McGowan, 43 So. 378, 149 Ala. 440.

⁹⁰ St. Louis, I. M. & S. R. Co. v. Brogan, 151 S. W. 699, 105 Ark. 533.

ent to ordinary observation. He has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty toward him.⁹¹

§ 3741(3). California

The court instructs the jury that it is the duty of the master to provide reasonably safe and suitable appliances with or upon which his employé is to work. As to those things and appliances which it becomes the master's duty to furnish, the servant, or employé, has the right to assume that the master has done his duty, and that the appliances are reasonably safe and secure, and it is not contributory negligence for an employé to neglect to investigate and examine the conditions as to the safety of the appliances. In such a case the employé is held only to have assumed the risk of a danger of which he had knowledge, or the risk of a danger which was so obvious that he must have known of it, or of one as to which he had been put upon inquiry by discovery or suggestion of danger, and which by gross carelessness he has neglected to take notice of.⁹²

§ 3741(4). Georgia

The jury are instructed that it was the duty of the defendant to furnish a reasonably safe place for this man to work. It was the right of the plaintiff to assume that the place was safe when he was directed to go to it.⁹³

§ 3741(5). Missouri

It was not incumbent on the plaintiff to search for latent defects in the construction of the runway, and he had a right to assume that it was properly constructed, and that it was reasonably safe for the use for which it was designed.⁹⁴

You are instructed that plaintiff had a right to assume and rely and act upon the assumption that the defendant had used reasonable care in furnishing a reasonably safe scaffolding, staging, or platform upon which he was required to pass in the duties of his employment by the defendant if he was so required to pass; and that plaintiff was not required to search or inspect such staging, scaffolding, or platform for defects therein that were not obvious and apparent.⁹⁵

§ 3741(6). Texas

You are further instructed that by "assumed risk," as meant in the charge, is meant the ordinary risk of service not caused by the

⁹¹ St. Louis, I. M. & S. Ry. Co. v. Hesterly, 135 S. W. 874, 98 Ark. 240.

⁹² Thompson v. Southern Pac. Co., 183 P. 153.

⁹³ City Council of Augusta v. Owens, 36 S. E. 830, 111 Ga. 464.

⁹⁴ Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255, 140 Mo. 1.

⁹⁵ Doyle v. Missouri, K. & T. Trust Co., 41 S. W. 255, 140 Mo. 1.

negligence of the master. It was the duty of the defendant to exercise ordinary care to furnish plaintiff with a reasonably safe place upon which to perform the duties required of him, and, when the plaintiff entered the employment of defendants, he had the right to rely upon the assumption that the ladder in question was reasonably safe, and was not required to use ordinary care to see whether or not the ladder was safe, and he did not assume the risk arising from the failure of the defendant to do this duty if there was a failure, unless he knew of the failure and attendant risk, or, in the ordinary discharge of his own duties, must necessarily have acquired said knowledge, or unless by the terms and nature of his employment it was made the duty of the plaintiff to inspect the place upon which he was to work, and he failed to make such inspection.⁹⁶

§ 3741(7). *Virginia*

The court instructs the jury that the plaintiff had a right to presume that the conductor of defendant company would discharge his duties in a careful manner, and in the usual and ordinary way.⁹⁷

§ 3742. *Same—Risk of improper guard furnished for machinery*

You are instructed that, defendant being required to furnish a guard which was proper to protect the operator on said buzz planer, if you find a guard could have been used thereon which was practicable and would not have interfered with the use of the machine, plaintiff did not assume the risk of using an improper guard, if one was furnished.⁹⁸

§ 3743. *Same—Railroad operations*

§ 3743(1). *Texas*

The jury are instructed that, when a person enters the employment of a railway company, he assumes the risks and dangers ordinarily incident to such employment; but he does not assume any risks arising from the negligence, if any there be, on the part of such company, unless he knows of such negligence and the attendant risk, or in the exercise of ordinary care in the discharge of his own duty must necessarily have acquired knowledge thereof in time to have avoided injury therefrom.⁹⁹

You are instructed that railway companies are not to be regarded as insurers of the safety of their employes, for under the law they are not insurers, and one who enters the employment of a

⁹⁶ *Smith v. Webb* (Civ. App.) 181 S. W. 814.

⁹⁷ *Virginia & S. W. Ry. Co. v. Bailey*, 49 S. E. 33, 103 Va. 205.

⁹⁸ *Amen v. Standard Steel Car Co.* (Ind. App.) 123 N. E. 7.

⁹⁹ *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 120 S. W. 553, 56 Tex. Civ. App. 246.

railway company assumes all risks that are ordinarily incident to the business, but he may assume that the railway company and its other servants and employes have exercised ordinary care to do their duty, and he does not assume the risk of any danger that may be brought about by the negligence of the railway company, or its other servants or employes, unless he knows of such negligence and the attendant risk, or in the ordinary discharge of his duty must necessarily have acquired the knowledge.¹

The jury are instructed that it is the duty of a railway company to exercise ordinary care to furnish its servants and employes reasonably safe and suitable machinery and appliances with which to perform the duties required of them; and when a person enters the employment of a railroad company he has the right to rely upon the assumption that the machinery and appliances with which he is called upon to work are reasonably safe, and he is not required to use ordinary care to see whether this has been done or not, and he does not assume the risk arising from the failure of the railroad company to do its duty (if there is a failure), unless he knows of the failure and the attendant risk, or in the ordinary discharge of his own duty must necessarily have acquired such knowledge, or unless, by the terms or nature of his employment, it is made the duty of such person to inspect the machinery and appliances with which he is called upon to work, and he has failed to make such inspection.²

The jury are instructed that one who enters the employment of a railway company as a locomotive engineer assumes all the risks that are ordinarily incident to the business, but he may presume that the company will furnish him with a reasonably safe track over which to operate its locomotives and trains, and he does not assume any risks that may be brought about by reason of the company's negligence, unless he knew of such.³

§ 3743(2). Virginia

The court instructs the jury that when a person enters the employment of a railroad company as fireman he only assumes the ordinary and usual risks that are incident to such employment.⁴

§ 3744. Same—Risks from accumulation of explosive materials

The court instructs the jury that, with reference to the defense of the assumption of risk by plaintiff, the jury are instructed that if they shall find from the evidence that the accumulation of such

¹ *El Paso & S. W. R. Co. v. O'Keefe*, 110 S. W. 1002, 50 Tex. Civ. App. 579.

² *Missouri, K. & T. Ry. Co. of Texas v. Blackman*, 74 S. W. 74, 32 Tex. Civ. App. 200.

³ *Texas & P. Ry. Co. v. McClane*, 62 S. W. 565, 24 Tex. Civ. App. 321.

⁴ *Virginia & S. W. Ry. Co. v. Bailey*, 49 S. E. 33, 103 Va. 205.

explosive material, as plaintiff alleges accumulated and caused said explosion, if the same did accumulate, was an ordinary incident to the kind of work in which the plaintiff was engaged when the employer exercised ordinary care to avoid the accumulation and confinement of such explosive material in a condition to cause an explosion, they will find for the defendant, but if, on the other hand, they shall find from the evidence that experience has proved that there are practical means of avoiding the accumulation of such explosive materials, if such accumulation there was in rooms where persons may work, or about which they may work, or that there are practical means well known to the persons engaged in such work whereby such combustible material may be so rapidly eliminated as to prevent its gathering in such quantities as to cause an explosion, and that the defendant failed to use such means of avoiding danger to the plaintiff in or about the place wherein he was set to work, then the plaintiff did not assume the risk of such failure on the part of defendant, if the defendant did fail to use such ordinary means and care of avoiding such danger to the plaintiff, and in determining whether the plaintiff should have known of the danger existing about where he was working, the jury will take into consideration whether or not such knowledge was such as an ordinary laborer, working about such premises, should understand, or was information which would not, in the nature of things, be known to others than men of science.⁵

§ 3745. Continuing in employment with knowledge of omission of master to provide proper safeguards, or safe ways, appliances, etc.

§ 3745(1). United States

The jury are instructed that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue "Yes."⁶

§ 3745(2). California

You are instructed that an employé, injured by the defective or unsafe character or condition of any machinery, ways, appliances,

⁵ *Southwestern Portland Cement Co. v. Moreno* (Tex. Civ. App.) 181 S. W. 221.

⁶ *Seaboard Air Line Ry. v. Horton*, 34 S. Ct. 635, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

or structures of such employer, shall not be barred of recovery for injury or death caused thereby, unless it shall also appear that such employé fully understood, comprehended, and appreciated the dangers incident to the use of such defective machinery, ways, or structures, and therefore consented to use the same or continued in the use thereof.⁷

The jury are instructed that, if you believe from the evidence that for more than _____ years immediately preceding the accident in question the deceased, _____, was employed by defendant as a locomotive engineer, and that he passed _____'s switch during said time often enough and under such circumstances as to make him familiar with the situation there, and with the methods of loading which were followed there, and with the fact that defendant kept no loading superintendent there, and kept no depot or loading platform, and had no track walker, and he also knew or should have known the danger and risk to which he was exposed by reason of said facts and such situation, and with full knowledge of said facts and such situation and the said danger and risk to him, he voluntarily elected to continue and did continue in his said employment as locomotive engineer for as long as _____ years after having become acquainted with said facts, dangers, and risks and said situation, then I instruct you that by so continuing in his employment he assumed said danger and risk.⁸

§ 3745(3). *Delaware*

You are instructed that, if you should believe from the evidence that the plaintiff knew on the day of the accident and before he began to operate car number _____ that the brake of said car was defective, and should also believe from the evidence that the defendant did not promise to remedy said defect upon any complaint thereof by the plaintiff, and that the plaintiff took said car out and operated it with knowledge of such defective brake, then the plaintiff assumed the risk of operating said car with such defective brake, and cannot recover for any injury to himself caused by such defective condition of such brake.⁹

§ 3745(4). *Iowa*

The court instructs the jury that, if the danger in using the rip-saw without a guard was so imminent that a reasonably prudent person would not have continued in the work, then the plaintiff by continuing in the work waived the alleged negligence of defendant and assumed the risk, and would not be entitled to recover.¹⁰

⁷ *Humphres v. Western Pac. Ry. Co.*, 160 P. 415, 173 Cal. 428.

⁸ *Wyckoff v. Pajaro Valley Consol. R. Co.*, 103 P. 1100, 11 Cal. App. 108.

⁹ *Spahn v. People's Ry. Co.*, 83 A. 27, 3 Boyce, 302.

¹⁰ *Corell v. Williams & Hunting*, 148 N. W. 633.

The jury are instructed that if you believe, from the evidence in this case, that the proximity of said coal platform to the track and to cars as they passed was plain and apparent, and the liability to injury therefrom manifest, and that deceased knew of such proximity, or by the exercise of ordinary care to avoid injury to himself might have known it, and with such knowledge, or opportunity of knowledge, remained in the defendant's employ and continued to work in the vicinity thereof without objection or protest, and without promise of amendment, then plaintiff cannot recover in this action.¹¹

§ 3745(5). Missouri

The court instructs the jury that, even if the jury find from the evidence that the hammer used by the plaintiff when the injury was received was defective and unsafe to use, and that defendant, through its foreman or officers, knew it to be defective and unsafe to use, yet if it further appear from the evidence that such defective and dangerous condition was obvious and was known to the plaintiff, and with this knowledge he continued to use the same until hurt, then the plaintiff cannot recover, and your verdict must be for the defendant.¹²

§ 3745(6). North Carolina

The jury are instructed that, if they should find from the evidence that the plaintiff knew, or by the exercise of ordinary care he ought to have known, at the time of the injury, that the spinning frame which he was repairing was not provided with a shifter, and therefore the belt was liable to slip from the loose to the tight pulley, and should further find from the evidence that the act of the plaintiff in so attempting to repair the spinning frame was obviously so dangerous that in its performance the probabilities of danger were greater than those of safety, as where the machinery is so grossly and clearly defective that the plaintiff knew he was taking an extra risk, then he assumes the risk, and cannot recover; and if you should find that his conduct was of that character in continuing to work there, and he was working with a machine clearly so dangerous that he must have known he was taking an extra risk, then you will find that he did assume the risk; but if you find it was not of that character, then you will find that he did not assume the risk, and answer the issue accordingly.¹³

§ 3745(7). Oklahoma

The court instructs the jury that, if a brakeman on a railroad knows that the materials with which he works are defective and

¹¹ *Perigo v. Chicago, R. I. & P. R. Co.*, 3 N. W. 43, 52 Iowa, 276.

¹² *Duerst v. St. Louis Stamping Co.*, 63 S. W. 827, 163 Mo. 607.

¹³ *Pressly v. Dover Yarn Mills*, 51 S. E. 69, 138 N. C. 410.

continues his work without objection and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risk of such defects, for the continuance of the brakeman in the employment is purely voluntary, and if he so continues without objection with knowledge of the defects in the machinery, he is presumed to have waived the right to insist upon indemnity for injuries resulting from such defect.¹⁴

You are instructed that, if you believe from the evidence that the said angle where the said L. got his foot caught and was run over was unblocked, but that the same was known to the said L., and that the dangers arising therefrom were so open and apparent that a person of ordinary prudence would not continue to work without the same being blocked, then you will find that L. assumed the risk of danger arising from the unblocked condition of said angle, and in that event you will find for the defendant.¹⁵

You are instructed that, if you believe from the evidence that the coupling apparatus of the car above referred to was defective, and if you believe from the evidence that the said L. knew of the same, or by the use of ordinary care in the performance of his duties could have known of the same, before he undertook to operate it, and you further believe that a person of ordinary prudence after becoming acquainted with the said defects would not have undertaken to uncouple the cars in the manner that L. did, then you are instructed that the said L. assumed the risk of being injured by uncoupling the same in the manner he did, and, if you so believe, you will find for the defendant.¹⁶

§ 3745(8). Texas

The jury are instructed that, if the defendant company knew of the condition of the engine, and that it did not have the automatic air working on it, but only the straight air, then the plaintiff did not assume the risk arising from such danger, if any; but if a person of ordinary care, under the same or similar circumstances, would not have continued in the service of the defendant company as brakeman to work with the said engine as such brakeman, then the plaintiff did assume the risk arising from such danger, if any, from the condition of the air brake appliance on the engine, and in such case knowledge on his part of the condition of the engine, and the danger therefrom, would prevent his recovering, if you find the defendant did not know that the engine only had the straight air-braking appliance working on the same.¹⁷

¹⁴ Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132, 60 Okl. 249.

¹⁵ St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

¹⁶ St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

¹⁷ Texas & P. Ry. Co. v. Matkin (Civ. App.) 142 S. W. 604.

The jury are instructed that, if the defendant or its employes intrusted with authority to remedy, or cause to be remedied, the failure to put a lock on said switch did not know of the absence of a lock thereon at the time plaintiff was injured, and you believe from the evidence that the plaintiff had an opportunity before being injured to inform the defendant, or such employes as are intrusted with authority to remedy or cause to be remedied the failure to put a lock on said switch stand that said switch stand had no lock thereon, and failed to do so, and that such failure on his part was negligence, and you further believe from the evidence that a person of ordinary care, in the exercise of ordinary care for his own safety, under the same or similar circumstances, with the knowledge of the absence of a lock on said switch stand, and the danger, if any, incident thereto, would not have continued thereafter in the service of defendant's company, then you will find for the defendant; or, if you believe from the evidence that a person of ordinary care, in the exercise of ordinary care for his own safety, under the same or similar circumstances as plaintiff was situated, would not have continued in the service of defendant's company, in the absence of a lock on said switch stand after the discovery of such absence, then, if you so find, you will find for the defendant; or, if you believe from the evidence that the accident and the injury of which the plaintiff complains was the result of some cause or causes other than the fact that there was no lock on the switch stand, and that such cause or causes, if any, were unknown to the defendant, and you believe that the defendant could not, by the use of that care which a person of ordinary care, engaged in a similar business, would have exercised under the same or similar circumstances, have discovered such cause or causes, then such failure to discover such other cause, if any, would not be negligence upon the part of defendant company.¹⁸

However, in connection with the ——— paragraph of this charge, if you find and believe from the evidence that the plaintiff knew at the time he was engaged to perform the caisson work, or if afterwards and before his alleged injury he knew, or if in the ordinary discharge of his caisson work he necessarily acquired the knowledge, that the relative position of such sand hoghouse to the place where his caisson work was being performed was not in such a position as to be a reasonably safe means and method in carrying on the work in which he was engaged, you are instructed that plaintiff assumed the risk incident to the position of such house relative to such place of work, and you will find for defendant upon this issue, although you may find in this connection de-

¹⁸ International & G. N. R. Co. v. Clark, 125 S. W. 959, 59 Tex. Civ. App. 82.

fendant owed a duty, was negligent thereto, and plaintiff was injured thereby.¹⁹

§ 3745(9). *Washington*

The court instructs the jury that even though you should find that the wall was improperly constructed, even though you should further find that notice should have been given to the plaintiff of the nature of the lower course of the projection, you should not find, even then, for the plaintiff, if it appears to you from the evidence that the plaintiff ought to have known the nature of the lower course of the projection. Even where an employer has been negligent, if an employé knows of that negligence, knows he has been negligent, and, knowing such fact, continues to work without making complaint as to the condition, the employé is held to have assumed the risk; and, in determining whether the plaintiff in this case assumed the risk or not, you should not only hold him charged with what he actually knew, but you should hold him charged with what he might with reasonable diligence, have known. So that among other questions submitted to you is the question of whether or not the plaintiff ought not, in the exercise of reasonable diligence, to have known that this lower course was a stretcher course; and, if you find that he ought to have so known, your verdict should be for the defendant.²⁰

§ 3746. *Same*—Knowledge by servant of danger or appreciation by him of risk incident to use of defective ways, appliances, etc.

See, also, post, § 3747.

Use of defective appliance as contributory negligence, see post, §§ 3774, 3775.

§ 3746(1). *United States*

The jury are instructed that the true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances.²¹

§ 3746(2). *Arkansas*

The jury are instructed that if plaintiff knew of the defective condition of the hopper door fastenings in question, if such fastenings were in fact defective, and appreciated the danger to himself

¹⁹ *Missouri Valley Bridge & Iron Co. v. Ballard*, 116 S. W. 93, 53 Tex. Civ. App. 110.

²⁰ *Soderburg v. Wells*, 106 P. 751, 57 Wash. 281.

²¹ *Gila Valley, G. & N. Ry. Co. v. Hall*, 34 S. Ct. 229, 232 U. S. 94, 58 L. Ed. 521.

therefrom in passing over said car and with such knowledge and appreciation of danger passed over the hopper or attempted to do so, and fell through and was injured, he by such conduct assumed the risk himself, and plaintiff cannot recover. But, if the fastenings were defective and unsafe and plaintiff knew this, but did not appreciate the danger to himself therefrom in passing over the car, and passed over the hopper or attempted to do so and fell through and was injured, he did not assume the risk.²³

§ 3746(3). California

The court instructs the jury that knowledge by the employé of the defective or unsafe character or condition of any ways, appliances, or structures of his employer is not a bar to recovery for any injury caused thereby, unless it shall also appear from a preponderance of the evidence that such employé fully understood, comprehended, and appreciated the dangers incident to the use of such defective ways, appliances, or structures, and thereafter consented to use the same or continued in the use thereof.²³

§ 3746(4). Missouri

The court instructs you that although you may believe from the evidence that plaintiff knew, or by the exercise of ordinary care might have known, that the track and roadbed in question was in an unsafe condition (if you find that it was), and continued to use the same, yet if the said track was not so dangerous as to threaten immediate injury, or if plaintiff might have reasonably supposed that he could safely operate cars over it by the use of care and caution, he cannot be said to have assumed the risk or danger incident thereto.²⁴

§ 3746(5). North Carolina

The jury are instructed that the plaintiff — will not be deemed to have assumed the risk growing out of the failure of the defendant to provide such railing and safeguards as described above along the margin of said platform, unless the danger arising from such defect was obvious and so imminent that no man of ordinary prudence and acting with such prudence would have incurred the risk of assisting — to remove the skids or planks along said platform, and the burden is upon the defendant to show that — voluntarily assumed the risk incident to the conditions surrounding him, and it is not enough to make good this defense to show merely that he worked on, knowing the danger, but it is necessary for such purpose for the defendant to show that the con-

²³ St. Louis, I. M. & S. Ry. Co. v. Hesterly, 135 S. W. 874, 98 Ark. 240.

²⁴ Thompson v. Southern Pac. Co., 183 P. 153.

²⁴ Houts v. St. Louis Transit Co., 84 S. W. 161, 108 Mo. App. 683.

struction of said platform was so grossly and clearly defective that the employé ——— must have known of the extra risk and have voluntarily and knowingly assumed it. And it is the duty of the jury, in passing upon the question whether ——— voluntarily and knowingly incurred an imminent risk of injury growing out of the condition of the platform when he was working upon it, to consider any evidence tending to show that he was a youth and inexperienced, and the jury should find accordingly in passing upon the issue submitted.²⁵

§ 3747. Same—Elevators

The jury are instructed that, if the jury find from the evidence that prior to and on ——— the defendant occupied the premises, known as ———, mentioned in the evidence, and used the elevator mentioned in the evidence; and if the jury find from the evidence that on said day the plaintiff was in the service of the defendant as a cabinet repairer, and that it was in the line of his duty to ride upon the elevator mentioned in the evidence in the discharge of his duties; and if the jury further find from the evidence that said elevator passed through a hatchway in the floor of the shipping room; and if the jury find from the evidence that the shipping room near said elevator opening on said day was dark and insufficiently lighted, and that the sunlight was partly excluded by the piling up of furniture therein; and if the jury find from the evidence that the defendant did not exercise ordinary care in maintaining said room near said elevator opening in such condition; and if the jury further find from the evidence that defendant was maintaining said elevator opening in said floor without keeping the guard or rail closed to prevent persons from falling therein, and sustained injury; and if the jury further find from the evidence that defendant did not exercise ordinary care in maintaining said elevator hole in said floor without keeping the guard for protection closed and without having said room properly lighted; and if the jury further find from the evidence that on said day the plaintiff was at or near said elevator hole for the purpose of using said elevator in the discharge of the duties of his employment, and that while so near said elevator opening for said purpose he fell therein and sustained the injuries on account of which he sues; and if the jury further find from the evidence that the plaintiff was caused to so fall into said opening by reason of its being so open, unlighted, and unguarded; and if the jury further find from the evidence that the plaintiff knew that said room was insufficiently lighted, and that there was no guard or protection kept closed around

²⁵ Aiken v. Rhodhiss Mfg. Co., 50 S. E. 696, 146 N. C. 324.

said elevator opening, and that thereby he incurred some risk in remaining in defendant's service and in discharging the duties of his employment; yet if the jury find from the evidence that the dangers arising to the plaintiff by reason of said unguarded elevator opening and said want of light near said elevator were not so obvious and imminent as to threaten immediate injury, and were not such that an ordinarily prudent person under the circumstances would not have remained in defendant's service and performed the duties plaintiff was hired to perform; and if the jury further find from the evidence that plaintiff was exercising ordinary care at the time of his injury—plaintiff is entitled to recover.²⁶

The jury are instructed that if the jury find from the evidence that the defendant's shipping room, at or about the elevator hole mentioned in the evidence, was dark and unlighted; and if the jury further find from the evidence that plaintiff before his injury knew that said room was dark and unlighted, and that there was some risk or danger of falling into the elevator hole, by reason of said condition of said room, while undertaking to use the elevator in the discharge of the duties of his employment; and if the jury find from the evidence that defendant was maintaining said elevator opening in said floor without causing the same to be effectually barred or closed by railing, gate, or other contrivance for the prevention of accidents therefrom; and if the jury find from the evidence that the plaintiff knew before his injury that defendant was maintaining said elevator opening without such guard or protection being closed; yet if the jury further find from the evidence that said condition of said room and elevator opening and the danger arising therefrom was not such as to threaten immediate injury to plaintiff while in defendant's service in the discharge of the duty of his employment, and was not such that a person of ordinary prudence, while exercising care and caution, would not have undertaken to have remained in defendant's service and discharge the duties of his employment—then the fact alone that plaintiff continued in defendant's service under the circumstances will not of itself defeat this action.²⁷

§ 3748. Same—Rule, under statute, as to liability of railroads

The court instructs the jury that under our statute knowledge by any railroad employé injured of any defective or unsafe character or condition of any appliances or structures shall be no defense to an action for injury caused thereby; and, if the jury believe from the evidence that ——— was killed by reason of the fact

²⁶ *Wendler v. People's House Furnishing Co.*, 65 S. W. 737, 165 Mo. 527.

²⁷ *Wendler v. People's House Furnishing Co.*, 65 S. W. 737, 165 Mo. 527.

that the condition or character of the defendant company's appliances or structures was not reasonably safe, viz. that the bridge in question was situated dangerously near the top of the tender and cars, and was thereby rendered unreasonably unsafe to the said ——— in the performance of his duties as brakeman, and if they believe that the deceased ——— was attending to his accustomed duties using such care as a man of ordinary prudence would use under the circumstances therein at the time he received the injury which caused his death, they must find for the plaintiff, notwithstanding they may believe from the evidence that he had knowledge of said unsafe condition or character of the bridge.²⁸

§ 3749. Right of servant to rely on promise of master to remedy defects

§ 3749(1). Arkansas

You are instructed that, while the servant assumes all the ordinary risks incident to his employment, yet a duty rests upon the company to commit no act of negligence whereby he may suffer injury, and to exercise ordinary care to protect him from danger; and in this case, if you find from a preponderance of the evidence that the plaintiff ——— was in the employ of the defendant, ———, operating a stave jointer wheel, and that a piece of the wooden rimming that incased the wheel came off, making the wheel defective, and increased the danger of its operation, and that plaintiff notified defendant, or one of its agents whose duty it was to keep defendant's machinery in repair, of the condition of the jointer wheel, and requested that the same be repaired, and that the said agent of the defendant told him to operate the wheel in its defective condition until noon, at which time he would have it repaired; and further find that the plaintiff relied upon said promise, if any, and continued to operate said wheel, and was injured on account of the defective condition of the wheel as aforesaid, and that the danger arising from its continued operation in its defective condition was not so obvious, imminent, and glaring that an ordinarily prudent person would not have continued in the work, and that the defendant thereby failed to exercise ordinary care to protect plaintiff from danger, and that its failure to repair the machine was the proximate cause of the injury, and that the plaintiff at the time was exercising ordinary care for his own safety—you will be authorized to find for the plaintiff, and assess his damages at such a sum as will, from the evidence, fully compensate him for his injuries.²⁹

²⁸ *Chesapeake & O. Ry. Co. v. Rowsey's Adm'r*, 62 S. E. 363, 108 Va. 632.

²⁹ *Pekin Cooperage Co. v. Duty*, 215 S. W. 715, 140 Ark. 135.

§ 3749(2). Missouri

The court instructs the jury that even if they shall find and believe from the evidence that the corking machine with which plaintiff worked was out of repair and dangerous to use, yet if the jury shall also find and believe from the evidence that plaintiff knew the machine was out of repair and understood and appreciated the danger of using it in such condition, and continued to do so, then plaintiff cannot recover, unless the jury shall further find from the evidence that plaintiff continued the use of such machine in reliance upon a promise of defendant to have the same repaired; or to furnish a better one in place thereof, provided plaintiff would continue the use of the machine in question for the time being.³⁰

§ 3749(3). Oklahoma

You are instructed that, though plaintiff knew of the condition of the track and saw that it was unsafe, yet if it did not appear to be imminently dangerous, and he made complaint to the pit boss and coal rustler, and they, or one of them, promised to have the defect remedied within a short time, and from the nature of their employment plaintiff had a right to rely on these promises, and he proceeded to work on the trip as usual, relying on the promise that it would be repaired, and not believing that it was imminently dangerous, then he did not assume the risk of injury on account of the defective condition, even though he may have known that the track was unsafe.³¹

§ 3750. Reliance on assurances of safety**§ 3750(1). Alabama**

The court charges you that the servant has the right to rely on the assurance of the master, if such assurance was given, as to the safety of the machinery, appliances, and places to work, where the attention of the master has been called to it, unless the danger was so obvious that no prudent man would use such machinery or appliances, or would work at such a place, or continue the performance of his duties in such place of work.³²

§ 3750(2). Kentucky

The court instructs the jury that, if you believe from the evidence that the defendant's servant superior in authority to plaintiff, and in charge of said work, stated to the plaintiff that it was safe to remove the coal from under said slate, then the plaintiff had a right to rely on the said statement as true, and continue the

³⁰ *Bliesner v. G. Riesmeyer Distilling Co.*, 157 S. W. 980, 174 Mo. App. 139.

³¹ *Great Western Coal & Coke Co. v. Malone*, 136 P. 403, 39 Okl. 693.

³² *Merriweather v. Sayre Mining & Mfg. Co.*, 49 So. 916, 161 Ala. 441.

work of removing said coal without assuming the risk of injury of falling slate, if the danger of removing said coal was not so obvious and imminent that a reasonably prudent person would not have undertaken the work. And if the jury believe from the evidence that plaintiff's superior in charge of the work did assure the plaintiff that it was safe to remove the said coal, and that such assurance of safety was negligently given to the plaintiff and that at the time of such assurance the place was in fact unsafe, and the plaintiff relied upon such statement and the superior knowledge of the superior servant, and was thereby induced to continue said work, and while doing so and exercising ordinary care for his own safety was injured, the law is for the plaintiff, and the jury will so find, unless they shall further believe from the evidence that the danger of continuing said work was so obvious and imminent that a person of ordinary prudence would not, under the conditions, have continued the work, and if they so believe and find, they shall find for the defendant.³³

The jury are instructed that, if they believe from the evidence that the stirrup upon the piling was defective, or in the act of breaking or giving away, and the plaintiff was assured by ——— or ———, his superiors, that it would hold until a new one could be furnished, and such superiors ordered the plaintiff to proceed with the work, and the plaintiff relied upon the superior knowledge of said ——— or ——— in regard to the matter, and did proceed with the work, and was afterwards injured by reason of the breaking of the stirrup, the fact that he continued at said work under the circumstances would not preclude him from a recovery, unless the jury believe from the evidence that the dangerous condition of the stirrup was evident or manifest to a person of ordinary prudence as set out in instruction No. ———, in which case the law is for the defendant.³⁴

The jury are instructed that if they believe from the evidence that the stirrup upon the piling on which plaintiff was working was defective, and in an unsafe condition, and this fact was evident or manifest to a person of ordinary prudence, then the fact that the plaintiff may have been ordered to continue the work by his superiors, or assured that said work or appliances were safe, would not authorize the plaintiff to continue the work under such conditions; and if the dangerous or unsafe condition of the stirrup was manifest to a person of ordinary prudence, and plaintiff still continued to work under these conditions, then he cannot recover

³³ North East Coal Co. v. Setzer, 183 S. W. 553, 169 Ky. 245.

³⁴ Louisville, H. & St. L. Ry. Co. v. Armstrong, 125 S. W. 276, 137 Ky. 146.

in this action although he may have been ordered to continue the work or have been assured that said work and tools were safe by his superiors.³⁵

§ 3750(3). *Missouri*

The court instructs you that if, from the evidence in the case, you believe that on or about ———, defendants were operating and controlling a furnace, and buildings in connection therewith, situate in the city of ———; that said furnace stood at the north end of a room (of such buildings) known as the "casting room," on the floor of which room melted iron from such furnace was, in the ordinary course of the business there carried on by defendants, cast into pig iron; that in the furnace iron ores were melted, and the melted iron and slag were, in the course of defendants' business, drawn from the furnace by opening a hole therein, known as the "notch hole," located on the south side of the furnace, and facing toward the south end of such casting room; that, in the ordinary course of such business, upon the opening of said hole, iron, slag, ashes, and other heated matter was liable to run from said hole; that, to facilitate the drawing off from said furnace through said hole, heated air was, in the ordinary course of defendants' business, forced into said furnace in such manner as to create strong atmospheric pressure upon the contents of said furnace, so as to force the same strongly outward through said hole, and in such manner as to at times force and blow out from said furnace, through said hole, into said room, and toward the south end thereof, molten iron, slag, and other hot substances, so as to endanger employes of defendants engaged in said casting room on the south side of said notch hole; and if you further find that on ——— plaintiff was in the employ of the defendants in said casting room, and that there was no screen in front of said notch hole to intercept melted iron, slag, or other material that might be forced by such pressure through such notch hole, and this state of affairs had existed for three or more days, and that during that time plaintiff had occasion, from time to time, in the course of his employment by defendants, to pass in front of said notch hole in such a manner as to be exposed to danger of being burned by hot metal, slag, or other substances thrown from said furnace as aforesaid; and if you find that such danger would not have existed, had a proper screen to intercept such hot substances been then and there erected and maintained by defendants, and that the danger, if any, to which plaintiff was so exposed, was dependent, to a great extent, upon the degree of atmospheric pressure existing at any time within the said furnace, and tending to force its contents out through said notch hole,

³⁵ *Louisville, H. & St. L. Ry. Co. v. Armstrong*, 125 S. W. 276, 137 Ky. 146.

and that the extent of such pressure was not a matter within the observation of plaintiff, so that he could determine the amount or force thereof; and if the jury find that in said casting house defendants had, some ten feet or more in front of said notch hole, a place provided for the maintenance of a screen for the interception of such melted iron, slag, and other hot substances thrown out of such notch hole, and that it was necessary, and known to defendants to be necessary, for the safety of defendants' employés in said casting room, or of plaintiff, that such a screen should be there maintained, and that plaintiff, in the course of his employment, while said furnace was in operation, on ———, from time to time, had occasion to pass in front of such notch hole, south of the point provided for such screen; and if you further find that ——— was defendants' foreman, and, as such, had charge and control of the business, and of the employés of defendants in said furnace and casting house, and that plaintiff was aware that he was exposed to some danger, from the absence of such screen, in so passing in front of such notch hole, and called the attention of the said foreman to the absence of such screen, and that thereupon the said foreman said to him that they would not blow hard until the screen was put up; and if you find that afterward, on the said ———, at a time when said furnace was in operation, and plaintiff was, in the course of his employment aforesaid, passing in front of such notch hole, and south of the point so provided for such screen, a quantity of hot slag, ashes, or other material suddenly blew out from said furnace through said notch hole, and struck and burned plaintiff, and that, at the time of so being burned, plaintiff was exercising such care to prevent injury to himself as a person of ordinary prudence should have exercised under the like circumstances, and was relying upon the assurance, if any, of such foreman that they would not blow hard until the screen was put up—then the jury will find the issues for the plaintiff.³⁶

§ 3750(4). *Virginia*

The court instructs the jury that if they believe from the evidence that ——— ordered the plaintiff to ascend the pole near the intersection of ——— and ——— avenues, and cut the primary wire, that at the time the said ——— assured the plaintiff that there was no current upon said wire, and the plaintiff, relying upon said assurance, took hold of the said wire with his naked hands, and was injured, then they must find for the plaintiff, but the burden of proving the above facts to the satisfaction of the jury is upon the plaintiff.³⁷

³⁶ *Curtis v. McNair*, 73 S. W. 167, 173 Mo. 270.

³⁷ *Lynchburg Traction & Light Co. v. Gordon*, 96 S. E. 195, 123 Va. 198.

§ 3751. Known dangers not of imminent or threatening character

The court instructs the jury that, although the jury may believe from the evidence in this case that the work of lifting up the motor mentioned in the evidence, and attaching it in place, was unsafe and dangerous in the manner in which plaintiff and his two fellow-workmen were doing it, and that plaintiff was apprised of this fact, yet if you shall further find from the evidence in this case, that the danger and hazard of the undertaking in which plaintiff was engaged at the time of his alleged injuries as described in the evidence was not of such an imminent and threatening character as to prevent a reasonably prudent person from undertaking the same, then the plaintiff did not assume to do said work at his own peril, and was only required to exercise ordinary care and prudence incident to the situation and the character of the work required.³⁸

The jury are instructed that even though you may believe from the evidence that the plaintiff knew, or by the exercise of ordinary care could have known, that the position he was working in at the time he claims to have been injured was not a safe one, yet this does not and should not defeat his recovery in this case, if you further find and believe from the evidence that he was negligently permitted to go into this position by the defendant's representatives in charge of plaintiff, and that the danger, if any, was not of such a glaring and dangerous nature as to threaten immediate injury in case he did such work.³⁹

§ 3752. Risk of temporary peril to which servant suddenly exposed by act of master**§ 3752(1). Illinois**

You are instructed that if you believe, from the evidence, that ——— was not a fellow servant of plaintiff, but was a foreman, with full power and authority to control the movement of the men employed at the work in question, and that he had full authority to direct and control the manner of doing said work, and that said ——— did, within his authority, order the plaintiff to work in a dangerous place or perform the work in a dangerous manner, that then and in that event the plaintiff did not assume the hazard or risk of obedience, unless the danger was so imminent that a man of ordinary prudence would not have incurred the risk or hazard.⁴⁰

The jury are instructed that even if they believe from the evi-

³⁸ *Levecke v. Curtis & Co. Mfg. Co.*,
193 S. W. 985, 197 Mo. App. 262.

³⁹ *Corby v. Missouri & K. Tele-
phone Co.*, 132 S. W. 712, 231 Mo. 417.

⁴⁰ *Yarber v. Chicago & A. Ry. Co.*,
85 N. E. 928, 235 Ill. 590.

dence that the rope referred to in the evidence in this case was split, frayed, raveled, or untwisted, and even if they believe from the evidence that the plaintiff was ordered by ——— to put said rope on the spool just before he was injured, yet the jury are further instructed that if they believe from the evidence that the plaintiff, at the time he put the rope on the spool, knew of the condition of the rope, and knew and appreciated the danger, and further believe that the danger was so imminent that an ordinarily prudent man would not incur it, but would disobey such order, then there can be no recovery.⁴¹

§ 3752(2). *Missouri*

The court instructs the jury that, if the jury find from the evidence in this case the facts set out in instruction No. ——— given to be true, and further find from the evidence that said pile of ties as so piled was liable to fall by reason of not being fastened or secured to prevent its falling and injuring the plaintiff whilst at and about the work of his said employment, if the jury find that the said pile was so insecure and unfastened, and if the jury find from the evidence that the plaintiff in the exercise of ordinary care would have known that said pile of ties was so unfastened and insecure, and that there was some danger of said pile falling and injuring him while in the discharge of the duty of his employment, yet, if the jury further find from the evidence that said danger of said pile so falling and injuring the plaintiff was not so apparent or imminent, that a person of ordinary prudence under the same or similar circumstances as the plaintiff, would not have done the work that plaintiff was doing at the time of his injury, as mentioned in the evidence, then the fact that the plaintiff did said work on said pile under said circumstances, will not of itself prevent a recovery in this case.⁴²

§ 3752(3). *Oregon*

You are instructed that, while a servant assumes ordinary risk, he does not assume the risks arising from a sudden peril not incident to his employment, where he does not have time to exercise deliberation, which one of ordinary prudence would do when confronted with a known danger. And where a servant is injured by something not incident to his employment, but by a temporary peril to which he is exposed by the negligent act of his employer, he is entitled to recover damages from the employer on account of such injury. When a servant is employed, and the employer negligently and carelessly creates a peril at the place where the serv-

⁴¹ *Illinois Steel Co. v. Wierzbiцкий*,
68 N. E. 1101, 206 Ill. 201.

⁴² *Wilson v. United Rys. Co. of St. Louis*, 152 S. W. 426, 169 Mo. App. 405.

ant is at work, and the servant is injured thereby, then the servant will be entitled to recover for such injury.⁴³

The jury are instructed that a servant in entering the employment of a master assumes the ordinary risks incident to the work contracted to be done, but not such as the master might have avoided by reasonable care. The law also provides that if a master directs his servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of the injury to the servant, the master is guilty of actionable negligence.⁴⁴

§ 3752(4). Virginia

The court instructs the jury that, if they believe from the evidence that the plaintiff was a servant of the defendant company, and that he was ordered by a representative of the company in authority over him to go from where he was on a "bent" or trestle section to another "bent" or trestle section on the three block and tackle ropes connecting said "bents" or trestle sections, then it was the duty of the plaintiff to obey such order, unless the act was one obviously attended by such danger that a man of common prudence would not have undertaken it.⁴⁵

The court further instructs the jury that if they believe from the evidence that while the "wringer" machine operated by the plaintiff was equipped with the loose pulley referred to in the evidence, the plaintiff cleaned said machine by causing it to come to a standstill by means of the loose pulley and then threw water on it and wiped it off with waste, and if they further believe from the evidence that for some time after the removal of the said loose pulley, he undertook to clean said machine only by throwing water on it while it was in motion, and if they further believe that some days after the loose pulley had been removed, Mr. M., the company's superintendent, directed the plaintiff to clean said machine by throwing water on it and rubbing it with waste while it was in motion, and showed the plaintiff how to clean said machine while in motion, the plaintiff had the right to rely upon the directions given him by the said M., unless the dangers of his undertaking to obey the directions of the said M. were so open and obvious as to be discernible by one of his age, experience and mental capacity. And if the jury believe from the evidence that the plaintiff, with ordinary care and caution to be reasonably expected from one of his age, experience, and mental capacity, was injured while clean-

⁴³ Pfeiffer v. Oregon-Washington R. & Nav. Co., 144 P. 762, 74 Or. 307.

⁴⁴ Prement v. Wells, 133 P. 647, 35 Or. 336.

⁴⁵ Millboro Lumber Co. v. Donald, 90 S. E. 618, 120 Va. 150.

ing said machine while it was in motion in the manner directed by said M., they shall find a verdict for the plaintiff, unless the jury believe from the evidence that the plaintiff knew, or, taking into consideration his age, experience, and mental capacity, should have known, the danger of undertaking to clean said machine while in motion.⁴⁶

The jury are instructed that, although they may believe from the evidence that the plaintiff knew there was some danger in jumping into the pit to shut off the valve and stop the turntable, yet if they further believe from the evidence that the danger was not so imminent that a reasonably prudent man would not have attempted it under the direction of his foreman, and that the plaintiff used such reasonable care as an ordinarily prudent man would have exercised and was injured, then he is entitled to recover.⁴⁷

§ 3753. Extraordinary risks or dangers

Risks arising from negligence of master, see ante, §§ 3740-3748:

§ 3753(1). Arizona

The defendant, in its answer, has alleged that the plaintiff's injuries, if any, were caused by the ordinary risks or hazards of the work in which the plaintiff was engaged, and that the plaintiff voluntarily assumed the risk of injury therefrom. Now, I charge you that whether or not he did assume the risk is a question of fact which, under the law of this state, is within your exclusive province to determine. The law is that a servant assumes the ordinary risk incident to the business in which he is engaged, but he does not assume the extraordinary risk of the negligence of the master, or in obedience to the master's order doing work in a dangerous place with unsafe appliances, or in a dangerous manner, unless the danger thereof was so imminent that a man of ordinary prudence would not have incurred the risk or hazard. You are instructed that plaintiff assumed the risk of injury from the extraordinary and unusual dangers and hazards of his work if they were open and obvious to and were fully observed, understood, and appreciated by him. If you find that plaintiff was injured by an extraordinary risk, danger, or hazard, or by several of them concurring, and that the same was, or were, open and obvious to and was, or were, fully observed, understood and appreciated by him then your verdict must be for the defendant.⁴⁸

⁴⁶ United States Leather Co. v. Showalter, 74 S. E. 400, 113 Va. 479.

⁴⁷ Washington-Southern Ry. Co. v. Cheshire, 65 S. E. 27, 109 Va. 741.

⁴⁸ Inspiration Consol. Copper Co. v. Lindley, 177 P. 24, 20 Ariz. 95.

§ 3753(2). Colorado

You are instructed that, in entering upon his employment as a brakeman, the deceased assumed the risk of all dangers ordinarily incident to his work, and if he was assigned to work at an unusually or extraordinarily dangerous place, and was informed of said unusual or extraordinary dangers, or by any means learned thereof, and understood and appreciated them, said dangers became ordinary to said employment, and were likewise assumed by him, and if his death was the result of said dangers, the risk of which was assumed as hereinbefore defined, the plaintiff cannot, in any event, recover in this action.⁴⁹

§ 3753(3). Texas

The court instructs the jury that plaintiff did not assume the risk of extrahazardous work, if any, unless he was warned and instructed in said work by defendant company, and after so being warned continued to work at said hazardous work.⁵⁰

§ 3753(4). West Virginia

The court instructs the jury that the plaintiff did not assume any extraordinary risks and hazards caused by the negligence of the defendant or any of its officers, agents or employés, and if from all the evidence adduced the jury believe the injury to the plaintiff was caused by such extraordinary risks and hazards, resulting from such negligence and further believe that the plaintiff had not notice or knowledge of such risks and hazards then the jury should find for the plaintiff.⁵¹

§ 3754. Agreement by servant to make his working place safe

If you find by a preponderance of the evidence in this case that the plaintiff was sent to make his working place safe or agreed to make his working place safe, then you are instructed that the plaintiff assumed the risk of his employment with respect to the safety of such place, and your verdict should be for the defendants.⁵²

§ 3755. Risks attendant on work outside of scope of employment**§ 3755(1). Arkansas**

You are instructed that, if plaintiff was in the employment of the defendant, and his usual work was to run the equalizer, and at the time of the injury plaintiff was holding the belt of the planer for ———, to lace it, and defendant's superintendent was present and knew that plaintiff was holding the belt and acquiesced there-

⁴⁹ Great Western Sugar Co. v. Parker, 123 P. 670, 22 Colo. App. 18.

⁵⁰ Missouri, K. & T. Ry. Co. of Texas v. Mooney (Civ. App.) 181 S. W. 548.

⁵¹ Keathley v. Chesapeake & O. Ry.

Co., 102 S. E. 244, 85 W. Va. 178. Such an instruction is not defective, because it does not include a qualification as to open and patent risks.

⁵² Ricardo v. Central Coal & Coke Co., 163 P. 641, 100 Kan. 95.

in, then you may consider this in determining whether or not at the time of the injury plaintiff was engaged in the line of his duties in the service of defendant, in a place of danger outside the duties of his employment.⁵³

§ 3755(2). California

The court instructs you that, if an employé in the discharge of his duties to which he has been assigned by his employer, voluntarily takes a place which he is not required to take, he assumes the risk which may attach to such place which is obvious to him by the use of ordinary care, and which is greater than the risk attached to the place he may have taken by reason of his employment.⁵⁴

§ 3755(3). Texas

The jury are instructed that, if you find that said plaintiff had been instructed to work at another place in the mine, and that he, without knowledge or consent of the defendant or his agents having charge and control of the mine, went to work at the place where he claims to have been injured, then he assumed the risk of being injured by some defective condition, if any, of the track and switch, and cannot recover, but if the plaintiff was given the privilege of working at either of two places, and he was working at one of these places when he claims to have been injured; or if he was instructed to work at another place, yet if the agent of the defendant in charge of defendant's mine knew plaintiff was at work where he claims to have been injured, then he did not assume such risk, unless the defect, if any, was open and patent and was known to the plaintiff or must necessarily have been known had he used that circumspection which an ordinarily prudent person would have exercised in the same employment.⁵⁵

§ 3756. Same—Effect of knowledge acquired at usual task

The court instructs the jury that, if you find that the task at which the plaintiff was working when the accident occurred was, under all the circumstances of the case, one of special danger, then I charge you that such knowledge of danger as plaintiff may have acquired at the usual tasks of his employment does not necessarily raise the presumption that he knew of such special danger. A servant directed to undertake work outside of that which he is engaged to do is not presumed to be aware of its peculiar risks, and therefore, if the master does not fully explain them to the servant before putting him at such new work, the servant is

⁵³ St. Louis Stave & Lumber Co. v. Sawyers, 119 S. W. 830, 90 Ark. 473.

⁵⁴ Cordler v. Keffel, 119 P. 658, 161 Cal. 475.

⁵⁵ Consumers' Lignite Co. v. Cameron (Civ. App.) 134 S. W. 283.

entitled to assume that it has no greater risk than those which attach to his regular work.⁵⁶

§ 3757. Rule as to youthful employees and minors

§ 3757(1). Arkansas

The jury are instructed that, in passing upon the question of contributory negligence on the part of the deceased, and of assumed risk, you must take into consideration his age, experience, intelligence, and means of knowledge; and after considering these matters, if you believe from the evidence that the deceased, on account of his youth or inexperience, did not know or fully realize and appreciate the danger incident to the act or employment in which he was engaged at the time of the injury complained of, then you cannot hold him guilty of contributory negligence, nor can he be held to have assumed the risk, unless the danger of doing whatever he is shown to have done was, at the time and under all the circumstances then existing, obvious and apparent to a person of his age, intelligence, and experience.⁵⁷

You are instructed that the mere fact that plaintiff was not of age at the time of the injury complained of is not sufficient to enable him to recover damages in this case, if he was able to appreciate the danger incident to his employment; so if you believe from the evidence that he was aware of the danger of coming in contact with the saw in evidence, that same was likely to injure him from such contact, and that his employment was such as to necessitate carefulness on his part to avoid injury from such cause, then he assumed the risk when he entered such employment and cannot recover therefor.⁵⁸

§ 3757(2). Wisconsin

The jury are instructed that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger.⁵⁹

7. Contributory Negligence

§ 3758. Concurrence of negligence of servant in causing injury as essential element of contributory negligence

§ 3758(1). Kansas

The jury are instructed that "contributory negligence" is an omission of duty, either in a failure to do that which a reasonably

⁵⁶ *Petersen v. California Cotton Mills Co.*, 130 P. 169, 20 Cal. App. 751.

⁵⁷ *St. Louis, I. M. & S. Ry. Co. v. Jacks*, 151 S. W. 706, 105 Ark. 347.

⁵⁸ *Holmes v. Bluff City Lumber Co.*, 133 S. W. 819, 97 Ark. 180.

⁵⁹ *Horn v. La Croase Box Co.*, 111 N. W. 522, 131 Wis. 384.

prudent person would do, or in doing that which a reasonably prudent person would not do under like and similar conditions on the part of the one injured by the negligence of another, which omission of duty contributed directly to the injury sustained.⁶⁰

§ 3758(2). Texas

You are instructed that "contributory negligence" means such act or omission on the part of a plaintiff as an ordinarily prudent person would not do or suffer under similar circumstances, which, concurring with a negligent act or omission of a defendant, becomes a proximate cause of an injury.⁶¹

The court instructs the jury that, if you find that plaintiff was guilty of some act of negligence in the manner in which he attempted to set the brake on the occasion in question, and if such negligence, if any, concurred with some negligence, if any, of defendant in failing to inspect, discover, and repair the defect, if any you find, in the dog, it would make him guilty of contributory negligence.⁶²

The court instructs the jury that, if you shall find that it was the duty of plaintiff to examine the braking appliance on the car to ascertain if it would hold the car, before setting same in on the side track at ———, then if you find he failed to use ordinary care to so examine same, then he would be guilty of such negligence which, if it concurred with some negligence, if any, of the defendant in failure to inspect, discover, and repair the defect, if any you find in the dog, in causing injury, if any, to the plaintiff, would make him guilty of contributory negligence.⁶³

The jury are instructed that contributory negligence is negligence on the part of the person injured which, concurring or co-operating with some negligence of the defendants, causes or contributes to cause or produce the injury complained of.⁶⁴

§ 3759. Duty of servant to exercise ordinary care

§ 3759(1). Florida

The jury are instructed that, if you believe from the evidence that the plaintiff was injured while engaged in the performance of his usual duties as a servant of the defendant, he was bound to exercise ordinary care for his own safety, or that degree of care which prudent persons usually exercise under similar circum-

⁶⁰ Ross v. St. Louis & S. F. R. Co., 144 P. 844, 93 Kan. 517.

⁶¹ St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

⁶² St. Louis Southwestern Ry. Co. of Texas v. Downs (Civ. App.) 153 S. W. 714.

⁶³ St. Louis Southwestern Ry. Co. of Texas v. Downs (Civ. App.) 153 S. W. 714.

⁶⁴ Southwestern Telegraph & Telephone Co. v. Sanders (Civ. App.) 133 S. W. 1181.

stances; and, if he was injured by failure to exercise such care, then the defendant is not liable in this action.⁶⁵

§ 3759(2). *Michigan*

The court instructs the jury that if you find that the plaintiff, while engaged in carrying boards from the machine to the piling place, as has been described before you, and performing his duty as has been set forth to you here, did not exercise proper caution and observation, such as an ordinarily prudent person of like years and experience and understanding of the plaintiff would and should have exercised, as the circumstances required, and you further find from the testimony that an ordinarily prudent person under like circumstances, of the age, experience, and intelligence of the plaintiff, under such circumstances would have guarded himself against injury from the knife upon which plaintiff was injured, and would have remained in a place of safety without especial care and attention, then it was the duty of the plaintiff to have done so, and the failure on his part to take such precaution would prevent his recovery.⁶⁶

§ 3759(3). *Missouri*

The court instructs the jury that by the term "ordinary care" as that expression is used in these instructions, is meant such care as an ordinarily prudent person would have used at the time and under the same or similar circumstances; and the court further instructs you in this connection that, if you find from the evidence that the plaintiff used such care as an ordinarily prudent person would have used at the time in doing the work which plaintiff was engaged in at the time he was injured, then the plaintiff is not guilty of negligence.⁶⁷

The court instructs the jury that if you find and believe from the evidence that ——— was not using ordinary care and exercising ordinary prudence at the time and place of his injury, and that the failure to use such care and prudence directly contributed to cause his injury resulting in his death, then you will find for defendant, and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same or similar circumstances.⁶⁸

The court instructs the jury that if they believe from the evidence that the only tools used by this plaintiff to perform his work were a hammer and a mandrel, and that said tools were reason-

⁶⁵ *Florida Cent. & P. R. Co. v. Mooney*, 33 So. 1010, 45 Fla. 286, 110 Am. St. Rep. 73.

⁶⁶ *Radic v. Thomas Jackson & Co.*, 146 N. W. 136, 178 Mich. 618.

⁶⁷ *Wagner v. Gilsonite Const. Co.*, 220 S. W. 890.

⁶⁸ *Hegberg v. St. Louis & S. F. R. Co.*, 147 S. W. 192, 164 Mo. App. 514.

ably safe and suitable tools for the plaintiff to use in the performance of his duties, but that this plaintiff used the hammer in so careless a manner as to strike the mandrel instead of the wire handle of the utensil, and thereby caused a piece of the hammer to chip off and fly up and strike him in the eye, thus causing the injury, then the plaintiff himself was negligent, and cannot recover.⁶⁹

§ 3759(4). North Carolina

The jury are instructed that if you find from the evidence in this case, and by its greater weight, that at the time of his injury the plaintiff knew, or by the exercise of his ordinary powers of observation could have known, that the log which he was engaged in sawing was not "chocked," or if you find by the greater weight of the evidence that the plaintiff, by the exercise of ordinary care in stepping to the other side of the log, or otherwise, could have avoided the injury, then, in either of these events, you will answer the third issue, "Yes."⁷⁰

The jury are instructed that it was the duty of the plaintiff to exercise reasonable and ordinary care to avoid danger, and if the plaintiff, by the exercise of ordinary and reasonable care, could have seen the danger in time to have escaped the danger, then he would be guilty of contributory negligence, and the jury would answer the second issue "Yes"; if the jury should not so find, they will answer the second issue "No."⁷¹

§ 3759(5). Oklahoma

You are instructed, gentlemen of the jury, that it is the duty of every man employed by another to use reasonable and ordinary care to prevent injury to himself from the open and obvious dangers incident to his employment. And you are instructed that, even though you should believe from the evidence in this case that the defendant was negligent in providing the place in which plaintiff was to work, yet, if you should further believe from the evidence that plaintiff failed to use reasonable and ordinary care to protect himself from danger and hurt, your verdict should be for the defendant.⁷²

You are instructed that it was the duty of the plaintiff in this cause upon his part to use ordinary care and in the use of ordinary care to use ordinary observation to avoid being injured by the defendant or any of its employes, and if you find from the evidence in this case and all the facts and circumstances proved upon the trial,

⁶⁹ Duerst v. St. Louis Stamping Co., 63 S. W. 827, 163 Mo. 607.

⁷⁰ Williams v. Farmers' Mfg. Co., 104 S. E. 31, 180 N. C. 64.

⁷¹ Turrentine v. Wellington, 48 S. E. 739, 136 N. C. 308.

⁷² Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132, 60 Okl. 249.

including the experience of the plaintiff as a miner and as a foreman of mines and his knowledge of the condition of the entry in question, that the plaintiff did not exercise ordinary care and was thereby injured, then your verdict must be in favor of the defendant and against the plaintiff.⁷³

You are instructed that contributory negligence, as used in these instructions, is such an act or omission on the part of plaintiff's decedent which amounts to a want of ordinary care on his part, and which, concurring or co-operating with the negligent act of the defendant, is the proximate cause or occasion of the injury complained of.⁷⁴

You are further instructed that, if you find from the evidence in this case that the plaintiff's decedent was guilty of contributory negligence, then the plaintiff herein cannot recover, regardless of whether defendant was guilty or not. By contributory negligence, as already explained, is meant want of ordinary care on the part of the deceased which in some degree directly caused his injury, and without which the injury would not have occurred. While it was the defendant's duty to provide a reasonably safe place for the deceased to work, and reasonably safe tools and appliances with which to perform his work, and maintain same in such condition, it was also the duty of the deceased, while engaged in the work assigned to him, to exercise ordinary care for his own safety; that is, such care as a reasonably prudent person of his experience and understanding would exercise under the same circumstances and conditions. If you find from the evidence that he did not exercise such care, and was injured by reason thereof, plaintiff cannot recover herein, and your verdict should be for the defendant.⁷⁵

§ 3759(6). Oregon

In this same connection you have no doubt observed from the testimony, as well as from the pleadings, that the plaintiff's participation in the transaction complained of has been alleged to be negligent in character. Now the plaintiff's negligence, if you find he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that he did an act or number of acts which a prudent engineer would not have done, or if he failed to do an act or number of acts which an ordinarily prudent engineer would have done under all the existing circumstances, having in view the probable danger of his receiving an injury, then I charge you that he is, with respect thereto, guilty of

⁷³ Henryetta Coal & Mining Co. v. O'Hara, 150 P. 1114, 50 Okl. 150.

⁷⁴ St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

⁷⁵ St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

negligence; and if his acts, if any you find, were the proximate cause of the injury, and if you further find that the acts, if any, of the defendant and its employes were not the proximate cause of the injury, then it will be your duty to find a verdict for the defendant. And in this connection, if you believe from the evidence that plaintiff's injury was caused partly by one or more of the negligent acts of the defendant, mentioned in the complaint, and one or more of the negligent acts of the plaintiff, as mentioned in the answer, then it will be your duty to compare the same in accordance with the instructions which I shall give you.⁷⁶

§ 3759(7). Texas

You are instructed that if you believe from the evidence that, under and in view of the rules relied on by the defendant, or the custom and usage of the business as you may find it, or independent of such rules and such custom or usage, the plaintiff approached or came into the yard, at the north opening of the switch in question, without having the train in his charge under control, such as the evidence may show you was proper, and that such act was a want of ordinary care, that is, a failure on his part to exercise such care as an ordinarily prudent person would have exercised under the same or similar circumstances, or if you believe that plaintiff so approached or came into such yard without keeping a proper lookout, and that such was a want of ordinary care on his part, or if you believe that he so approached or came into such yard at a speed in excess of that at which a person of ordinary prudence would have operated the train under like circumstances, or in excess of ——— miles per hour, then he was guilty of negligence.⁷⁷

Upon the subject of contributory negligence you are instructed that it is the duty of every person to use ordinary care, as herein-after defined, to avoid injury to his person, and the failure to use such care upon the part of the person injured will be negligence, which negligence, if it causes or contributes to cause the injuries complained of, will defeat recovery of damages therefor.⁷⁸

You are instructed that, if you should find that the defendant was guilty of negligence as charged, then you must also determine, from the law given you in this charge, and the evidence before you, whether or not the plaintiff was guilty of contributory negligence. Negligence, in a general sense, is every omission to perform a duty imposed by law for the protection of one's own person or property,

⁷⁶ Pfeiffer v. Oregon-Washington R. & Nav. Co., 144 P. 762, 74 Or. 307.

⁷⁷ St. Louis B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

⁷⁸ Southwestern Telegraph & Telephone Co. v. Sanders (Civ. App.) 138 S. W. 1181.

or that of another. Negligence, to some extent, should be measured by the character, risk, and exposure of the business under consideration; and the degree of care of all parties is higher when lives and limbs of themselves or others are endangered than in ordinary cases. Ordinary negligence is the want of such care and diligence as reasonably prudent men, in regard to the subject-matter of inquiry, under such circumstances as those under consideration, would use to endeavor to prevent the injury of which complaint is made. Contributory negligence is negligence not only upon the part of the one committing the injury, but also upon the part of him upon whom the injury is committed, and by which they both contributed thereto. One who is injured by the ordinary negligence of another cannot recover damages therefor, if the injured party, by his own ordinary negligence or willful wrong, proximately contributed to the injury, so that it would not have happened but for his own fault. If the party injured by his own carelessness substantially contributed to the injury, or might, by the exercise of ordinary care, such as prudent men would have used under similar circumstances, have avoided the injury, he cannot recover damages. The law required of the plaintiff, as a brakeman, for his own self-protection, the use of such ordinary care in the performance of the duties of his position as prudent men, under similar circumstances, would employ; and if the testimony shows that the defendant, in the first instance, was guilty of negligence, in the want of the use of due and reasonable diligence, as before stated, in leaving said hole or excavation (if you believe there was such a hole), by means of which the plaintiff was thrown in such position, in his attempt to couple the cars of the defendant, as to have had his arm injured, and if the testimony further shows that the plaintiff, by his own ordinary negligence, in not using such means and precautions as were proper and usual with prudent brakemen generally under similar circumstances, contributed to his own injury, so that the same would not have happened but for the mutual contributory or co-operative negligence of both, then the plaintiff would not be entitled to recover.⁷⁹

You are instructed that, if it should appear that plaintiff knew that in performing said duty in the manner that he undertook to do so, or by the exercise of ordinary care might have known, that it was dangerous, and he still continued performing said work, then plaintiff cannot recover. It was the duty of the plaintiff, for his own safety, to exercise that degree of care that a reasonably prudent person would have exercised under the same circumstanc-

⁷⁹ *Missouri, K. & T. Ry. Co. of Texas v. Kirkland*, 32 S. W. 588, 11 Tex. Civ. App. 523.

es; and if his injury resulted to him from a failure on his part to use such care, then you will find for the defendant, and that without regard to whether said ——— had or had not failed to perform the duty required of him.⁸⁰

§ 3759(8). Utah

You are instructed that it is the duty of the servant to use reasonable and ordinary care to protect himself from injury, and if he fails to use such ordinary care, and injury results to him by reason of such failure, he cannot recover, even though the master is also guilty of negligence that contributes to the injury. The servant in his work may assume that the master has used reasonable and ordinary care to provide him a reasonably safe place in which to work, and the servant is not bound to inspect the premises to ascertain whether the master has performed his duty; but this does not mean that the servant must not continue at all times to exercise ordinary care for his own safety, and the court instructs you that if the work being done by the plaintiff in this case at the time of the injury tended to make the place insecure, then you are instructed that it was his duty to use ordinary care to discover the danger and to protect himself from injury, and if he failed to do so, he was guilty of contributory negligence and cannot recover.⁸¹

§ 3760. Question of negligence as dependent upon knowledge of servant

§ 3760(1). California

You are instructed that contributory negligence is not established, unless you find plaintiff was chargeable with a knowledge, or ought to have known, not only of the defective conditions, if you believe from the evidence there were defective conditions, but also of the dangers of those conditions, and this conclusion is to be drawn in the light of the duties of plaintiff, his opportunities of observation, time for observation, and capacity for understanding the peril.⁸²

§ 3760(2). Texas

You are instructed that, if you believe from the evidence that, as plaintiff stood in attempting to place the belt on the pulley, on the occasion in question, there was a plank or board in easy convenient reach above the line shaft, by which he could have steadied or supported himself with one hand while he put on the belt with

⁸⁰ Texas & P Ry. Co. v. French, 23 S. W. 642, 86 Tex. 96.

⁸¹ Dovlich v. Chief Consolidated Mining Co., 174 P. 627, 53 Utah, 522.

⁸² Ingalls v. Monte Cristo Oil & Development Co., 139 P. 97, 23 Cal. App. 652.

the other, and if the plaintiff did not hold to said plank, while attempting to put on the belt at the time he claims to have been injured, but assumed some other position, and if you believe the plaintiff, in so attempting to put on the belt by not holding to said board or plank, failed to use ordinary care, and that such want of ordinary care, if any, there was, was the proximate cause of plaintiff's injury, or proximately contributed thereto, you will find for the defendant. But in this connection you are instructed that, if you believe from the evidence that the set screw in question, at the time, did project beyond the surface of the coupling on the shaft, and was in a dangerous condition, yet if the plaintiff did not know of the set screw, or in the course of his duties must not have known of same, or if the same was not obvious—that is, open to the observation of a person of ordinary prudence under like circumstances and conditions—then the plaintiff, in selecting a method of putting on the belt, would not be held to the duty of taking into consideration the set screw in question, and if you so believe you will not attribute to plaintiff notice of the existence or danger of the set screw, if it was dangerous, in determining the question of plaintiff's want of ordinary care, as submitted to you in this paragraph of this charge.⁸³

§ 3761. Duty to inspect place of work

The court tells the jury that if they believe from the evidence it was the duty of both plaintiff and O. to use ordinary care to inspect their working place and see if the same was in a reasonably safe condition, including the mine roof over that part of the room where they were cutting coal and loading and unloading or standing their tools and machinery, and if such inspection did disclose, or, if made, would have disclosed, to an ordinarily careful and intelligent man engaged in their occupation, situated as they were, and under all the circumstances, as they appeared to them, that said roof was dangerous, it was the duty of both men to leave such working place and stay away until after such roof had been properly protected, or until after they had been assured by defendant that it had been protected; and if the jury believe from the evidence that the plaintiff, in the exercise of such care, inspected the roof and found it defective, or would have found it so if he had inspected, but that he failed to inspect it, or if they should believe from the evidence that plaintiff thought it was the duty of O. only to make such inspection, and he relied upon O. to do so, and O. did make such inspection, and found the roof defective, and communicated this to plaintiff, and that plaintiff failed to leave said

⁸³ *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

working place, and that his failure to leave it was the proximate cause of the accident, then plaintiff was guilty of contributory negligence and cannot recover.⁸⁴

§ 3762. Disregard by servant of known dangers

§ 3762(1). Alabama

The court instructs the jury that, if you believe from the evidence that the plaintiff was himself aware that steam was escaping from the boilers into the cylinders of said engine, and that this would probably cause the disk or side rods of said engine to move at any moment, and with knowledge and appreciation of the danger arising therefrom he voluntarily placed his said hand that was injured on the said disk or side rods of said engine without necessity therefor, and thereby received his said alleged injuries, then the jury must find for the defendant.⁸⁵

§ 3762(2). California

The court instructs you that the plaintiff (who claims that, while engaged as a well puller, he was injured by the fall of the roof of the derrick under which he was working) cannot be deemed to have been in fault because he failed to take precaution that he did not know to be necessary as a reasonably prudent and observing man, and that he cannot be denied a recovery on the ground of contributory negligence, unless you believe from the evidence that the condition of the roof of the derrick was defective and dangerous, and that the plaintiff knew or ought to have known of such condition, rendering his act an imprudent one considered in the light of his duties as a well puller, and of the fact that he was engaged in those duties at the time of the injury.⁸⁶

§ 3762(3). South Carolina

The court instructs the jury that, if you find from the evidence that the plaintiff knew of the wet and slippery condition of the floor over which he had to pass, if he did have to pass, or that by the exercise of ordinary care the plaintiff could have known of such condition, or that any reasonable man of ordinary care and prudence would have known of such condition, and that any reasonable man of ordinary care and prudence, knowing of such condition of the floor, would have realized the risk and danger in passing over it, and would not have attempted to pass over it, and that the plaintiff, in attempting to pass over the floor, failed to exercise the ordinary care which would have been exercised by a person of

⁸⁴ *Darby Coal Mining Co. v. Shoop*, 83 S. E. 412, 116 Va. 848.

⁸⁵ *Reid v. Sloss-Sheffield Steel & Iron Co.*, 58 So. 301, 177 Ala. 262.

⁸⁶ *Ingalls v. Monte Cristo Oil & Development Co.*, 139 P. 97, 23 Cal. App. 652.

ordinary prudence under similar circumstances, and that such failure to exercise ordinary care and prudence contributed, as a proximate cause, to his injuries, why, then, he could not recover.⁸⁷

§ 3762(4). Texas

The court instructs the jury that, if you believe from the evidence before you that upon the occasion of the accident in question, it was obvious and apparent to the plaintiff, if such you find it was, as the employé ——— approached the skids with the log being drawn by him, that there was a probability and likelihood, if such you find there was, that the log so being drawn would come in contact with a log or logs on the skids, and that thereby plaintiff would be injured, and you further believe from the evidence that it would have been a simple and easy matter for the plaintiff to have avoided any injury to himself by removing himself away from the logs lying on the skids, so that any contact between the log being drawn up and a log or logs on the skids would not have resulted in any injury to him, and you further believe from the evidence that the plaintiff failed to so remove himself away from the logs on the skids, so that any contact between the logs being drawn up and a log or logs on the skids would not have resulted in any injury to him, and you further believe from the evidence that in so failing, if he did so fail, plaintiff did not exercise such care for his own safety as a person of ordinary prudence would have exercised under the same or similar circumstances, then you are charged that plaintiff was himself guilty of negligence, and if you further find that such negligence upon his part, if such you find, was the sole, proximate cause of plaintiff's injury, then and in such event you will let your verdict be in favor of the defendant.⁸⁸

§ 3763. Duty to guard against obvious danger

You are further instructed that if you believe from the evidence that plaintiff knew that some one or more of defendant's employés was or were engaged in doing some work on said derrick above him, while he was at work beneath, winding a rope to the windlass on said derrick, and if you further believe from the evidence that a man of ordinary prudence in plaintiff's situation would have used care to avoid being struck by anything that might fall, and if you believe further from the evidence that, if he had used such care, he would not have been struck by the falling block, you will find for defendant, irrespective of any other question in the case.⁸⁹

⁸⁷ *Harwell v. Columbia Mills*, 112 S. C. 177, 98 S. E. 324.

⁸⁸ *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

⁸⁹ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

§ 3764. Injuries received while temporarily absent from place of work

The court instructs the jury that if they shall believe from the evidence that on the day on which plaintiff's intestate, ——— was injured, he, the said ———, had been placed by the defendant company to work at a place of safety, and that said ——— (with the knowledge and in the presence of the agent of the defendant company who was in authority over said ———) left his said place, and went a short distance to a fire, and was there injured by the negligence of the defendant company, and if the jury shall further believe from the evidence that the said ———, in leaving his said place of work and in going to said fire, had reasonable and proper cause for so doing, and which cause was sanctioned by the defendant company, then the said ———, in so doing, was not thereby guilty of such contributory negligence as to bar a recovery in this action.⁹⁰

§ 3765. Unnecessarily remaining in dangerous place

See, also, ante, § 3762(4).

§ 3765(1). Arkansas

The court instructs the jury that if you find from the evidence that the injury received by the plaintiff was due to his negligent failure to remove himself to a place of safety, if the opportunity was given him to do so, then your verdict will be for the defendant.⁹¹

§ 3765(2). Missouri

The court instructs the jury that, even though you believe from the evidence that the gearing on the machine in question was entirely unguarded, yet if you further believe and find from the evidence that the presence of said gear wheels and the fact that said gear wheels were uncovered were known to the plaintiff, and if you further believe from the evidence that the danger of working near the same was open and obvious and was known to plaintiff and was so obvious and imminent that a person of ordinary prudence would not have continued to work near said gear or cogwheels, then and in that case your verdict must be for the defendant.⁹²

§ 3766. Going voluntarily or unnecessarily into dangerous place**§ 3766(1). Alabama**

The court charges the jury that the burden of proving contributory negligence is on the defendant, and if the jury believe from

⁹⁰ *Bertha Zinc Co. v. Martin's Adm'r*, 22 S. E. 869, 93 Va. 791, 70 L. R. A. 999.

⁹¹ *Arkansas Land & Lumber Co. v. Wilson*, 201 S. W. 818, 132 Ark. 617.

⁹² *Huss v. Heydt Bakery Co.*, 108 S. W. 63, 210 Mo. 44.

the evidence that plaintiff was injured by the sudden falling of the nail bed at which he was working, the mere fact that plaintiff's foot was in reach of the falling nail bed would not of itself charge plaintiff with contributory negligence unless the jury further finds under the evidence that the danger in putting plaintiff's foot where he did was so great that a man of ordinary prudence would not have done so.⁹³

The court charges the jury that an employé is held by the law to the use of ordinary care for his own safety, so that if he voluntarily undertakes to do work attended with danger which is obvious, he impliedly assumes the risk involved in its execution, but it does not follow that he is guilty of negligence in working merely because he knows the work to be dangerous without regard to the degrees of danger and risk involved, nor unless it be of a degree which would ordinarily deter one of ordinary prudence from the work.⁹⁴

§ 3766(2). Iowa

You are instructed that, if you find from the evidence that the plaintiff left a place of safety, and while there was not time for him to open the door in the manner he attempted to open the same before the mule and cars would have so far advanced as to put him in danger of injury, and that, without first looking and ascertaining the position of the advancing mule and cars, he voluntarily put himself in a position where he could be injured in consequence of the advancing mule and cars, there can be no recovery on behalf of the plaintiff, and your verdict should be for the defendant. However, this would not be true if you find by a preponderance of the evidence that the place which the plaintiff left when the rope broke was not a place of safety, but was a place of danger, or if you find that, from the circumstances as they then appeared to plaintiff, he, acting as a reasonably prudent and careful man, thought that the position was one of peril and danger to him.⁹⁵

§ 3766(3). Kansas

The jury are instructed that if, in the discharge of a duty, an employé of a railroad company voluntarily places himself in a dangerous position unnecessarily, when there is another place that is safer that he could have chosen, and he has time to exercise his judgment, and injury occurs by reason of his choice, he cannot recover for such injury.⁹⁶

⁹³ Alabama Steel & Wire Co. v. Wrenn, 34 So. 970, 136 Ala. 475.

⁹⁴ Alabama Steel & Wire Co. v. Wrenn, 34 So. 970, 136 Ala. 475.

⁹⁵ Johnson v. Plymouth Gypsum Plaster Co., 156 N. W. 721, 174 Iowa, 498. No prejudicial error.

⁹⁶ Atchison, T. & S. F. R. Co. v. Tindall, 48 P. 12, 57 Kan. 719.

§ 3766(4). *Kentucky*

The court instructs the jury that if they find from the evidence in the case that the plaintiff, on the occasion in question, when the train on which he came from ——— arrived at or near to the yards of defendant at ——— and stopped at the east end of said yards at the telephone station to phone for orders for track to switch train on, did not then see his own train (No. ———) and believe and have reasonable grounds to believe that he could catch his said train, and under such circumstances left the train on which he was riding in an effort to get on his train ———, but without necessity and out of the line of his employment left the engine of train ——— and was injured in an effort to return to said engine, then and in that event they must find a verdict for defendant.⁹⁷

You are instructed that, if you shall believe from the evidence that, on the occasion complained of by plaintiff, he went between two of defendant's freight cars while same were in motion and being moved and backed by the engineer in charge of said train, on its side track, and undertook to uncouple said cars, and in so doing, and as the sole and only cause thereof, and without any negligence on the part of defendant as defined to you by instruction No. ——— herein, he received the injuries now complained of by him, then he cannot recover in this case, and the law is for the defendant, and you will so find.⁹⁸

§ 3766(5). *Missouri*

The court instructs the jury that if they believe from the evidence that plaintiff, in going upon the pile of rubbish, knowing that there were many boards in the rubbish with nails in them, failed to use due care for his own safety, then he was guilty of contributory negligence, and if you find that such negligence, if any, contributed to cause his injuries, if any, then your verdict must be for defendant.⁹⁹

The court instructs the jury that if you believe from the evidence defendant furnished plaintiff a reasonably safe place in which to work, and that plaintiff while doing that work voluntarily went into a dangerous place without being ordered so to go, having full knowledge of the danger, and that the said danger was such as to threaten immediate injury, or such that a person of ordinary prudence would not have gone into it, then plaintiff was guilty of contributory negligence and the defendant is not liable for any injury sustained by plaintiff while in such dangerous place and directly caused thereby.¹

⁹⁷ *Norfolk & W. Ry. Co. v. Thompson*, 171 S. W. 451, 161 Ky. 814.

⁹⁸ *Nashville, C. & St. L. Ry. v. Henry*, 164 S. W. 310, 158 Ky. 88.

⁹⁹ *Bone v. Fruin-Colnon Contracting Co. (App.)* 191 S. W. 1062.

¹ *Bone v. Fruin-Colnon Contracting Co. (App.)* 191 S. W. 1062.

§ 3766(6). North Carolina

The jury are instructed that, while the law imposes a duty upon the master, it also imposes a correlative duty upon the servant. It requires him to exercise ordinary care for his own safety, to use his intelligence and his senses, and it holds him responsible if he is injured by his failure to exercise such care. It requires him to observe the machinery at which he is working and the appliances used to discover those dangers which a man of ordinary prudence would discover, and, if he fails to perform his duty and is injured thereby, he cannot recover damages, and if the plaintiff knew of the danger of the machinery when he went up to fix the "hog," and if in consequence thereof the danger to himself was so obvious that any man of ordinary prudence would not have gone up the way plaintiff went, then the plaintiff would be guilty of contributory negligence, and you should answer the second issue, "Yes." If, however, the plaintiff was not guilty of contributory negligence, you will answer this issue, "No." If there was a safe way to go to the "hog" provided by the company, which intestate knew, or ought to have known, and he chose another way which was unsafe, and this was the proximate cause of the hurt, the jury shall answer the second issue, "Yes." If the jury shall find that it was clear in the mind of one of ordinary intelligence that it was dangerous to go into the machinery as deceased did, and that the danger was obvious and imminent, and notwithstanding he undertook to do so, and his doing so was the proximate cause of his hurt, the jury will answer the second issue, "Yes."²

§ 3766(7). Texas

You are instructed that, if you believe from the evidence that, during the time plaintiff was employed at the linter, he could have seen and known, by ordinary observation in the performance of his duty, that the gin saws were in the linter at or about the place where he received the injury, and that the saws were constantly revolving on the inside, and near enough to the opening where he placed his hands to be almost certain to endanger his hand if he put it in the opening, then, for the purpose of this case, it is the same as if he had actually known it, for one is held to know whatever it is his duty to know, when he has had opportunity of knowing it; but, in determining this matter, you can take into consideration whether plaintiff was experienced or inexperienced in the particular work he was engaged when injured, together with all the other circumstances by which he was then surrounded.³

² *Midgette v. Branning Mfg. Co.*, 64 S. E. 5, 150 N. O. 333.

³ *Hillsboro Oil Co. v. White* (Civ. App.) 54 S. W. 432.

§ 3766(8). Virginia

The court instructs the jury that where a servant who has been assigned to work at a particular place, without any reasonable or proper cause for so doing, voluntarily goes away from his post of duty, and is injured in consequence thereof, he has no remedy against his employer. And if the jury shall believe from the evidence that ———, the deceased, was employed by the defendant company to work at drilling earth on top of a bank at its mines, and that his duty was, with a drill, pick, or shovel, to drill a hole in said earth, and that it was a safe position; and if the jury shall further believe from the evidence that the said ——— voluntarily, and without the direction of the defendant company or its agents, and without any reasonable or proper cause for so doing, left said position to which he was assigned, and voluntarily exposed himself to known danger, by going to a fire at which dynamite was being thawed by other servants of the defendant company, and that the said ——— was injured by an explosion of said dynamite at said fire to which he went voluntarily, and without the direction of the defendant company or its servants, and without any reasonable or proper cause for so doing; and if the jury further believe from the evidence that the said ——— in so doing was guilty of negligence which proximately contributed to his injury—then the said ———'s administrator cannot recover for an injury thus caused.⁴

§ 3767. Disregard of warnings or signals

§ 3767(1). California

The court instructs you that the plaintiff's continuing to work on defendant's mangle after being warned of the dangerous character of the machinery was not an act of contributory negligence on her part, nor was she guilty of contributory negligence by reason of continuing to feed into the mangle the articles of laundry to be ironed by the mangle after getting her fingers pinched in the rollers of the mangle (if you should find she did get them so pinched).⁵

§ 3767(2). Kentucky

The jury are instructed that, if you believe from the evidence that the motorman, ———, or his helper on the motor, did, on the occasion of the decedent's death, in operating the motor and cars, give to the decedent the customary signal of their approach, and shall further believe from the evidence that there was a rule of the defendant which permitted the motorman, after giving such

⁴ *Bertha Zinc Co. v. Martin's Adm'r*,
22 S. E. 869, 93 Va. 791, 70 L. R. A.
999.

⁵ *Perry v. Angelus Hospital Ass'n*,
156 P. 449, 172 Cal. 311.

signal, to run the motor and cars through the trapdoor without previously stopping unless the trapper signaled to the motorman to stop, that such rule was known, or, by the use of ordinary care, could have been known, to the decedent, and that following the giving, if any, of such customary signal of the approach of the motor and cars, the decedent failed to signal the motorman to stop the motor and cars, and by reason of such failure, if any, the motorman was caused to run the motor against the trapdoor and upon the decedent, when he would not otherwise have done so, you should in that event find for the defendant.⁶

§ 3767(3). *Missouri*

The jury are instructed that if, from the evidence, you believe that there was a warning card or marks or words placed on the car by which plaintiff was injured, and was there at the time plaintiff was injured; that the said cards or warning marks or words were in a place that could be seen, and were legible—then plaintiff cannot recover, whether he had observed said warning sign or not; and if you so find the facts your judgment should be for the defendant.⁷

§ 3767(4). *North Carolina*

If you find from the evidence that, immediately before the plaintiff's injury, ——— was standing within a few feet of plaintiff; that ——— then and there warned the plaintiff that the phosphate was about to fall, and told him to leave his rake behind and get out of the way of said phosphate; that, if the plaintiff had heeded said warning, he would have had time to escape the danger; and, if you should further find that the plaintiff failed to heed the warning thus given him, if it was so given, and that such failure on his part was the proximate cause of the injury, it will then be your duty to answer the second issue, "Yes."⁸

§ 3767(5). *Texas*

You are instructed that, if you should find from the evidence that, before said block fell upon plaintiff, he was warned by any one to look out, and that he heard said warning, and that he yet failed to keep a lookout, and that, in so failing to keep a lookout, he failed to exercise ordinary care for his own safety, and thereby helped cause his own injury, you will find for defendant, even though you should believe from the evidence that the said ——— failed to exercise ordinary care in some one or all of the particulars hereinbefore mentioned.⁹

⁶ *Linard's Adm'r v. Interstate Coal Co.*, 169 S. W. 1006, 160 Ky. 598.

⁷ *Rodney v. St. Louis S. W. Ry. Co.*, 28 S. W. 887, 127 Mo. 676.

⁸ *Edwards v. Interstate Chemical Co.*, 83 S. E. 714, 167 N. C. 671.

⁹ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

§ 3767(6). *Virginia*

The jury are instructed that, if the jury believe from the evidence that the pole in question was marked so as to show that it was condemned, as shown by the evidence, and the plaintiff did see, or by the exercise of ordinary care could have seen, that it was so marked, that, of itself, would not necessarily make him guilty of contributory negligence in climbing said pole; but if, under all the circumstances surrounding the case at the time, including the practice of the company in removing poles that were so marked, and of using them until they were so removed, the plaintiff, as a man of ordinary care and prudence, might have foreseen that it was dangerous to climb said pole to perform the duties required of him, then he was guilty of contributory negligence, and in that case he would not be entitled to recover.¹⁰

§ 3768. Disobedience of orders or violation of rules of master

§ 3768(1). *United States*

The court charges you that if plaintiff's decedent, ———, for the purpose of cleaning his engine at the time when he was not required by the company to clean it, voluntarily violated the rule of the defendant company requiring him to assist the engineer in watching for signals and obstructions, and if you also find that, but for such violation of the rule of the company, he would not have been injured, the plaintiff cannot recover in this case, and you should return a verdict in favor of the defendant railroad company.¹¹

§ 3768(2). *Alabama*

The jury are instructed that, if the jury believe from the evidence in this case that plaintiff was instructed by ———, his superior officer, to prop said pillars or stumps after the blast, and that a sufficient number of props suitable for the purpose were placed convenient for plaintiff's use, but that plaintiff failed to follow said instructions and failed to prop said pillar and stump and was injured because of such failure, then you will find for defendant.¹²

§ 3768(3). *Arkansas*

You are instructed that the plaintiff admits in his evidence that there was a rule of the railroad company in force, at the time of his injury, that prohibited the running of a freight train over ——— miles per hour, at any point in the yards where he was injured, so if you believe from the evidence in this case that the

¹⁰ *Southern Bell Telephone & Telegraph Co. v. Clements*, 34 S. E. 951, 98 Va. 1.

¹¹ *Erie R. Co. v. Kane* (C. C. A. Ohio) 118 F. 223, 55 C. C. A. 129.

¹² *Lookout Fuel Co. v. Phillips*, 66 So. 946, 11 Ala. App. 657.

plaintiff was running his engine at a speed exceeding ——— miles per hour, at the time he discovered or was told that there was an engine ahead of him, then the court tells you as a matter of law that the plaintiff would be guilty of negligence.¹³

You are instructed that although you may believe that the yardmaster, ———, gave the plaintiff a "high ball," and although you may believe this indicated that the track ahead was clear, and indicated plaintiff could proceed, this did not give the plaintiff any authority to proceed with his train at any greater speed than the rules of the defendant permitted, if you find those rules were in force and known to the plaintiff.¹⁴

You are instructed that, although you may find from the evidence that, at the time of the injury to plaintiff, the defendant had in force a rule requiring its employes to display a blue flag or flags while performing work in its yards, still if you find from the evidence that for a number of years this rule had been openly, continuously, and habitually disregarded by the employes of defendant for such period and for such an extent during said time down to the date of said injury as to lead to and justify the belief that the rule had been abrogated by the company, or its nonobservance acquiesced in, then the failure to obey said rule by the said plaintiff will not of itself prevent a recovery, provided that you find that the nonobservance of the rule was known to the defendant, or was for a long period and of so frequent occurrence as to cause you to believe that defendant must have known or acquiesced in its nonobservance; and in determining whether or not the rule has been abrogated, or its nonobservance acquiesced in by the company, you may take into consideration the period of time, the extent of openness with which the rule had been violated by the employes of the defendant, if you find from the evidence that the rule had been violated.¹⁵

§ 3768(4). Georgia

You are instructed that if you should find from the evidence that the plaintiff was ordered from the room where he alleges he was hurt, and from the machine, and directed by the proper authority of the company to leave the room and not to operate the machine, and if you find that his mental capacity was such as to enable him to appreciate and understand the order given him and to remember it, the warning, if any, and that afterwards he voluntarily returned and attempted to operate the machine upon which he is alleged to

¹³ St. Louis, I. M. & S. R. Co. v. Stewart, 187 S. W. 920, 124 Ark. 437.

¹⁴ St. Louis, I. M. & S. R. Co. v. Stewart, 187 S. W. 920, 124 Ark. 437.

¹⁵ St. Louis, I. M. & S. Ry. Co. v. Sharp, 171 S. W. 95, 115 Ark. 308.

have been hurt, and was hurt and injured thereby, then the defendant company could not be—would not be—liable.¹⁶

§ 3768(5). *Illinois*

The court instructs the jury that if you believe, from the evidence in this case, that the defendant's assistant mine manager entered plaintiff's working place at or about ——— o'clock on the morning of the day of the accident in question and found a loose rock in the roof of the room and placed a conspicuous mark on it and told plaintiff to take down or prop up such loose rock, and that such loose rock extended over and rested partly upon the rock which afterwards fell upon plaintiff, and that plaintiff failed to take down or prop up the rock so marked by the assistant mine manager, and afterward the loose rock caused the rock which fell upon plaintiff to fall, and that the latter rock became loose and fell solely because the rock marked by the assistant mine manager had rested partly upon it, then in such state of proof (if the proof so shows) you should find in favor of the defendant as to the ——— and ——— counts of the declaration.¹⁷

§ 3768(6). *Indiana*

You are instructed that if the decedent, on the occasion of the injury, failed to obey any rule of the defendant of which he had notice, or any instruction given him by his superior in the defendant's service, and such failure contributed to bring about his injury, it may be considered as bearing upon the question of decedent's contributory negligence, but it would not be a defense to the right of the plaintiff to recover.¹⁸

§ 3768(7). *Kansas*

The jury are instructed that the observance or nonobservance of the rules of the defendant company as to the operation of its trains is not conclusive as to the negligence or care of the defendant company or its employes, but are only circumstances to be taken by the jury for what they may think they are worth in determining whether or not the defendant's employes were negligent in the operation of said train at the time in question.¹⁹

§ 3768(8). *Michigan*

You are instructed that if you find that it was safer to lower the saw in order to saw what the plaintiff wanted to saw on the morning in question, and if you further find that the plaintiff did not lower the saw, and because he did not, if he did not lower the

¹⁶ *Eagle & Phenix Mills v. Moncrief*, 86 S. E. 260, 17 Ga. App. 10.

¹⁷ *Arkley v. Niblack*, 112 N. E. 67, 272 Ill. 356.

¹⁸ *Pennsylvania Co. v. Stalker* (App.) 119 N. E. 163, 67 Ind. App. 329.

¹⁹ *Deister v. Atchison, T. & S. F. Ry. Co.*, 162 P. 282, 99 Kan. 525, L. R. A. 1917C, 784.

saw, he was hurt, and if you further find that ——— had before the time of the accident, whether on that day or some other day or days, told the plaintiff to lower the saw so that the saw just came through the material to be sawed, or told him that in substance, then plaintiff cannot recover.²⁰

§ 3768(9). *Oklahoma*

You are instructed that it was the duty of the deceased, ———, as engineer of the freight train whose collision with the passenger train caused the death of the deceased, to observe the rules and orders of the railway company with reference to the running of his train.²¹

You are instructed that the deceased, ———, the engineer of the freight train, was equally responsible with the conductor of the freight train for the safety of that train.²²

You are instructed that under the evidence in this case the passenger train had the right of way at the time of the collision, and that it was the duty of the employes in charge of the freight train to keep said train out of the way of the passenger train.²³

§ 3768(10). *Virginia*

The court instructs the jury that if they believe from the evidence that ——— placed in the bill box in the machine shop of defendant company for the plaintiff, ———, written instructions for the shifting of the box car which is alleged to have caused the injury complained of, such instructions being left in the usual and proper place for them, and that there was written upon said instructions that said car was to be left at said store and not taken across the mountain because said car was unsafe, they shall find for the defendant, although they further believe that plaintiff for any reason failed to get said instructions, or having gotten them, failed for any reason to observe that part of said instructions.²⁴

§ 3769. *Same*—Rule as to method of coupling cars

§ 3769(1). *Alabama*

The court charges the jury that the rule of the defendant prohibiting employes from going in between moving cars to couple or uncouple them while in motion was a reasonable rule.²⁵

The jury are instructed that, if the jury believe from the evidence that the plaintiff was ordered by ———, the yard conductor, to make the coupling he was attempting to make when injured, the fact that he was ordered to make the coupling did not authorize

²⁰ *Welling v. Kalamazoo Lumber Co.*, 143 N. W. 73, 177 Mich. 340.

²¹ *Missouri, K. & T. Ry. Co. v. Lenahan*, 171 P. 455.

²² *Missouri, K. & T. Ry. Co. v. Lenahan*, 171 P. 455.

²³ *Missouri, K. & T. Ry. Co. v. Lenahan*, 171 P. 455.

²⁴ *Honaker Lumber Co. v. Call*, 89 S. E. 506, 119 Va. 374.

²⁵ *Huggins v. Southern Ry. Co.*, 41 So. 856, 148 Ala. 153.

or justify him in going between the said cars to make the said coupling in violation of the rules of the defendant and of which plaintiff had knowledge.²⁶

The jury are instructed that, if the jury believe from the evidence that plaintiff knew that the rule of the defendant prohibited employes from going in between moving cars for the purpose of coupling them, and it was not necessary for the plaintiff to go in between them while they were moving in order to couple them, he was guilty of contributory negligence.²⁷

§ 3769(2). Minnesota

The jury are instructed that the only claimed right or excuse for the plaintiff's presence upon the track at the time of the accident is an alleged defect in the automatic coupler sufficient to then necessitate his presence on the track for the purpose of preparing it for its destined impact. If such defect existed at the time, it is sufficient to establish his right to be upon the track at that time, and was the proximate cause of his injury, provided he was then engaged in the line of his duty in making the coupling. But, if no such defect existed, then there was no excuse for his presence on the track at the time, and he was then in violation of the law and the rules of the service, and his own negligence and disobedience was the proximate cause of his injury. So that the only question for you to consider in this case, so far as negligence is concerned, is: Did this coupler, that is in issue upon this car, comply with the requirements of the federal Safety Act or not? Was it in such a condition that it could be properly prepared for its destined impact without the necessity of — going between the ends of the cars, or was it in such a condition that it could not be so prepared without the necessity of — going between the cars? If it was in such a condition that it was necessary for — to go in front of the car, as he did, for the purpose of preparing the coupling for its approaching impact and in order to couple onto the other car, then the defendant was guilty of negligence for the injurious consequence of which to — it must respond in damages.²⁸

§ 3769(3). Missouri

The jury are instructed that, if you should find from the evidence that defendant has established a rule prohibiting its employes from being upon the pilot of the engine while the same was in motion, still if you find that deceased, —, just prior to the

²⁶ Huggins v. Southern Ry. Co., 41 So. 856, 148 Ala. 153.

²⁷ Huggins v. Southern Ry. Co., 41 So. 856, 148 Ala. 153.

²⁸ Burho v. Minneapolis & St. L.

Ry. Co., 141 N. W. 300, 121 Minn. 328. There was uncontradicted evidence that the custom and practice was to do the work just as plaintiff did whenever the coupler failed to work.

time of his death, was attempting to uncouple the two cars from the engine, and if you find that the handle of the pin lifter of the engine was in such a position that in order for him to perform his duty and uncouple said cars it was necessary for him to step upon the pilot or go between the engine and cars, and if you find that an ordinarily prudent person under similar circumstances and conditions would have stepped upon the pilot or would have gone between the cars for the purpose of uncoupling, and that it was the uniform custom within the knowledge and acquiescence of the superior officer of the defendant for brakemen to step upon the pilot or go between the cars while the same were in motion in coupling or uncoupling, then the violation of said rule by deceased, if you find it was violated, would not of itself defeat a recovery in this case.²⁹

§ 3770. Same—Effect of custom in violating rule

See, also, ante, §§ 3768(3), 3769(3).

§ 3770(1). Alabama

The jury are instructed that, in regard to the custom as to going in between cars to make couplings, unless you believe from the evidence that such custom was known to the defendant and acquiesced in by it, or had prevailed for so long a time that defendant was bound to know it and would be presumed to have acquiesced in it, then you should not consider such custom in arriving at your verdict.³⁰

§ 3770(2). Missouri

The jury are instructed that, even though you may believe that defendant company had a rule requiring brakemen to couple and uncouple cars from the ground, and you further believe that ———, deceased, was not at the time he was killed complying with that rule, yet if you believe from the evidence that deceased was doing the work in a manner in which the same was customarily done by the employes and servants of defendant company with the knowledge and acquiescence of the superior officers of defendant company, then such violation of the rule, if there was any, would not preclude a recovery in this case on account of the violation of said rule.³¹

§ 3771. Failure to perform routine duty relating to condition of premises

The court instructs the jury that it was the duty of the plaintiff, while working in the vicinity of the machine in question, to exer-

²⁹ *Hegberg v. St. Louis & S. F. R. Co.*, 147 S. W. 192, 164 Mo. App. 514.

³⁰ *Huggins v. Southern Ry. Co.*, 41 So. 856, 148 Ala. 153.

³¹ *Hegberg v. St. Louis & S. F. R. Co.*, 147 S. W. 192, 164 Mo. App. 514.

cise ordinary care for his own safety; that is, such care as a person of ordinary prudence would exercise under the same or similar circumstances. And the court instructs the jury that, if you believe from the evidence that one of the duties of the plaintiff as an employé of defendant was to keep clean the floor in the vicinity of the machine in question, and, had the plaintiff fulfilled the said duty on the occasion in question, he would not have slipped, and would not have caught his hand in the gearing in question, then and in that case your verdict must be for the defendant.³²

§ 3772. Acts in obedience to direction of master

§ 3772(1). Alabama

The jury are instructed that, if the jury are reasonably satisfied, from all the evidence, that F. offered to ride the cars down, and O. said, "I will ride them down," and that F. then said, "Get on there at the double brakes and hold them," this would constitute in law an order on the part of F. to O. to ride the cars down the incline.³³

§ 3772(2). Arkansas

You are instructed that if you find from the testimony that the plaintiff was directed by the defendant, or his agent, to cut the string of cars and to uncouple the cars loaded with rock, and that it had been the custom so to do, and that the plaintiff, following said instructions in the usual way, attempted to perform his duty in the usual way, but that the defendant failed to check its engine, or caused the same to jerk the cars as the plaintiff was attempting to perform his duty as directed, then the plaintiff was not guilty of contributory negligence in attempting to perform his said duty.³⁴

§ 3772(3). Delaware

You are instructed that the servant is not bound to obey the orders of his superior directing him to go to a place of danger or engage in a dangerous service if he knows, or by the reasonable use of his senses might know of the danger of the place or service; and if he, having such knowledge, or opportunity of observing the danger, nevertheless obeys the order and exposes himself to the danger, and suffers injury therefrom, the master cannot be held liable therefor.³⁵

§ 3772(4). Indiana

You are instructed that it is the duty of a servant to obey the orders and directions of the master, or his duly authorized agent or foreman, and said servant has the right to presume, and to act upon

³² *Huss v. Heydt Bakery Co.*, 108 S. W. 63, 210 Mo. 44.

³³ *Woodstock Iron Works v. Kline*, 43 So. 362, 149 Ala. 391.

³⁴ *Taylor v. Evans*, 145 S. W. 564, 102 Ark. 640.

³⁵ *Seininski v. Wilmington Leather Co.*, 83 A. 20, 3 Boyce, 286.

the presumption, in the absence of notice or knowledge to the contrary, that the master or his agent or foreman will not order him into a place of danger, or to perform dangerous work without his notifying him of such danger, and if the master or his duly authorized agent or foreman does order said servant to do certain specified work, then said servant has the right to presume, in the absence of knowledge or notice to the contrary, that it is reasonably safe for him to obey such orders and to perform said work, and that he is encountering no unusual dangers by doing so.³⁶

§ 3772(5). *Missouri*

The court instructs the jury that if you find from the evidence in this case that on the ——— day of ———, plaintiff's decedent and S. were in the employ of defendant, and that said S. was then and there authorized by defendant to instruct said decedent when, where, and how to perform his duties to defendant, and then and there instructed said decedent, for defendant, to work at the point where you find from the evidence decedent was working, if at all, when he received his injuries, if any, obedience to such instruction, if any, would not constitute contributory negligence, unless you find that from such obedience, if any, there arose danger so imminent and glaring that no reasonably careful and prudent man would have obeyed such instruction, if any.³⁷

The jury are instructed that, though the plaintiff may have believed the act he was ordered to do was not safe, yet this does not and should not defeat a recovery by him in this action if you further find and believe from the evidence that the plaintiff was negligently ordered into this position by said N., and was told by said N. that it was safe, and that the plaintiff relied upon said assurance of safety and upon said order, provided you further find that the danger of the timbering or structure falling was not of such a manifest or glaring nature as to threaten immediate injury in case the plaintiff obeyed the order.³⁸

§ 3772(6). *Oregon*

The court instructs the jury that, if you find from a preponderance of the evidence that defendant was negligent, under the rules laid down in these instructions, in failing to exercise reasonable care that the method or rule prescribed for plaintiff to work should be reasonably safe, or in ordering plaintiff and his coemployés to quit a safe method of work for an unsafe method, then the mere fact that plaintiff followed the rule or method prescribed, or obeyed

³⁶ *Marietta Glass Mfg. Co. v. Bennett*, 106 N. E. 419, 60 Ind. App. 435.

³⁷ *Medley v. Parker-Russel Min. & Mfg. Co.* (App.) 207 S. W. 887.

³⁸ *Swearingen v. Consolidated Troup Mining Co.*, 111 S. W. 545, 212 Mo. 524.

the order given, is not negligence, unless you find that a reasonably prudent and careful person would not, under similar circumstances, have followed such method or rule or obeyed such orders.³⁹

§ 3772(7). Texas

You are instructed that a member of a section gang rests under no duty or obligation, with knowledge of an impending danger, to continue in the dangerous situation in obedience to the order, direction, or command of the foreman of the section gang. If, therefore, you believe from the evidence that the plaintiff knew of the approach of the train to the push car by or near which he was standing at said time, and the probability of a collision, and the danger to which the same exposed him, and remained in his said position, relying upon the foreman to notify him when to leave the same, and you further believe that said conduct on his part was not such conduct as an ordinarily prudent person would have pursued under the same circumstances, and that, but for such conduct, he would not have been hurt, then you will return a verdict for the defendant.⁴⁰

The jury are instructed that, if you believe from the evidence that the plaintiff was in the employ of the defendant on the date alleged in his petition, and that while being carried to his work by defendant, and under its direction, if he was under its direction, he was injured by jumping from the car on which he was riding, while said car was in motion, as alleged by him, and striking his knee against a cross-tie, as stated in his petition, and if you believe that defendant ordered and commanded plaintiff to jump, and if you believe that said command, if any was given, was imperative, and left no time for calculation and deliberation, and if you believe that plaintiff believed that he could safely obey said order by taking proper care, and if you believe said plaintiff jumped pursuant to said command, if any, and if you believe that at said time said train was going at a rate of speed that made it dangerous to jump therefrom, and if you believe that plaintiff was inexperienced in jumping off of moving trains and ignorant of the danger, if any, arising therefrom, and if you believe that it was no part of his ordinary duty to do so, and was extrahazardous, and that defendant knew of his said ignorance and inexperience, if he was, and it did know it, and if you believe that defendant knew or could have known, by the exercise of ordinary care, of the danger, if any, from so jumping, and that defendant, nevertheless, if it did, gave said

³⁹ *Adams v. Corvallis & E. R. Co.*,
152 P. 504, 78 Or. 117.

⁴⁰ *International & G. N. R. Co. v. Tisdale*, 81 S. W. 347, 36 Tex. Civ. App. 174.

order under said circumstances, and that in consequence of said order, if any, plaintiff, in the exercise of ordinary care, jumped as alleged in his petition, and was injured as therein charged, and if you further believe that the giving of said order was, if it was given, under all the facts and circumstances, negligence on the part of the defendant, and that such negligence, if any, was the direct cause of plaintiff's injuries, if any, and that plaintiff did not by his own negligence contribute to his injuries, or assume the danger or risk, then your verdict should be for the plaintiff.⁴¹

§ 3772(8). *Virginia*

The jury are instructed that a servant is as a general rule excusable for obeying orders in and about his master's business, when such orders are given by the master or by one in authority over the servant, as the representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would attempt obedience, even under orders from one having authority over him, and although there be apparent danger in obeying the master's orders, yet such knowledge on the part of the servant will not, of itself, defeat a recovery, if the danger is not glaring and such as threatens immediate injury.⁴²

§ 3772(9). *West Virginia*

You are instructed that plaintiff was excusable for obeying the orders of his master, or of the person placed in authority over him by the master, unless the danger to be incurred by such obedience was so manifest that a prudent person would not attempt to obey, and though there be apparent danger in obeying the master's orders, yet such knowledge on the part of a servant will not defeat a recovery, if the danger is not glaring and such as threatens immediate injury.⁴³

§ 3773. *Going into dangerous place in obedience to orders*

§ 3773(1). *Alabama*

The court charges the jury that master and servant do not stand upon equal privileges, even when they have actual knowledge of the danger. The position of servant is one of subordination and obedience to the master; and he has the right to rely upon the superior skill of the master, and is not entirely free to act upon his suspicion of danger. If a servant, being ordered into a position, obeys and is injured, he will not be held to be guilty of contributory negligence, unless the danger is so glaring that a reasonably prudent man would not have entered into it.⁴⁴

⁴¹ *Galveston, H. & S. A. Ry. Co. v. Sanchez* (Civ. App.) 65 S. W. 893.

⁴² *E. I. Dupont de Nemours & Co. v. Brown*, 105 S. E. 660.

⁴³ *Ward v. Liverpool Salt & Coal Co.*, 92 S. E. 92, 79 W. Va. 371.

⁴⁴ *Alabama Consol. Coal & Iron Co. v. Heald*, 55 So. 181, 171 Ala. 263.

§ 3773(2). Washington

You are instructed that, if you find that C. was the mine foreman, and that as such he was in charge of and had authority over the men in the mine, including plaintiff, and the only one who gave orders to the workmen in the mine, and among them to plaintiff, and that the workmen, plaintiff with the others, were bound to obey his orders, that he gave plaintiff and others the order to ascend to the surface at the time in question, by way of the cage instead of by the ladders, and that he thereupon ordered plaintiff to ascend to the roof of the cage and to stand on its roof beam, then in that case, the court charges you that if plaintiff was injured in taking this position in obedience to this order, he is not guilty of contributory negligence in obeying the order, unless the danger was so glaring and apparent that a reasonably prudent person would have refused to obey the order given.⁴⁵

§ 3774. Use of defective appliance

§ 3774(1). Alabama

The court instructs the jury that, whether the bosh jacket was old or not, if the jury believe from the evidence that it was reasonably sufficient for a furnace of that size, or that it appeared to ——— in the exercise of reasonable care and diligence that the bosh jacket was reasonably sufficient, and that ——— was a reasonably careful and prudent man, then he could not be charged with contributory negligence in reference to the bosh jacket, even if the jury should believe that greater strength in the bosh jacket would have prevented the death of ———.⁴⁶

§ 3774(2). Indiana

You are instructed that, if you find from the evidence in this case that the defendant was engaged in the business in the city of ———, and employed more than ——— persons in such business, and such business consisted of the manufacturing of lumber in a manufacturing plant, and if you find from the evidence that the plaintiff on the ——— day of ———, was employed by said defendant to work in its said manufacturing establishment or plant, then I instruct you it was the duty of said defendant to furnish reasonably safe appliances to said plaintiff with which to do the work he was instructed to do, and said defendant was required, under the law, to exercise reasonable care and diligence to see and know that such appliances so furnished were safe to be used by the plaintiff in the labor which he was to do for said defendant, and the plaintiff is not chargeable with contributory negligence to the

⁴⁵ Johansen v. Pioneer Mining Co.,
137 P. 1019, 77 Wash. 421.

⁴⁶ Williamson Iron Co. v. McQueen,
40 So. 306, 144 Ala. 265.

degree that a recovery on the part of the plaintiff would be defeated because he used the defective appliance furnished, even though the dangers and hazards incident to the use of such appliance were inherent and apparent to the employé.⁴⁷

§ 3774(3). Missouri

The jury are instructed that, although you may believe from the evidence that plaintiff knew of the defective condition of said gate and alley and the danger therefrom in transferring said horses, yet if you further find that the use of said gate and alley was not so dangerous as to threaten immediate injury, or that a reasonably prudent person in the exercise of care and caution incident to the situation in which he was placed would have continued to work about said place, his knowledge of said defects would not defeat a recovery by him.⁴⁸

The court instructs the jury that if they believe from the evidence that the plaintiff called the attention of the defendant company's foreman, under whose direction and supervision he was working, to the condition of the hammer plaintiff was using in his duties, and inquired whether the same was in proper condition and safe for him to use, and that said foreman informed plaintiff that it was, then plaintiff had a right to rely upon the supposed superior knowledge of said foreman, and was justified in continuing in good faith the use of said hammer, without being guilty of contributory negligence, unless you further find that the danger was obvious, and that the plaintiff was fully aware of the same.⁴⁹

§ 3774(4). Texas

You are instructed that by contributory negligence is meant such act or omission on the part of plaintiff as an ordinarily prudent man would not do or suffer under similar circumstances, which act, concurring with a negligent act or omission of the defendant railway company, becomes the proximate cause of an injury. Therefore, if the jury believe from the evidence that the lifting jack furnished by the defendant was defective or out of repair, so as to make its use probably dangerous, and likely to result in an injury to those using it, and if such defects and want of repair, and the probable consequences of the use thereof, were known to plaintiff at the time he did use the same, which use resulted in an accident and injury to him, if any, and if such defects and want of repair were such that an ordinarily prudent person would not have used the lifting jack in its then condition, then the plaintiff cannot re-

⁴⁷ *Benkowski v. Sanders & Egbert Co.*, 109 N. E. 924, 60 Ind. App. 374.

⁴⁸ *Buckner v. Stockyards Horse & Mule Co.*, 120 S. W. 766, 221 Mo. 700.

⁴⁹ *Duerst v. St. Louis Stamping Co.*, 63 S. W. 827, 163 Mo. 607.

cover in this case, notwithstanding you may believe that the defendant was negligent in furnishing the same, and you will find for the defendant.⁵⁰

§ 3775. Same—Lack of knowledge of danger of using defective appliance as affecting question of negligence

You are instructed that, if you believe from the evidence that the brake shoes on said car were in a defective and unsafe condition, as alleged in plaintiff's petition, and that by reason thereof, when the brake on said car was applied to stop same, if you find the brake was applied to stop same, it caused the car to stop so suddenly that plaintiff was thrown therefrom, and run over and injured, as he alleges in his petition, and that the defendant knew, or by the exercise of ordinary care could have known, of the defective and unsafe condition of said brake shoes, if you find that they were defective and unsafe, and that the plaintiff did not know of such unsafe and defective condition of said brake shoes, and could not have known of it by the exercise of ordinary care, and if he did know of it, could not, by ordinary care, have reasonably anticipated any danger therefrom, if any, and that defendant was negligent in having same on said car, and that the defective and unsafe condition of said brake shoes was the proximate cause of plaintiff's injuries, in this event also your verdict should be for plaintiff, unless you believe plaintiff was guilty of contributory negligence, or assumed the risk, as hereinafter defined.⁵¹

§ 3776. Duty to use safest of two or more methods of work

§ 3776(1). Alabama

The court charges the jury that, if it appears from the evidence that plaintiff could reasonably have used a less dangerous way to work the handle of the lever of the car, this will not of itself bar his recovery. It must further reasonably appear from the evidence that the plaintiff knew he was using a more dangerous way, that such use of a more dangerous way was negligence, and that this negligence was the proximate cause of his injuries.⁵²

§ 3776(2). Florida

The jury are instructed that if, in the performance of his duties, ——— had no instructions to pursue a particular method, and two or more methods were open to him, he cannot be said to have been negligent if he in good faith adopted that method which was more

⁵⁰ St. Louis Southwestern Ry. Co. of Texas v. Kern (Civ. App.) 100 S. W. 971.

⁵¹ Galveston, H. & S. A. Ry. Co. v. Parrish (Tex. Civ. App.) 40 S. W. 191.

⁵² Southern Ry. Co. v. McGowan, 43 So. 378, 149 Ala. 440.

hazardous than another, if the one adopted be one which reasonable and prudent persons would adopt under like circumstances.⁵³

§ 3776(3). Virginia

The jury are instructed that, where there are two ways for a servant to perform his work, the one safe and the other unsafe, it is his duty to adopt the safe way, if he knows of it, or in the exercise of ordinary care might know of it; also, that it is the duty of the master to inform the servant of the safe way, and, if they believe from the evidence that the plaintiff was not so informed and did not know, and could not have ascertained, the safe way of stopping the turntable by means of the stop-cock by the exercise of ordinary care, and that he was doing the work assigned him in the only way known to him, and that the manner of doing it was not so obviously dangerous that a reasonably prudent man would not have undertaken it, he is entitled to recover, unless he was guilty of negligence other than the failure to use the cut-off, which contributed to the accident.⁵⁴

§ 3777. Duty to adopt safest of one of two possible means of escape from danger

The court further instructs you that it was the duty of the deceased to use every reasonable effort at his command, after having been warned or signaled of the presence of the work train upon the track, or after having discovered its presence on the track, to stop said train and prevent said collision and protect himself from danger or death, if it could have been done by the exercise of ordinary care, and the failure on his part so to do, if any, would be contributory negligence as defined in these instructions; but the court instructs you that if you shall believe from the evidence that the deceased was through the negligence, if any, of the defendant, its officers, agents, or employes, placed in a position of peril, where he believed or had reasonable grounds to believe there were open to him two or more possible means of escape, the fact that he adopted one of such means of escape and was killed will not render him guilty of contributory negligence, even though the jury may believe, from the evidence, that had he adopted some other means of escape he would not have been killed, if the said deceased, at the time believed, and had reasonable grounds to believe, that the means he adopted were the safest for him considering his position and the duty he owed to those upon the train he was operating.⁵⁵

⁵³ Florida Cent. & P. R. Co. v. Mooney, 33 So. 1010, 45 Fla. 286, 110 Am. St. Rep. 73.

⁵⁴ Washington-Southern Ry. Co. v. Cheshire, 65 S. E. 27, 109 Va. 741.

⁵⁵ Louisville & N. R. Co. v. Holloway's Adm'r, 173 S. W. 343, 163 Ky. 125.

§ 3778. Failure of servant to use safety device supplied by master

The court instructs the jury that, if you believe from the evidence that the defendant had equipped said machinery with a safety device by which the steam could be cut off, so as to prevent the engine from starting, owing to the defective throttle valve, while work was being done on said engine, and the plaintiff knew of this safety device, and knew that by using it the steam could be cut off, and the engine prevented from moving while he was working on it, and if the jury further believe from the evidence that the plaintiff knew that, if the steam was not cut off, the engine would likely or probably start while he was working on it, and injure him, and that plaintiff failed to cut off the steam by means of said safety device before beginning said work on said engine, and that said engine started by reason of said steam not being cut off, and injured him, then the jury must find for the defendant.⁵⁶

The jury are instructed that, if you shall find from the evidence that it was the duty of plaintiff to put in props at the place or places from which he removed the coal, and that he failed to put in such props, and that defendant supplied props for the use of plaintiff, and that plaintiff's failure to put in the prop at the place from which he removed the coal was the proximate cause of the injury, plaintiff could not recover, no matter what particular position he occupied in the room or entry at the time of the accident.⁵⁷

§ 3779. Acts of servant in sudden emergency

See, also, ante, § 3777.

§ 3779(1). United States

The jury are instructed that, if you find that the plaintiff, at the moment when he conceived it to be his duty to convey a signal to the engineer to instantly stop, apprehended that there was threatened danger, or conceived a necessity for unusually quick and expeditious action, and selected of two ways one that was not as safe as the other, you will consider, in determining whether or not he was at that time exercising ordinary care for his own safety, what was the emergency, if any, that presented itself to him, and what kind of conduct you have to demand of him under those circumstances.⁵⁸

§ 3779(2). Alabama

The jury are instructed that if he, the plaintiff, was hit in the side by a piece of iron, and the force of the blow caused him to step back upon track ———, or if he through a natural impulse, caused by the blow in front, threw himself backwards upon the track in

⁵⁶ *Reid v. Sloss-Sheffield Steel & Iron Co.*, 58 So. 301, 177 Ala. 262.

⁵⁷ *Lookout Fuel Co. v. Phillips*, 66 So. 946, 11 Ala. App. 657.

⁵⁸ *Erie R. Co. v. Schomer* (C. C. A. Ohio) 171 F. 798, 96 C. C. A. 453.

a moment of mental perturbation or excitement, why then his stepping upon the track couldn't be said to be a voluntary act on his part, but would be an incident to his attention to his business; and if he then fell faint upon the track, not having the time or ability to get off of it, such conduct on his part would not be contributory negligence.⁵⁹

§ 3779(3). Iowa

You are instructed that it is claimed by the plaintiff in this case that just prior to the happening of the accident which resulted in his injuries, and as the mule and train of cars of which he was in charge approached the door to the entrance of the mine, and when he pulled the rope for the purpose of opening said door, the rope broke and the door did not open, and that the plaintiff was then confronted with a sudden and imminent danger and peril to himself, and that such emergency was brought about by the alleged negligence of the defendant, and without negligence on the part of the plaintiff, and that in running ahead to open said door before they should reach it he was seeking to avoid danger and peril and to obtain safety for himself and for the mule and train of cars of which he was in charge. With regard to such claim you are instructed that, if you find by a preponderance of the evidence that one of the specific charges of negligence made by the plaintiff and submitted in these instructions was the proximate cause of placing the plaintiff, at the time and place charged, in a place of danger and peril, then in such emergency you are instructed that the plaintiff was not required, under the law, to act with the same deliberation and foresight that might be expected of him under ordinary circumstances, but that all the law requires of a servant acting in an emergency such as above described is that he act with ordinary and reasonable care, in the light of the circumstances as they appeared to him at the time, and the fact, if it be a fact, that he did not take the safest course or best course which he could have taken in such emergency, will not authorize you in finding that he was guilty of contributory negligence in so doing.⁶⁰

§ 3779(4). Kentucky

You are instructed that it was the duty of those in charge of the broken train to give to a train approaching from the rear all signals which experience and ordinary prudence required, in order to warn those approaching of the danger; and if the jury believe those in charge of the broken train negligently failed to give such signals, and by reason of such failure the plaintiff was placed in a position

⁵⁹ Louisville & N. R. Co. v. Thornton, 23 So. 778, 117 Ala. 274.

⁶⁰ Johnson v. Plymouth Gypsum Plaster Co., 156 N. W. 721, 174 Iowa, 498.

which to him, in the exercise of a reasonable discretion as engineer, under all the circumstances, seemed one of immediate danger, and that he jumped from his engine to avoid such danger, even though the same might not have been real, and that in such jumping he acted as an ordinarily prudent engineer would have done under the circumstances, and that he was injured thereby, the jury shall find for the plaintiff.⁶¹

§ 3779(5). Virginia

The court instructs the jury that if they believe from the evidence that W., while in the discharge of his duty in defendants' mine, and without contributory negligence on his part, was placed in a position of sudden and imminent peril by the negligence of the defendants, which resulted in his death, it is their duty to find for the plaintiff, although they may further believe that, when suddenly confronted with said peril, and acting under the influence thereof, the said W. failed to avail himself of any means of escape open to him. In other words, an employer who negligently places an employé in sudden and imminent peril cannot excuse himself from liability upon the ground that the employé, when in such sudden and imminent peril, lost his presence of mind, and failed to use ordinary care and caution to escape. But if the jury shall believe from the evidence that said W., before he was confronted with, and came under the influence of, imminent peril, which resulted in his death, had been ordered by ——— to roll his wheel out of the drift in time to have escaped the impending danger, and that if he had obeyed said orders or order with reasonable promptitude the accident would not have occurred, but that, instead of doing so, he negligently remained in the drift, at the point of accident, until he was overwhelmed by the falling earth and water, and killed, this conduct would constitute such contributory negligence on his part as would bar a recovery in this action.⁶²

The jury are instructed that, even if the jury should believe from the evidence that the plaintiff jumped from the defendant's car at the time of the wreck, yet if they further believe from the evidence that said plaintiff did so under a well-grounded fear of danger to his life or limbs, plaintiff is as much entitled to recover in this action, so far as his jumping is concerned, as if he had received the injuries complained of while in defendant's car, although they may further believe from the evidence that if he had remained in the car he would not have been injured.⁶³

⁶¹ Louisville & N. R. Co. v. Rains, 23 S. W. 505, 15 Ky. Law Rep. 423.

⁶² Dingee v. Unrue's Adm'r, 35 S. E. 794, 98 Va. 247.

⁶³ Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.

The jury are instructed that, even though the jury may believe from the evidence that the plaintiff received the injuries complained of by reason of his jumping from the defendant's car at the time of the wreck, yet if the jury further believe from the evidence that the plaintiff was so stunned and bewildered by the shock of the collision as to render said plaintiff unconscious of what he was doing, then the jury are instructed that said jumping was not such negligence as to prevent plaintiff from recovering damages any more than if he had received said injuries complained of while in defendant's car, although the jury may further believe from the evidence that no injury would have been received by him if he had remained in said car.⁶⁴

§ 3780. Right of servant to rely on exercise by master of ordinary care

§ 3780(1). Idaho

You are instructed that an employé has a right to assume, in the absence of apparent defects, that a place in which he is ordered to work by a shift boss is safe, and he is not bound to inspect it for the purpose of discovering a latent defect. And where employé is directed to work in a certain place, he has a right, in the absence of proof to the contrary, to assume that the place had been made reasonably safe by his employer.⁶⁵

§ 3780(2). Iowa

You are instructed that, if you find that the defendant was negligent in directing the plaintiff to move the piano with a defective truck, you will next proceed to determine whether or not the plaintiff has shown by a preponderance of the evidence that he himself was free from negligence contributing to his injury; and you are instructed that plaintiff cannot recover unless he has shown to you by preponderance of the evidence that he himself was free from negligence contributing to his injury. It was the duty of the plaintiff in performing his work to give reasonable attention to the implements with which he was required to work in the discharge of his duty. He was not entitled to voluntarily expose himself to a danger of which he had knowledge, or might have known by the exercise of reasonable and ordinary care. And if he knew that the truck in question was defective, or should have known it was defective, in the exercise of reasonable care, and he did not exercise ordinary care for his own safety in using the truck, then he cannot recover. But, in determining the question as to whether in using the truck the plaintiff was in the exercise

⁶⁴ Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.

⁶⁵ Cnkroch v. Success Mining Co., 186 P. 567, 30 Idaho, 623.

of reasonable care, you are instructed that he had a right to presume, in the absence of knowledge to the contrary, that the defendant had performed its duty and exercised reasonable care in furnishing the implement with which he was required to work. In determining whether or not the plaintiff was in the exercise of reasonable care in using said truck, you may take into consideration the evidence as to the length of time the plaintiff was employed in the warehouse, the knowledge or means of knowledge he had of the condition of the truck, the direction, if any, he had from the defendant to use the truck, and all other facts shown by the evidence bearing on the question of his exercise of reasonable care, and therefrom determine whether or not the plaintiff, at the time of the injury complained of, was in the exercise of reasonable care.⁶⁶

§ 3780(3). Nevada

The court instructs you that it is the duty of an employer, whether a corporation or an individual, to exercise ordinary care to provide for its employes reasonably safe tools and appliances and a reasonably safe place in which to work. The employe has the right to presume that the employer has fulfilled this obligation. The failure of an employer to exercise the care and diligence of an ordinarily prudent person in providing for its employe reasonably safe tools and appliances and a reasonably safe place in which to work is negligence. Since the servant has the right in the first instance to presume that the master has performed his duty, he may, therefore, without being guilty of contributory negligence, act upon such presumption until he knows, or by the exercise of ordinary care and prudence ought to know, that such tools and appliances and such place in which to work, so provided by the employer, are not safe.⁶⁷

§ 3780(4). Texas

Gentlemen of the jury, in addition to the main charge already given you, the court instructs you that the plaintiff had the right to assume that the place at which he was injured was a "reasonably" safe place in which to work, and to act on such assumption unless he was informed that the said place was unsafe (if it was), or learned that the same was not safe (if it was not), prior to the accident in question, or unless he could have learned of the unsafe condition of such place (if it was unsafe) by the use on plaintiff's part of ordinary care for his own safety.⁶⁸

⁶⁶ *Parkhill v. Bekin's Van & Storage Co.*, 151 N. W. 506, 169 Iowa. 455.

⁶⁷ *Cutler v. Pittsburg Silver Peak*

Gold Mining Co., 116 P. 418, 34 Nev. 45.

⁶⁸ *Farmers' Gin & Milling Co. v. Jones* (Civ. App.) 147 S. W. 668.

§ 3781. Duty of employees of railroads

§ 3781(1). United States

The jury are instructed that the engineer had a right to assume the track was in a reasonably safe condition for the passage of his train, that it was customary for men to work on and along a track kept open for traffic, and that an engineer on an approaching train is not required to slacken speed or stop until he knows or has reasonable grounds for believing they are not going to remove their hand cars, tools, and implements and get off the track—that after such knowledge, or after reasonable grounds to so believe, then if he fails to exercise care to stop it, he may be chargeable with negligence.⁶⁹

The jury are instructed that any one who goes upon or near a railroad track is bound, at his peril, to make diligent use of his senses of sight and hearing in order to detect the approach of trains; and if, in disregard of this duty to his own safety, he steps upon the track without looking or listening, he is guilty of negligence.⁷⁰

The jury are instructed that when the plaintiff came around the car across the track No. ———, if you find from the evidence that he turned directly in an easterly direction to go down to his train, and did not look or listen for any train or car that might be approaching within the distance in which he was at that time at any place between the track, such failure to look or listen would be negligence on his part.⁷¹

The jury are instructed that a person approaching, or going upon or near, a railroad track upon which trains are in the habit of running, is bound by law to stop, and look, and listen for approaching trains, providing that he has any reason to believe that there may be such approaching; and the fact that he was an employé did not release him from the necessity of exercising reasonable care under the circumstances for his own safety. He had no right to rely wholly upon the railroad company for protection from passing trains or cars.⁷²

§ 3781(2). Alabama

The jury are instructed that, if the jury believe, from the evidence, that on the day the plaintiff's intestate received his injuries the smoke on, along, and by the coke ovens was so thick that the

⁶⁹ *Chicago Great Western R. Co. v. McCormick* (C. C. A. Iowa) 200 F. 375, 118 C. C. A. 527, 47 L. R. A. (N. S.) 18.

⁷⁰ *Illinois Cent. R. Co. v. Nelson* (C. C. A. Iowa) 203 F. 956, 122 C. C. A. 258.

⁷¹ *Illinois Cent. R. Co. v. Nelson* (C. C. A. Iowa) 203 F. 956, 122 C. C. A. 258.

⁷² *Illinois Cent. R. Co. v. Nelson* (C. C. A. Iowa) 203 F. 956, 122 C. C. A. 258.

track opposite the upper half of the coke ovens could not be seen by persons on the hand car when it came to the lower end of the coke oven battery, and if they believe that the said ——— knew or was informed that the yard engine, in switching cars to and from the coke ovens, was liable to be or likely to be passing along through at any time of day, and the hand car was so far behind the coal train as that the said ——— could not see it, and could not tell how far ahead of the hand car it was, then the court charges you that it was negligence in said ——— to ride on said hand car through said smoke under the circumstances, without stopping and sending a flagman ahead to protect the hand car from collision with said yard engine.⁷³

§ 3781(3). Arkansas

The jury are instructed that, if you find from the evidence in this case that it was the duty of the plaintiff, while engaged in the performance of his duties as a locomotive fireman; to receive from the brakeman on said train signals indicating that cars were about to be coupled onto the locomotive on which plaintiff was when he was injured, and find that plaintiff negligently failed to keep a proper lookout for such signals and to receive the same; and further find that if plaintiff had been in his proper position on said locomotive in time to have permitted plaintiff to receive such signals he could have prevented his injury; and further find that this negligent and careless conduct of the plaintiff was the cause of, or that it contributed in any manner, or to any extent, or to any degree, to his injury, then plaintiff was guilty of contributory negligence and cannot recover in this action, and your verdict must be for the defendant, unless you find that he was at the time engaged in other duties, which made it impossible for him to keep such a lookout, and was exercising due care and caution to avoid injury.⁷⁴

§ 3781(4). Delaware

You are instructed that it is the duty of a motorman to so run and operate his car as to have it under proper control, and be able to stop it, or reduce its speed whenever necessary to avoid accident, if by proper care and caution he can do so. Therefore, if you believe from the testimony in this case that the brakes were not defective, and that the plaintiff's injuries were caused by his running the car at such a high, excessive and unusual rate of speed, or by such improper handling of the brakes, that he was not able at, and just before the collision, to stop or control the car by the means

⁷³ Woodward Iron Co. v. Herndon, 30 So. 370, 130 Ala. 364.

⁷⁴ St. Louis, I. M. & S. Ry. Co. v. Booth, 135 S. W. 811, 98 Ark. 227.

provided for the purpose, he would be guilty of contributory negligence and could not recover.⁷⁵

§ 3781(5). *Kentucky*

You are further instructed that it was the duty of the plaintiff, together with his crew, upon the occasion of the injury complained of, to remove the hand car from the track, if it could be done consistently with the exercise of ordinary care for his own safety; so, if you believe from the evidence that the plaintiff, in attempting to remove the hand car from the track at the time of the injury, exercised such care as might be reasonably expected of a person of ordinary prudence, situated as he was under all the circumstances surrounding plaintiff at that time, as described to you in this evidence, his act in making this attempt cannot be imputed to him as contributory negligence.⁷⁶

The court instructs the jury that it was the duty of the plaintiff, while in the employ of the defendant, the ——— Railroad Company, to perform the duties incident to his employment in a reasonable time and in the ordinary and customary manner under all the circumstances; and if the jury believe from the evidence that the plaintiff failed to use ordinary care for his own safety on the occasion of the accident to him, and by negligent acts and conduct of his own caused his injury or so contributed to it that, but for his contributory negligence, he would not have been injured, then they will find for the defendant.⁷⁷

§ 3781(6). *Missouri*

The court instructs the jury that it was the duty of the deceased when going in and around defendant's yards, to make use of his faculties for his own protection and safety, and if you believe from the evidence in this case that the deceased went upon the track where a train was standing likely to soon move in his direction, or went upon the track in front of an approaching train, without looking or listening for said train, and if by the exercise of ordinary care on his part he could have seen said approaching train but failed to do so, and was thereby run over and killed, then he was guilty of contributory negligence and the plaintiff cannot recover and it is your duty to return a verdict for the defendant, unless you further believe from the evidence that when decedent was on the track and the train was approaching him, the agents of defendant in charge of the engine saw deceased in a place of imminent peril or could have seen deceased in a place of imminent peril,

⁷⁵ *Spahn v. People's Ry. Co.*, 83 A. 27, 3 Boyce, 302.

⁷⁶ *Illinois Cent. R. Co. v. Evans*, 186 S. W. 173, 170 Ky. 536.

⁷⁷ *McKee v. Cincinnati, F. & S. E. R. Co.*, 171 S. W. 425, 161 Ky. 711.

by the exercise of ordinary care on their part in time to have stopped the engine and avoided injuring deceased.⁷⁸

You are instructed that, if you find from the evidence that the plaintiff had operated a car as conductor over the point of the accident, and knew, or by the exercise of ordinary care might have known, of the condition of the track, before the accident, and that he continued to operate a car knowing the condition of the track, and as a result of running said car over said track it collided with an east-bound car, and plaintiff was thereby injured, he is not entitled to recover, unless you find that the condition of the track was such that plaintiff might reasonably have supposed he could safely work on the cars operated thereon, in which event his knowledge of the condition of the track, or opportunity for such knowledge, would not preclude recovery.⁷⁹

§ 3781(7). Texas

The jury are instructed that if, from the evidence, you believe that prior to the time when the collision complained of occurred plaintiff had time, by the exercise of ordinary care and diligence, by the use of his senses of sight and hearing, to discover the approach of the passenger train towards the push car, but failed to look and listen, or either, and such failure on his part was negligence, then you will return a verdict for defendant.⁸⁰

You are charged that the defendant company is not an insurer of the safety of its employes, but is only bound to use ordinary care to protect them from injury; and you are further instructed that it was the duty of plaintiff, while working in the yards of defendant company, to use ordinary care to avoid injury to himself while the cars of defendant were being operated upon its tracks in said yard; and if you find from the testimony that plaintiff failed to use such care, and that such failure, if any, was negligence, and that such negligence, if any, proximately contributed to plaintiff's injury, if any, then plaintiff cannot recover, although you may believe defendant's agents and employes operating said car were also guilty of negligence in causing plaintiff's injury, if any.⁸¹

§ 3782. Same—Care required in making couplings

§ 3782(1). United States

The jury are instructed that it was the decedent's duty to have made that coupling in the way least hazardous. If he was aware that the tracks at that point were covered with ice and snow, and

⁷⁸ Walker v. Wabash R. Co., 183 S. W. 636, 193 Mo. App. 249.

⁷⁹ Houts v. St. Louis Transit Co., 84 S. W. 161, 108 Mo. App. 686.

⁸⁰ International & G. N. R. Co. v.

Tisdale, 81 S. W. 347, 36 Tex. Civ. App. 174.

⁸¹ Galveston, H. & S. A. Ry. Co. v. Pendleton, 70 S. W. 996, 30 Tex. Civ. App. 431.

knew it was more dangerous to couple moving cars under such circumstances, he not only had the power and authority to move the train slower, but could have come to a full stop, and it was his absolute duty to do so in order to protect his own life, and thereby protect the defendants' company from loss. If you find he undertook to make that coupling while the cars were moving, and that so undertaking to make it, under the circumstances then existing, made the coupling more hazardous than ordinary, and that he could have controlled the movement of the train, and made the coupling at a point and in a manner that would have been absolutely safe, and if you further find that he knew of these dangerous places as to the planks on the highway and the ditch across the track, then the court says to you he was guilty of contributory negligence, and cannot recover. Even though the defendant company was guilty of negligence, yet, if the injury would not have happened but for the decedent's own negligence, his representatives cannot recover in this action. It will be your duty to consider that this accident happened in broad daylight, on what is called a bright winter day, and at a place familiar to the decedent. The conductor of such a train has absolute control, not only of the movement of the train after it is made up, but he has control of the making up of the train in the yards; and under the conditions disclosed by this case the whole proceeding from beginning to end was absolutely under the control of decedent; and if you find he performed his duty there under such circumstances and in such a manner as made the injury probable, when by his own acts he might have made it almost impossible, the company has a right to plead such acts and such want of care on his part as contributory negligence, and the court charges you that it is contributory negligence—that it is a defense which the defendants are entitled to make, and the court enforce.⁸²

§ 3782(2). **Alabama**

The jury are instructed that, if the jury believe from the evidence that the plaintiff could have made the coupling by using the drawhead on the car attached to the engine, instead of the one on the stationary car, and could have by doing so made the coupling without going in between the moving cars, it was his duty to do so; and if he failed to do so he was guilty of contributory negligence in going between the moving cars.⁸³

⁸² *Herrick v. Quigley* (C. C. A. Ohio) 101 F. 187, 41 C. C. A. 294. This instruction was as favorable to defendant as it could ask.

⁸³ *Huggins v. Southern Ry. Co.*, 41 So. 856, 148 Ala. 153.

§ 3782(3). Missouri

The jury are instructed that, if you believe and find from the evidence that ——— got between the engine and the car to be uncoupled while the same was in motion, or was riding upon the step or pilot of the engine for the purpose of uncoupling the car, and further find that said ——— could, by the exercise of reasonable strength and skill, and while upon the ground, have uncoupled the car from the engine by using the automatic coupler, and that if he so used the automatic coupler he would have avoided the injury, then you should find the issues for the defendant; unless you further find from the evidence that said ——— in getting between the engine and car to be uncoupled while the same were in motion, or in riding upon the step or pilot of the engine to uncouple the car, if he did get upon or between the same while they were in motion, was performing said work in the usual and customary manner and that his superior officers knew of and acquiesced in such custom and practice.⁸⁴

The jury are instructed that if, from the evidence, you believe plaintiff, or a reasonably careful and prudent person circumstanced as plaintiff was, could have discovered the defective condition of the car coupling of the car by which he was hurt, by exercising prudence and care in discharging the duty imposed by his employment, then you will find the issues for the defendant, whether plaintiff knew of the condition of the car or not.⁸⁵

§ 3783. Same—Kicking cars

The jury are instructed that shifting cars by means of the kicking-back process is not necessarily at all times an act of negligence per se, even though there may be a safer method of shifting them.⁸⁶

§ 3784. Duty of trainmen in railroad yards

The court instructs the jury that it was the duty of the plaintiff while using the track within the yard limits to know what trains were expected and to use all possible precautions to protect his engine and cars. The court further instructs the jury that, if they believe from the evidence that the plaintiff inquired of the train dispatcher on the morning before the injury, if any, as to what trains were expected from the direction of ——— on the south, the plaintiff had a right to rely upon the information, if any, given to him by the train dispatcher, in the absence of any knowledge or information on his part to the contrary, and such inquiry and information, if any, obtained from the train dispatcher, was, in the ab-

⁸⁴ *Hegberg v. St. Louis & S. F. R. Co.*, 147 S. W. 192, 164 Mo. App. 514.

⁸⁵ *Rodney v. St. Louis S. W. Ry. Co.*, 29 S. W. 887, 127 Mo. 676.

⁸⁶ *Florida Cent. & P. R. Co. v. Mooney*, 33 So. 1010, 45 Fla. 286, 110 Am. St. Rep. 73.

sence of any knowledge or information of his own to the contrary, a discharge of his duty to know what trains were expected from the direction of ——— or the south; and the court further instructs the jury that the rule or duty to use all possible precautions to protect his engine and cars mean all precaution which the jury may believe from the evidence were usual and customary under the circumstances on the part of (and which the jury may believe from the evidence might reasonably be expected to be used by) persons of ordinary prudence engaged in the same or like business and under the same or like circumstances and exercising the highest degree of care, and the highest degree of care means the utmost skill exercised by prudent and skillful persons in the management and operation of engines and cars.⁸⁷

§ 3785. Care required from linemen of telegraph or telephone company

§ 3785(1). Texas

The jury are instructed that if the jury find and believe from the evidence that the plaintiff, either in going upon said awning or in falling off the same at the time he did, if you believe he did fall from the same, or in the manner in which he used said rope, while upon said awning, or in anything he did, or omitted to do, failed to use that degree of care which an ordinarily careful and prudent person would have exercised under the circumstances of the situation, and you further find from the evidence that the failure to use such care caused or contributed to cause the plaintiff to fall from said awning, and thereby he became injured, if you believe he was injured, then if you so find and believe, the plaintiff cannot recover, and you will find for the defendants, notwithstanding you may also find that both of the defendants were also guilty of negligence which directly and proximately contributed to cause the injuries to the plaintiff, if any. In such case, the plaintiff would be guilty of contributory negligence, such as will under the law defeat a recovery by him.⁸⁸

The jury are instructed that if you believe from the evidence in this case that on the day of and prior to his injury, if he was injured, plaintiff was furnished by his employer with a dry rope with which to do the work he was to perform, and that said rope while dry was a reasonably safe appliance with which to perform the work he was prosecuting, but that through the plaintiff's conduct he caused or permitted said rope to become wet while he was using it, and thereby it became a conductor of electricity, and that by reason

⁸⁷ Louisville & N. R. Co. v. Mitchell, 191 S. W. 465, 173 Ky. 622.

⁸⁸ Southwestern Telegraph & Telephone Co. v. Sanders (Civ. App.) 138 S. W. 1181.

of such condition the rope became an unsafe and dangerous appliance for plaintiff to use in doing his work, or that the plaintiff caused or permitted the rope he was using to come in contact with the electric light wires in question in this case, and that at the time he did so, if he did so, that he had knowledge of the danger of the rope's coming in contact with the said wires, or had previously been warned by his foreman to keep the rope he was handling clear of contact with the electric wires in question, and that in causing or permitting the rope to become wet, if he did so, or in causing or permitting it to come in contact with the electric light wires in question, if he did so, he failed to use ordinary care for his own safety, and was thereby guilty of negligence which caused or contributed to his injuries, if any, then, in the event you find plaintiff was negligent in either of the respects mentioned, he would be precluded from recovering damages, and your verdict will be for both defendants. By the term "proximate cause," as used in this charge, is meant a direct cause, without which the injuries would not have occurred.⁸⁹

§ 3785(2) Virginia

The court instructs the jury that, if the jury believe from the evidence that the pole in question was marked so as to show that it was condemned, as shown by the evidence, and the plaintiff did see, or by the exercise of ordinary care could have seen, that it was so marked, that, of itself, would not necessarily make him guilty of contributory negligence in climbing said pole; but if, under all the circumstances surrounding the case at the time, including the practice of the company in removing poles that were so marked, and of using them until they were so removed, the plaintiff, as a man of ordinary care and prudence, might have foreseen that it was dangerous to climb said pole to perform the duties required of him, then he was guilty of contributory negligence, and in that case he would not be entitled to recover.⁹⁰

§ 3786. Duty of employees in mines

§ 3786(1). Alabama

The court charges the jury that, if you are reasonably satisfied from the testimony that it was the duty of ———, after the shot had been made and the post blown down, before going under the roof where such post had been standing, and in close proximity to where such shots had been made, to sound such roof, and to ascertain if there were any loose rock, or see that it was done, and to pull down such loose rock as was found by such sounding, and you are further satisfied by reason of such testimony that he failed to

⁸⁹ *Southwestern Telegraph & Telephone Co. v. Sanders* (Civ. App.) 138 S. W. 1181.

⁹⁰ *Southern Bell Telephone & Telegraph Co. v. Clements*, 34 S. E. 951, 98 Va. 1.

perform such duty, and went under said roof after the prop had been blown out without first sounding said roof, or seeing that it was sounded, to ascertain whether there was any loose rock, and without pulling said loose rock down, and his failure to perform such duty was the proximate cause of his injury, then I charge you that you cannot find for plaintiff.⁹¹

The court charges the jury that, if you are reasonably satisfied from the evidence that ——— had such knowledge of existing conditions at the time he attempted to work under the roof where the prop had been blown out as would have suggested to an ordinarily prudent man the probability and danger of the roof falling, and with such knowledge he went to work thereunder, then I charge you he would be guilty of contributory negligence, and you cannot find a verdict for defendant.⁹²

The court charges the jury that if you are reasonably satisfied from the evidence that it was the duty of plaintiff's intestate, after a shot had been fired in the heading wherein he was working, to quarry down or assist in quarrying down the loose rock before attempting to go back to work in said place, and you further believe that plaintiff's intestate negligently failed to quarry down such rock, or assist in quarrying it down, and as a proximate consequence of such negligence was killed, your verdict cannot be for the plaintiff.⁹³

§ 3786(2). **Oklahoma**

Gentlemen of the jury, while the law imposes upon the coal company the duty of furnishing its miners with props of proper length to support the roof of the working places, that duty does not relieve or absolve the miner himself of exercising due care for his own safety; and if you believe from the evidence that the plaintiff knew of the dangerous condition of the roof of his working place, or by the exercise of reasonable care could have ascertained that it was in a dangerous condition and continued to work in said room, or if you believe that the defendant company had furnished him with sufficient props, prior to the accident, to prop up his room, and that he had failed and neglected to use the same, and if by using the same he could have, in all reasonable probability, prevented the accident, then he was guilty of contributory negligence, and in the event of such findings your verdict should be for the defendant.⁹⁴

You are instructed that, where a miner furnishes his own work-

⁹¹ *Porter v. Tennessee Coal, Iron & R. Co.*, 59 So. 255, 177 Ala. 406.

⁹² *Porter v. Tennessee Coal, Iron & R. Co.*, 59 So. 255, 177 Ala. 406.

⁹³ *Porter v. Tennessee Coal, Iron & R. Co.*, 59 So. 255, 177 Ala. 406.

⁹⁴ *Whitehead Coal Mining Co. v. Schneider*, 183 P. 49, 75 Okl. 175.

ing room, it is primarily his duty to render the same safe. It is the coal company's duty to furnish, upon request of the miner, sufficient props at the face of the miner's working place. After it has done this duty it then becomes the duty of the miner to prop the roof of his room as the work progresses. If you believe that the plaintiff was in his own working room and was excavating the coal therefrom at the time of the accident, it was his duty, and not that of the defendant coal company, to prop up said room after sufficient props of proper length had been furnished to him by the coal company at the face of his working place, and if the plaintiff was furnished with sufficient props and failed to use them, and has sustained an injury because said roof was not propped up, his injury is due to his own fault, and he cannot recover.⁹⁵

§ 3787. Duty of employee as to adjusting guard furnished for dangerous machinery

You are instructed that, if the jury find from the evidence that the guide or fence on such machine could be adjusted by the operator thereof and that it was part of the plaintiff's duty to adjust said guide or fence so as to leave no more than a certain portion of said knives exposed or such portion as was necessary to cut the material being used, in determining the plaintiff's conduct in this regard you have a right to take into consideration the way in which such machine was usually or ordinarily operated, the device which was furnished, and any other fact and circumstance bearing upon that branch of the case, including the manner in which he operated the machine at the time in question.⁹⁶

You are instructed that, if the jury find from the evidence that if the guard furnished by the defendant required adjustment, or, in other words, if the guard furnished was of such a character and the practicable use of the machine would necessitate that from time to time it be moved by the operator up against the board to be planed, and the defendant through its agents had theretofore instructed the plaintiff to so adjust it, or if a reasonably prudent man operating said machine would have so adjusted it and such adjustment would have prevented the injury which plaintiff suffered, and plaintiff was injured by reason of his failure to so adjust it by moving it up against the board, thereby leaving a portion of the knives exposed after having been instructed by the defendant to so readjust and cover such exposed portion of the knives, or if a reasonably prudent man would have so adjusted it and thereby have been protected, and under these circumstances the plaintiff was injured by

⁹⁵ *Whitehead Coal Mining Co. v. Schneider*, 183 P. 49, 75 Okl. 175.

⁹⁶ *Amen v. Standard Steel Car Co.* (Ind. App.) 123 N. E. 7.

his failure to so adjust said guard by moving it up against the board to be planed, he is guilty of contributory negligence, and inconvenience suffered by the plaintiff in reasonably adjusting it would not relieve him. Furthermore, if you find from the evidence that said guard could not be readjusted without leaving small portions of the knives exposed, but that the injury to the plaintiff, of which he complains, did not occur by reason of the failure of said guard to cover all portions of the knives, but that on the contrary such injury occurred by reason of the failure of the plaintiff to readjust said guard as a reasonably prudent man, under the circumstances, would have done, such failure of the guard to cover all of the exposed portions of the knives would not be the proximate cause of plaintiff's injury, and the failure of said guard to so cover all of such exposed portions of the knives could not be the basis of any liability on the part of the defendant in this action, unless it is a reasonable conclusion from the evidence that change of the location of said guard would bare other portions of said knives, and thereby render them dangerous in the operation which plaintiff was then engaged in.⁹⁷

You are instructed that, on the other hand, if the guard furnished by the defendant was not a proper guard, and said guard could not have been adjusted by a reasonably prudent man exercising ordinary care and working under conditions such as plaintiff worked so as to have prevented the injury which plaintiff suffered, and the injury was caused, not by reason of plaintiff's failure to adjust said guard or move it from place to place upon the table of the planer, but by reason solely of defendant's failure to furnish a proper guard thereon, he would not be guilty of contributory negligence by reason of his failure to adjust the same by moving it back and forth upon the table.⁹⁸

§ 3788. Care required from children

§ 3788(1). United States

The jury are instructed that, in determining this question of contributory negligence you are not controlled by the same rules you would be in the case of an adult who understands and appreciates the dangers of the situation, or the dangers of doing what he does do. An infant, in order to avoid the implication of negligence, is bound to exercise only that degree of care which can reasonably be expected from one of his years; one of his years in the first instance, and then comes in experience and knowledge gained in the work. Hence you, gentlemen of the jury, must consider his

⁹⁷ *Amen v. Standard Steel Car Co.*
(Ind. App.) 123 N. E. 7.

⁹⁸ *Amen v. Standard Steel Car Co.*
(Ind. App.) 123 N. E. 7.

age, his capacity, his intelligence, his experience, if any, in the business in which he was engaged; also what information he had received and gained, and what instructions he had received on the subject, if any. Of course, if he had been previously instructed as to such dangers before he went there, or he knew them from experience, then no instructions there were necessary. If he had not, and there were such dangers, it was the duty of the defendant, as I have said before, to fully instruct him, and it was negligence not so to do. If he knew the dangers from experience, then instructions would not be necessary, and a finding of negligence cannot be predicated or based on a failure to give them.⁹⁹

§ 3788(2). *Michigan*

I will discuss the first proposition which the plaintiff must maintain in order to recover, and in case he does not he must fail, irrespective of any other question in the case. Was the plaintiff himself—this boy—guilty of any negligence or lack of care which he ought to have observed for his own protection, which said lack of care helped to bring about this injury to himself? Now, the diligence or care in this case must be such as children of his age, experience, and knowledge should exercise for his own protection. It is neither more nor less than that. What might be carelessness on the part of a grown person might not be carelessness on the part of a child. It depends on the circumstances, and you are the judges of those circumstances. You take into consideration the age of this boy and his knowledge of the machine, its purpose, its use, and its operation, and what it would do to him if he got in the way of it so it should come against his legs.¹

You are instructed that plaintiff should exercise the care that any child should exercise under the same circumstances, in the same place, and amid the same conditions, and is required to use his diligence in proportion to his knowledge of what might happen to him if he should not pay attention and should get in the way. You should consider what he had seen of the workings of this machine, if anything, either on this or on any other occasion, of its operation, what it was doing, what it might do if it got against him and he ran into the knives, what he knew, or, in view of his age, and ability to see, understand, or comprehend, what he should have known and understood as to what it might do to him if he came in contact with the cutting parts. He should have acted in reference to the situation as he understood and comprehended it, and, if he knew that getting against those knives would result in

⁹⁹ *Force v. Standard Silk Co. (C. N. Y.)* 160 F. 992, affirmed 170 F. 184, 95 C. C. A. 286.

¹ *White v. Cowling*, 171 N. W. 450, 205 Mich. 318.

injury to him, then he should have taken such care, with such knowledge, as one of his age and experience should take for his own protection.²

You are instructed that you are to consider what plaintiff was doing, the way he was doing it, why he was doing it, where he was, where the machine was and his movements, what he knew, as to the dangerous character of the machine, if anything. You are also to consider the movements of defendant, what she was doing as he, the boy, perceived, or should have perceived, and determine whether he was exercising that ordinary care that a boy of his age, knowledge, and experience would exercise under the same or similar circumstances for his own protection.³

You are instructed that, if plaintiff knew of the danger, understood it, and paid no attention, allowed his mind to be wholly diverted, at a time when the machine was nearing him, moving in his direction, and carelessly ran in front of the knives, and was cut by them, and in so doing was not exercising such care as the ordinary boy of his age, knowledge, and experience and perception of what was evident or apparent would exercise under the same circumstances, then this boy was himself careless, and so helped to bring about the injury to himself, and in such case cannot recover, no matter whether defendant was also careless or not.⁴

You are instructed that, if plaintiff knew and understood the danger to himself from coming in contact with the machine in the way he did, then he should have exercised care to keep away from it.⁵

You are instructed that the plaintiff, the little boy, was only bound to exercise such care as a boy of his years and knowledge would ordinarily exercise under like circumstances. It is for you to say whether a boy ——— years old would know what it was to get in front of those knives and what diligence he would exercise to keep out of them. You are to consider all the circumstances attending the accident, the boy himself, his knowledge, his experience, what he knew or should have known, in determining whether he was careless and thereby aided in bringing about the injury. He should have known whatever was apparent to him which a boy of that age would understand.⁶

§ 3788(3). North Carolina

The jury are instructed that, if the jury find from the evidence that the plaintiff at the time of the injury was a boy ——— years

² White v. Cowing, 171 N. W. 450, 205 Mich. 318.

³ White v. Cowing, 171 N. W. 450, 205 Mich. 318.

⁴ White v. Cowing, 171 N. W. 450, 205 Mich. 318.

⁵ White v. Cowing, 171 N. W. 450, 205 Mich. 318.

⁶ White v. Cowing, 171 N. W. 450, 205 Mich. 318.

of age; that he only had the intelligence of ordinary boys of his age; that he had never seen a machine like the one he was helping to operate until ——— o'clock of the day he was injured; that he did not have the capacity to understand the mechanism of the machine or its dangerous parts; that because of his want of age and experience, and while waiting for the man operating, he threw his arm upon the machine to rest himself, and that the defendant's agent who employed him had failed to warn him against danger—then it will be the duty of the jury to consider these matters in passing upon the question as to whether the plaintiff was guilty of such negligence as the law terms "contributory negligence," which would justify the jury in finding the second issue "Yes."⁷

§ 3789. Intoxication of injured servant

The jury are instructed that if the jury believe, from the testimony, that at the time of the accident plaintiff was in a state of intoxication, and that such state of intoxication placed him in such a condition that he was unable and failed to exercise the caution and care required of him under the instruction heretofore given, and that, by reason of such condition, he was injured, then, in such event, he cannot recover.⁸

§ 3790. Effect of contributory negligence

§ 3790(1). Alabama

Character of negligence of servant which will defeat recovery in action against master not complying with Workmen's Compensation Act, see post, § 5860.

The court charges the jury that if you believe from the evidence that it was the duty of ——— to assist in pulling down the loose rock after a shot had been made, and you further believe that he negligently failed to perform such duty, and as a proximate result thereof received his injuries, then you must find for the defendant, even though you believe from the evidence that it was also the duty of the defendant to set the props and see that the roof was fixed when defective.⁹

I charge you, gentlemen of the jury, that even if ———, the engineer, was negligent in backing up the engine and cars at an unusual and great rate of speed, yet, if you find that the plaintiff himself was guilty of contributory negligence in going between the cars while they were in motion, plaintiff cannot recover under the fifth count of the complaint.¹⁰

⁷ Fitzgerald v. Alma Furniture Co., 42 S. E. 946, 131 N. C. 636.

⁸ Missouri, K. & T. Ry. Co. v. McGlamory, 35 S. W. 1058, 89 Tex. 635.

⁹ Porter v. Tennessee Coal, Iron & R. Co., 59 So. 255, 177 Ala. 406.

¹⁰ Huggins v. Southern Ry. Co., 41 So. 856, 148 Ala. 153.

The jury are instructed that, if the plaintiff emptied the slate on the track at the place of the accident, and the slate so emptied proximately contributed to the derailment in the slightest degree, then I charge you that the plaintiff cannot recover, even though you may also believe that the derailment would not have occurred if the track had been in perfect position and if the car had been running at a slower rate of speed.¹¹

§ 3790(2). California

The court instructs the jury that, if a person's own want of ordinary care is the proximate cause of his injury or death, this is contributory negligence on his part, and no damages can be recovered from another person for such injury or death, even though the negligence of such other person may also have been a cause of the injury or death, and therefore if it appears from the evidence in this case that deceased, ———, in walking along said flume, negligently and carelessly (from lack of ordinary care) made a misstep and fell, which fall resulted in his death, and that the proximate cause of his death was due to want of ordinary care on his part, then plaintiff cannot recover in this action and your verdict must be for the defendant.¹²

§ 3790(3). Iowa

The court instructs the jury that, if you find from the evidence introduced upon the trial under these instructions that the plaintiff exercised ordinary care, taking into consideration all the facts and circumstances connected with the injury as shown by the evidence, if you find that he sustained any injury, then he was not at fault or negligent. If, however, he did not exercise such care, and was negligent in any way, no matter how slight, and if, by reason thereof, any injury resulted to him, or if such negligence contributed in some degree to his injuries, then he was guilty of contributory negligence, and he cannot recover in this action.¹³

§ 3790(4). Kentucky

The jury are instructed that, if you believe from the evidence that in the matter of losing his life the decedent was himself guilty of negligence, which so contributed to his death that, but for his own negligence, he would not have been killed, then the law is for the defendant, and the jury should so find.¹⁴

¹¹ Redus v. Milner Coal & R. Co., 41 So. 634, 148 Ala. 665.

¹² Brown v. Lemon Cove Ditch Co., 171 P. 705, 36 Cal. App. 94. This instruction is held not to be in conflict

with the doctrine of comparative negligence.

¹³ Bird v. Hart-Parr Co., 146 N. W. 74, 165 Iowa, 542.

¹⁴ Linard's Adm'r v. Interstate Coal Co., 169 S. W. 1006, 160 Ky. 598.

§ 3790(5). *Michigan*

You are instructed that, although you may believe the defendant was negligent, and that her negligence contributed to the injury of plaintiff—that is, helped to bring about that injury—nevertheless the plaintiff cannot recover unless he was free from negligence contributing to his injury.¹⁵

The court instructs the jury that, on the question of contributory negligence, if you find that the injury plaintiff received was caused as a result of the negligence of the defendant in hiring him when under the age of ——— years, and setting him at work at a hazardous employment, as I have defined it to you, still you cannot return a verdict in his favor if you find that he was guilty of any negligence which contributed to his injury. In other words, if he has failed to establish that he did nothing to contribute to the injury, then he cannot recover.¹⁶

§ 3790(6). *Missouri*

The jury are instructed that, if the jury find from the evidence that plaintiff himself was careless or negligent at the time or place of the accident, and that such negligence directly contributed to the injury which he sustained, then plaintiff cannot recover damages in this case, and the verdict should be for the defendant.¹⁷

The jury are instructed that if, from the evidence, you believe that plaintiff could have avoided the accident or injury to himself by prudence, caution, or care, your verdict should be for the defendant.¹⁸

§ 3790(7). *North Carolina*

The jury are instructed that, if you find the derailment was caused by the bad condition of the track, but you also find that the plaintiff's death was caused by his act in attempting to get off the car while it was passing between the buildings, and that his conduct in this respect was negligent—that is, that he did not exercise the care that a man of ordinary prudence would have exercised under similar circumstances—then such conduct on his part would be the proximate cause of his death, and you should answer the second issue, "Yes."¹⁹

§ 3790(8). *Oklahoma*

Now, bearing in mind the above and foregoing definitions and instructions, if you find from the evidence that plaintiff's injuries were brought about by reason of his own negligence, or that his

¹⁵ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

¹⁶ *Radic v. Thomas Jackson & Co.*, 146 N. W. 136, 178 Mich. 618.

¹⁷ *Kaminski v. Tudor Iron Works*, 67 S. W. 221, 167 Mo. 462.

¹⁸ *Rodney v. St. Louis S. W. Ry. Co.*, 28 S. W. 887, 127 Mo. 676.

¹⁹ *Dortch v. Atlantic Coast Line R. Co.*, 62 S. E. 616, 148 N. C. 575.

negligence in any degree contributed to the injury complained of, you must find for the defendant and your verdict must be for the defendant.²⁰

§ 3790(9). South Carolina

The jury are instructed that, if you find from the evidence that defendant was negligent, and that plaintiff was also negligent, and that the negligence of plaintiff contributed as a proximate cause to his injury, then plaintiff cannot recover for such injury.²¹

§ 3790(10). Texas

You are further instructed that even though you may believe that the defendant's servants or employes were guilty of negligence, still if you should further believe from the evidence that the plaintiff carelessly and negligently placed himself in such position as that he would probably be injured, and that he was guilty of negligence in so doing, as the term of negligence is hereinbefore defined to you in the first paragraph of this charge, and that his said negligence, if any, was the proximate cause or contributed to his injury, you will find for the defendant.²²

The jury are instructed that it is also the duty of the servant to exercise ordinary care for his own safety while he is engaged in the performance of the duties of his employment; and if he fails to do this, and thereby helps to cause his own injury, he cannot recover any damages of the master, no matter how badly he may have been injured, nor no matter how much the master may have been to blame; for in such a case the law does not permit any inquiry to be made as to who is the more to blame, the master or the servant, but simply denies any recovery to the servant.²³

§ 3790(11). West Virginia

The court instructs the jury that if they should find that the evidence in this case discloses that the injury resulting in the death of C. was caused by the mutual fault of both parties, such fault being the proximate cause of the accident, and that it would not have happened except for the failure of C. to properly observe the company's rules, concurring with the fault of the defendant in allowing the boom of the derrick to swing around over the tracks, there can be no recovery in this action, unless said injury could have been avoided after the defendant had notice of the negligence of the plaintiff, or was wanton or malicious.²⁴

²⁰ *Dickinson v. Whitaker*, 182 P. 901, 75 Okl. 243.

²¹ *Charping v. Toxaway Mills*, 50 S. E. 186, 70 S. C. 470.

²² *St. Louis Southwestern Ry. Co. of Texas v. Norvell* (Civ. App.) 115 S. W. 861.

²³ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

²⁴ *McCreery v. Ohio River R. Co.*, 38 S. E. 534, 49 W. Va. 301.

§ 3791. Doctrine of last clear chance**§ 3791(1). Kentucky**

You are instructed that it was the duty of the plaintiff to exercise ordinary care for his own safety. If you believe from the evidence that in doing his work he leaned upon the track of the crane, and that in so doing, if he did so, he failed to observe that degree of care just mentioned, and that by reason of such failure, if any there was, he so helped to cause and bring about the injuries of which he complains as that but for such failure, if there was any, he would not have been injured, then the law is for the defendant and you should so find, even though you should believe from the evidence that the defendant failed to observe some one or more of the duties mentioned in the — instruction as incumbent upon it. But in this connection you are instructed that if you find from the evidence that, although plaintiff was guilty of contributory negligence, but for which he would not have been injured, yet if the ones in charge of the crane saw the peril of the plaintiff in time to have stopped the crane, or to have given him warning, so that he could have escaped the injury to him, the jury should find for the plaintiff.²⁵

You are instructed that it was the duty of decedent to keep a lookout for defendant's trains in the yards while on the way to the point he was directed to go, and to use ordinary care to keep out of their way, and, if the jury believe from the evidence that deceased failed to do this, and, as a result thereof, he was injured, he was guilty of negligence, and the jury should find for the defendant, unless they believe from the evidence that the defendant's employes and agents in charge of its engine saw, or, by the exercise of ordinary care, could have seen, decedent's peril in time to have stopped the train and avoided the injury.²⁶

§ 3791(2). Oklahoma

You are instructed that it was the duty of —, the engineer on the passenger train No. —, to use such precaution as an ordinarily prudent person would use under like circumstances to avoid the collision with the freight train of which the deceased was engineer, and if you find from the evidence that the deceased, —, in pulling his train out upon the main track, was guilty of negligence, this would not exempt the defendant railway company from liability for his death in the event the evidence shows that the engineer on train No. —, after discovering the position of deceased's train, did not use such precaution as an ordinarily prudent person would use under like circumstances to avoid the

²⁵ *Bradas v. Henry Voght Mach. Co.*, 194 S. W. 1044, 175 Ky. 803.

²⁶ *Louisville & N. R. Co. v. Taylor's* Adm'x, 166 S. W. 199, 158 Ky. 633.

collision, and if you find that the death of deceased would not have happened if such precaution had been used, then you will find for the plaintiffs herein and against the defendant railway company.²⁷

§ 3791(3). Utah

The jury are instructed that it was the duty of the defendant in the running of its engine to keep a reasonably careful lookout and watch for appearance of persons upon its track, and, when observed and seen, to warn them of its engine's approach by sounding the engine whistle, or ringing its bell, or other suitable signal of warning; and if, after doing so, the person so upon its track fails to heed the signal and remains thereon, then it would become the further duty of the defendant to make reasonable efforts to stop its engine, providing it could do so without danger to the persons upon it or injury to its engine, and thus avoid injury to the person upon its track; and if the defendant should fail to perform this duty, and should wantonly and carelessly run its engine upon or into such person, injuring him, it would be guilty of negligence.²⁸

The jury are instructed that, even if they find from the evidence that the plaintiff was guilty of negligence which contributed to the injuries he complains of, yet he would be entitled to recover against the defendant if the jury should further find that the defendant, after discovering the plaintiff's negligence, failed or neglected to use reasonable diligence or care to prevent accident or injury to the plaintiff, but went ahead wantonly or recklessly, and injured him. It is the law that the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible.²⁹

§ 3791(4). Virginia

The court instructs the jury that, if you believe from the evidence that the accident was caused as set forth in this instruction by the manner in which said ladder or scaffold was being moved, and that this put the said decedent in a perilous position without any negligence on his part, and that this peril was seen, or could have been seen, by said foreman by the use of ordinary care and

²⁷ Missouri, K. & T. Ry. Co. v. Lenahan, 171 P. 455.

²⁸ Coates v. Union Pac. R. Co., 67 P. 670, 24 Utah, 304.

²⁹ Coates v. Union Pac. R. Co., 67 P. 670, 24 Utah, 304. In this case Chief Justice Miner holds that the more correct rule is that, if the negligence of the defendant which contributed directly to cause plaintiff's injury, occurred after the danger, in

which the injured party has placed himself by his own negligence, was, or by the exercise of reasonable care might have been, discovered by the defendant in time to have avoided the injury, the defendant would be liable, and the Chief Justice accordingly holds that the above instruction is too favorable to defendant, in that it did not give plaintiff the benefit of such hypothesis.

caution on his part, in time to avoid the accident, and that the said foreman failed to do this, then the defendant is liable, and you must find for the plaintiff, even though you may believe from the evidence the deceased was guilty of contributory negligence.³⁰

The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care to look out for his own safety, and, if there was a safe position in which he could have stood while drawing the bucket of water from the tender, even though the engine should be moved, it was his duty to have taken such a position, and, if he saw fit to take a position which rendered it unsafe to him for the engine to be moved, it was his duty to have warned the engineer of his unsafe position, unless the engineer knew of his position, and, if he failed to do so, and the engineer backed his engine, causing the injury which the plaintiff received, this was not negligence on the part of the engineer, and the jury must find for the defendant, unless you further believe from the evidence that engineer knew, or by the exercise of ordinary care ought to have known, of the plaintiff's position, and by the exercise of ordinary care could have averted the accident.³¹

The court instructs the jury that if they believe from the evidence that plaintiff's intestate, ———, went to sleep upon defendant's railroad track at a place where defendant's trains ordinarily passed, and where the wreck train in question was expected to pass, and that such action of ——— was one of the contributing causes of his injury, even though they may believe from the evidence that said ——— had been without sleep for a considerable length of time, such action of ——— constituted contributory negligence on his part, and that the jury cannot consider any negligence, if any such there was, on the part of the defendant company or its employes, that happened prior to the said negligent act of plaintiff's intestate, ———; in other words, if the belief of the jury is as above set forth, the only negligence for which they can hold the defendant liable is the negligence, if any, of the defendant subsequent to the time it discovered the perilous position of the said ———, if it did so discover the same, or had such notice, if it did have the same, as would put a reasonably prudent man on the alert to discover his peril and guard against injuring him.³²

§ 3792. Effect where negligence of master is gross or wanton

You are instructed that, even if you believe from the evidence that plaintiff knew of the dangerous condition of the roof, and that

³⁰ *Chesapeake & O. Ry. Co. v. Newton's Adm'r*, 85 S. E. 461, 117 Va. 260.

³¹ *Norfolk & P. B. L. R. Co. v. Sturgis*, 85 S. E. 572, 117 Va. 532.

³² *Norfolk & W. Ry. Co. v. Sollenberger's Adm'r*, 66 S. E. 726, 110 Va. 606.

a prop was needed, and knew that props had not been furnished, and continued after such time to make conditions more dangerous, by the work which he was doing, that would not defeat his recovery if you are reasonably satisfied from the evidence that plaintiff is entitled to recover on count — of his complaint, charging defendant with gross and wanton negligence.³³

I charge you that defendant's plea of contributory negligence constitutes no defense to count — of plaintiff's complaint, and if you are reasonably satisfied from the evidence that plaintiff was injured by reason of the gross negligence and reckless act or omission to act, on the part of defendant, with the knowledge on defendant's part that its action or failure to act would likely or probably result in injury to plaintiff, and with a reckless disregard of whether plaintiff was injured or not so failed to act, then plaintiff would be entitled to recover, irrespective of the pleas of contributory negligence.³⁴

I charge you, gentlemen of the jury, that unless you believe from the evidence that the engineer was guilty of willful or wanton negligence in backing up his engine and cars at a great and dangerous rate of speed, and was conscious of the fact at the time that his act was likely to and probably would result in injury to plaintiff, then the plaintiff cannot recover under the — count of the complaint.³⁵

§ 3793. Effect where negligence of master consists in violating statute

You are instructed that the statute law of this state makes it unlawful for any commission, officer, agent, or employé of the state of —, or of any city and county, or city or county, or other political subdivision thereof, or any person, firm or corporation, to run, place, erect, or maintain above ground, within a distance of — feet from any wire or cable which shall conduct or carry at any one time more than — volts of electricity, any wire or cable conveying or carrying less than — volts of electricity, and that the statute above referred to in this instruction was enacted for the safety of employés, and in this connection I charge you that if you find the — Telephone Company, at the time of the killing of —, was, in the erecting and constructing of the telephone line upon which — was working at the time of his death, violating such statute law, and you further find from the evidence that such violation of such statute contributed to the death

³³ Clinton Mining Co. v. Bradford, 76 So. 74, 200 Ala. 308.

³⁴ Clinton Mining Co. v. Bradford, 76 So. 74, 200 Ala. 308.

³⁵ Huggins v. Southern Ry. Co., 41 So. 856, 148 Ala. 153.

of said ———, then and in that event the law conclusively presumes that said ——— was not guilty of contributory negligence, and you must so find.³⁶

§ 3794. Same—Violation of federal Safety Appliance Act

The court further charges the jury that if they shall believe and find from the evidence that, at the time and upon the occasion of receiving the injuries sued for, the plaintiff was himself negligent, and by his own negligence contributed to the injuries sustained by him and sued for herein, and that, but for such negligence upon the part of plaintiff, if any there was, such injury could not have happened to or been sustained by him, then they must find for defendant.³⁷

§ 3795. Liability for injuries to minor employed in violation of statute

See, also, ante, § 3790(5).

The court instructs the jury, as a matter of law, that if they are reasonably satisfied from the evidence that the plaintiff did not consent to the employment by defendant of his son to run and operate the machine known as a wringer, and that the work of running and operating a wringer was dangerous work for a boy of the age of plaintiff's son, and was more dangerous than the work known as turning ribs, then your verdict should be for the plaintiff, notwithstanding you may further believe from the evidence that plaintiff's son was himself guilty of negligence which proximately contributed to his injury.³⁸

The court instructs the jury as matter of law that contributory negligence of plaintiff's son is no defense to this action if the plaintiff did not consent for defendant to employ his son in operating and running a wringer machine.³⁹

§ 3796. Doctrine of comparative negligence

§ 3796(1). Michigan

You are instructed that it matters not that you may believe the defendant's negligence was very great and the plaintiff's negligence was very slight, nevertheless, if the plaintiff's negligence, though slight and much less than that of defendant, contributed to his injury, your verdict must be not guilty.⁴⁰

³⁶ *Bloxham v. Tehama County Telephone Co.*, 155 P. 654, 29 Cal. App. 326. The court says that, if a case might be conceived where the servant's negligence was so gross as to place him beyond the pale of the statute, this was not such a case.

³⁷ *Norfolk & W. Ry. Co. v. Hazel-*

rigg (C. C. A. Ky.) 170 F. 551, 95 C. C. A. 637.

³⁸ *Huntsville Knitting Mills Co. v. Butner*, 69 So. 960, 194 Ala. 317.

³⁹ *Huntsville Knitting Mills Co. v. Butner*, 69 So. 960, 194 Ala. 317.

⁴⁰ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

§ 3796(2). Mississippi

In this cause you are instructed that, under the law, the only question for you to consider is whether the defendants could have prevented the injury to ——— by the use of ordinary care. If defendants could not have prevented the injury to ——— by ordinary care, defendants are not liable. But if defendants could have prevented the injury to plaintiff by the use of ordinary care, then the defendants' negligence is, in law, the sole cause of the injury, regardless of whether ——— used his foot or his hand in kicking back the drawhead knuckle. But if you further find from all the evidence that ———, the plaintiff, was also negligent, then such damages as you would have awarded plaintiff had he been free from negligence should be diminished by the jury in proportion to the amount of negligence attributable to ———, if any.⁴²

§ 3796(3). Nebraska

You are instructed that, although you believe that plaintiff was injured through the failure of defendant to comply with the statute requiring it to guard the shafting and to countersink or cover the set screws or bolts in the coupling, yet if you further believe from the evidence that plaintiff in violation of said orders and warnings took a ladder and a short-handled brush and ascended on the ladder to a place in dangerous proximity to the shafting and gearing of defendant's machinery, while the same was in operation, and while so doing exposed himself to known dangers, and in consequence was injured, and if you further believe from the evidence that such acts and conduct on the part of plaintiff made him guilty of more than slight negligence as compared to the gross negligence, if any, of the defendant, then plaintiff cannot recover, and your verdict must be for defendant.⁴³

§ 3796(4). Oregon

You are instructed that, if you find that the defendant owned and had charge of the machinery referred to in the pleadings, that is, the live rolls, cut-off saw, slab conveyor, and dead rolls, and the operation thereof, and that the work and operation thereof involved a risk or danger to the employes, and particularly to the plaintiff herein, and that the defendant did not use every care and precaution in the operation thereof which was practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the machine or apparatus or the operation thereof, and that defendant was negligent as alleged in plaintiff's complaint, and that the negligence of the plain-

⁴² Illinois Cent. R. Co. v. Harris, 67 So. 54, 108 Miss. 574.

⁴³ McCarthy v. Village of Ravenna, 157 N. W. 629, 99 Neb. 674. No prejudicial error.

tiff himself contributed to the injury, I instruct you that such contributing negligence is not a defense, but may be taken into account by you in fixing the amount of damages to be recovered by plaintiff, and only for such purpose.⁴⁴

The court instructs the jury that, if you should find in this case that there was negligence upon the part of the defendant company, and if you find that there was negligence upon the part of the plaintiff, and that the negligence of both concurred and combined and came together to produce the injury to the plaintiff, the law does not prevent the plaintiff from recovering; but you are in that event to compare their negligence and say: How much ought the defendant to pay for its negligence, and how much ought the plaintiff to pay for his negligence? If you determine that the defendant ought to pay more for its negligence, then the difference between what you determine what the defendant ought to pay for its proportionate measure of negligence and what you determine what the plaintiff ought to pay for his negligence is the amount for which the plaintiff would be entitled to recover. You compare the negligence under the law as it is now, and you do not, by reason of contributory negligence upon the part of the plaintiff, prevent recovery upon his part, if he is at all entitled to recovery.⁴⁵

§ 3796(5). Texas

You are instructed that, if you believe from the evidence that negligence on the part of plaintiff, if any, as submitted to you by the court, and negligence on the part of the defendant, if any, as submitted to you by the court, were concurrent proximate causes of alleged injuries to plaintiff, if any, then you will diminish the damages to plaintiff, if you find him entitled to recover, in proportion to the amount of negligence you find attributable to him.⁴⁶

You are instructed that, if you do not believe from the evidence that plaintiff was guilty of any negligence on the occasion in question, as alleged by defendant, or submitted to you by the court, then you will not, if you find plaintiff entitled to recover, diminish his damages anything on account of contributory negligence.⁴⁷

The jury are instructed that, if you find from the evidence that the defendant was guilty of negligence in the operation of its train at the time and in the manner alleged in plaintiff's petition, and further find that plaintiff himself was guilty of contributory negligence in attempting to board said train at said time, then you are instructed that plaintiff's contributory negligence would not bar

⁴⁴ *Hudson v. Brown Lumber Co.*, 154 P. 533, 80 Or. 506.

⁴⁵ *Filkins v. Portland Lumber Co.*, 142 P. 578, 71 Or. 249.

⁴⁶ *St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.)* 161 S. W. 84.

⁴⁷ *St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.)* 161 S. W. 84.

a recovery herein, but the amount of plaintiff's damages, if any, should be reduced in proportion that his negligence bears to the negligence of the defendant.⁴⁸

§ 3797. Same—Rule under federal Employers' Liability Act

§ 3797(1). United States

The jury are instructed that contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of himself and the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.⁴⁹

§ 3797(2). Arkansas

You are instructed that the defendant pleads that the deceased was guilty of contributory negligence. You are told that the burden is upon the defendant to show such contributory negligence, if any, by the greater weight of the evidence. Even if you should believe that the deceased was guilty of contributory negligence, this would not preclude a recovery by the plaintiff; but you should reduce the amount of the verdict in the proportion that the negligence of the deceased bears to the combined negligence of the deceased and the defendant.⁵⁰

§ 3797(3). Kentucky

You are instructed that, if you believe from the evidence that the injuries received by the plaintiff were caused by the negligence of the defendant in the manner and under the circumstances described in instruction No. ———, but were contributed to by the negligence of the plaintiff, then you will diminish the damages, if any, awarded him, in proportion to the amount of negligence attributable to the plaintiff, so that the plaintiff will not recover full damages, but only a proportional part, bearing the same relation to

⁴⁸ *Gregory v. Pecos & N. T. Ry.* 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096.
 (Civ. App.) 155 S. W. 648.

⁴⁹ *Norfolk & W. Ry. Co. v. Earnest,*

33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096.

⁵⁰ *St. Louis, I. M. & S. Ry. Co. v. Rodgers,* 176 S. W. 696, 118 Ark. 263.

the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both.⁵¹

§ 3797(4). Michigan

As I have already intimated, if you find that defendant is guilty of negligence, as I have explained, then you will determine whether or not the plaintiff's decedent (that is, ———) is guilty of contributory negligence (that is, whether plaintiff's decedent is guilty of any negligence that contributed to his injury). If he was guilty of any negligence that contributed or helped to cause the injury, that is what is known as contributory negligence, and contributory negligence is a want of ordinary care on the part of the person injured by the actionable negligence of another concurring with the negligence and contributing to the injury as a producing cause. The act under which this action is brought says that the fact that the employé may have been guilty of contributory negligence shall not bar his recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. If you find that the plaintiff is entitled to recover, and that the decedent was not guilty of contributory negligence which contributed in any degree to his injury, then the plaintiff would be entitled to recover full damages (that is, all damages resulting from the negligent acts of the defendant). If you find that the decedent, ———, was guilty of contributory negligence, then the plaintiff will not be entitled to full damages, but you will have to deduct from the plaintiff's full damages such damages as you may find have been suffered by reason of decedent's own negligence (that is, if you find that the plaintiff is entitled to damages, you will have to estimate first how much damages the plaintiff has suffered, and then, if you find that the decedent was guilty of some negligence, you will subtract from the entire damages such proportion as you find was caused on account of the decedent's own negligence).⁵²

§ 3797(5). Missouri

The jury are instructed that, though you may believe that the defendant was guilty of negligence which contributed to the plaintiff's injuries, then and in that event the plaintiff cannot recover full damages for his injuries so received, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributed to both the plaintiff and defendant.⁵³

⁵¹ Cincinnati, N. O. & T. P. Ry. Co. v. Goode, 173 S. W. 329, 163 Ky. 60.

⁵² Walsh v. Lake Shore & M. S. Ry. Co., 151 N. W. 754, 185 Mich. 177.

⁵³ Maues v. St. Louis-San Francisco Ry. Co. (App.) 220 S. W. 14, 205 Mo. App. 300.

§ 3797(6). **Oklahoma**

The jury are instructed that if you find from the evidence that ——— was guilty of contributory negligence resulting in injuries causing his death, yet that fact will not bar a recovery by the plaintiff in this case, but the damages must be diminished by the jury in proportion to the amount of negligence attributable to the said ———.⁵⁴

You are instructed that it was the duty of ——— to exercise reasonable care for his own safety and protection while in the discharge of his duties in the employ of the defendants, and if you find from the evidence that he failed to exercise such care, and that his failure to do so was the direct and proximate cause of the injuries resulting in his death, without negligence contributed thereto on the part of the defendants, their agents and employés, then the plaintiff would not be entitled to recover in this action, and you should find for the defendants. If, however, you find that the defendants, their agents or employés, were negligent as charged in plaintiff's petition, and that the deceased, ———, was also negligent, and that his negligence contributed to his injuries and death, such negligence on his part would not bar plaintiff's right to recover herein, but the damages which you find from the evidence plaintiff is entitled to should be diminished by you in your verdict in proportion to the amount of negligence which you find from the evidence is attributable to the deceased.⁵⁵

§ 3797(7). **Oregon**

You are instructed that the contributing negligence of the plaintiff, if you should find him negligent, would not be a defense under the law, but it must be taken into account by you in fixing the amount of the damage. In other words, if you find that the defendant violated its duty, and because of the violation of its duty plaintiff sustained an injury, then the defendant would not have the right to say that the contributory negligence of the plaintiff, if plaintiff was guilty of contributory negligence, could serve it as an absolute defense, and in that event you would have the right only to take into consideration any contributory negligence of the plaintiff for the purpose of mitigating the damages the plaintiff may have sustained.⁵⁶

You are instructed that, in order to make clear to you what is meant by the comparison of negligence, declared by federal law to be the duty of the jury to make, let me say that your first inquiry

⁵⁴ *Kansas City, M. & O. Ry. Co. v. Costa*, 170 P. 892.

⁵⁵ *Kansas City, M. & O. Ry. Co. v. Costa*, 170 P. 892.

⁵⁶ *Sonnixsen v. Hood River Gas & Electric Co.*, 146 P. 980, 76 Or. 25.

should be: Was the defendant guilty of negligence? Your second inquiry should be: Was the plaintiff negligent? Your third inquiry should be: In what degree did these causal negligences contribute to the accident? And I say to you, as a matter of law, that you must determine that proportion. If the plaintiff's negligence contributed or caused, we will say, the accident to the extent of one-third of the entire negligence, then the plaintiff's damages would be reduced by one-third; if to the extent of one-half, then his damages would be reduced by one-half; if to the extent of two-thirds, then his damages would be reduced by two-thirds; and if his negligence was alone the cause of the accident, then of course that would wipe out the damages, and your verdict would be in favor of the defendant.⁵⁷

§ 3797(8). **Texas**

The jury are instructed that, if you believe from the evidence that the defendant was guilty of negligence, as explained in paragraph — of this charge, but that the plaintiff knew of said gully or gulch, and that it had a footway for people to cross the same on the east side thereof, but none on the west side thereof, or must necessarily have known of the same, by the exercise of ordinary care in the discharge of his duties as such porter, and that, by undertaking to alight from said train at the place and in the manner in which he did, he was guilty of contributory negligence, as that term has been explained to you hereinbefore, that proximately contributed to cause his injuries, yet such contributory negligence would not prevent plaintiff's recovery for the injuries received by him, if any; but the damages, which you find plaintiff entitled to, should be diminished by you in proportion to the amount of negligence attributable to plaintiff in alighting from said car at the time and in the manner in which he did alight.⁵⁸

§ 3797(9). **Washington**

The court instructs the jury that, if you shall find that the plaintiff was guilty of negligence which contributed to cause his injury, and that the defendant was also guilty of negligence which contributed, with the negligence of the plaintiff, to cause injury to him, then it is your duty to diminish the amount which, in your opinion, under the evidence, you believe that the plaintiff herein will be entitled to recover by reason of the negligence of the defendant, by an amount in proportion to the amount of negligence attributable to the plaintiff.⁵⁹

⁵⁷ Pfeiffer v. Oregon-Washington R. & Nav. Co., 144 P. 762, 74 Or. 307.

⁵⁸ Missouri, K. & T. Ry. Co. of Tex.

as v. Bunkley (Civ. App.) 153 S. W. 937.

⁵⁹ Snyder v. Great Northern Ry. Co., 152 P. 703, 88 Wash. 49.

8. *Vice Principals and Fellow Servants*

§ 3798. Liability of master for acts of vice principal

§ 3798(1). Iowa

You are instructed that there is no claim that the defendant personally did, or omitted to do, any of the acts which are alleged by plaintiff to be negligence in this case. The acts complained of and the duties alleged to have been omitted and which plaintiff claims makes defendant liable for his injuries are claimed by plaintiff to have been omitted or committed by one ———, who, plaintiff says, was defendant's foreman and in charge of the work upon which plaintiff was employed. You are instructed that, if you find from a preponderance of the evidence that ——— was, in fact, in charge of said work, that he hired and discharged the men employed upon said work, that he paid the men for their work, and that he directed the men as to how and where to work, then and in that case any act or omission to act on the part of ———, while employed in the prosecution of said work, and while acting for and instead of the defendant, and not as a coemployé, would be the act or omission of the defendant, and have the same force and effect as if done or omitted to be done by the defendant himself.⁶⁰

§ 3798(2). Minnesota

You are instructed that if V., in defendant's absence from his place of business, was authorized by the defendant to have control over what plaintiff should do, or if defendant knew or under all the circumstances ought to have known that in his absence V. was in the habit of exercising control over what plaintiff should do, and V. on ——— directed the plaintiff to grind sausage, or hamburger, requiring the use of the machine which injured him, you are instructed that the directions of V. to plaintiff would be in law the directions of the defendant, and, in such case, the defendant would be responsible for any negligent acts of V. resulting in injury to the plaintiff, if such act was committed in the course of his employment, or in the line of his duty, with a view to the furtherance of the defendant's business. The fact that V. may have exceeded his actual authority, or even disobeyed his express instructions, would not alter this rule.⁶¹

§ 3799. Assumption of risk of negligence of fellow servants

§ 3799(1). United States

The jury are instructed that this plaintiff, when he voluntarily entered into the employ of the defendant, took the risk of dangers

⁶⁰ McDonald v. Green, 154 N. W. 456, 172 Iowa, 186.

⁶¹ Gutmann v. Anderson, 171 N. W. 303, 142 Minn. 141.

ordinarily attending or incident to the business in which he was employed, including the perils arising from carelessness of his fellow servants. But the above rule is subject to the following limitation or exception, viz.: That the master or employer, whether a natural person or a corporate body, is legally bound to use due care not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.⁶²

§ 3799(2). Alabama

The court charges the jury that the defendant was not an insurer of the plaintiff against risks incident to the business in which the plaintiff was engaged, and that the negligence of ——— was such a risk, and one for which the defendant is not liable.⁶³

The court charges the jury that the pouring or dropping of iron into the wet sand by ——— was the act of a fellow servant, for whose negligence the defendant was not liable; and if the jury are reasonably satisfied that the act of ——— in pouring the iron in the wet sand was the proximate cause of the plaintiff's injury, then the jury should find the issues in favor of the defendant.⁶⁴

§ 3799(3). Delaware

You are instructed that a person entering into the employment of another assumes the usual risks of the employment, excluding that of the negligence of the employer, and including that of the pure negligence of the coemployé, whenever doing anything contemplated by his contract of employment.⁶⁵

You are instructed that, if the employer has exercised due and reasonable care in the selection and retention of reasonably careful and competent employés, he is not an insurer of the safety or against the negligence of such employés. Reasonable care means that degree of precaution and diligence which the risks and hazards of the particular service reasonably require.⁶⁶

You are instructed that, if it should be found from the evidence that ——— was not careless or incompetent in the actual performance of his duties, as alleged, but that he had always, prior to the accident by which the plaintiff was injured, performed his duty as a hammer man in a reasonably safe and careful manner, the plaintiff would not be entitled to recover, or, if it should appear from the evidence that ——— had been negligent only in respect

⁶² Northern Pac. R. Co. v. Mares, 8 S. Ct. 321, 123 U. S. 710, 31 L. Ed. 296.

⁶³ Jones v. Union Foundry Co., 55 So. 153, 171 Ala. 225.

⁶⁴ Jones v. Union Foundry Co., 55 So. 153, 171 Ala. 225.

⁶⁵ Warren v. Harlan & Hollingsworth Corporation, 84 A. 215, 3 Boyce, 182.

⁶⁶ Warren v. Harlan & Hollingsworth Corporation, 84 A. 215, 3 Boyce, 182.

to the particular act which caused the injury to the plaintiff, the latter cannot recover. The question whether the particular act which caused the injury to the plaintiff was negligent, and if negligent, whether it was merely a temporary lapse, or indicated an unfitness on the part of ——— for the duties assigned to him, you should determine from all the evidence adduced before you.⁶⁷

§ 3799(4). Illinois

The court instructs the jury that, as a matter of law, the negligence of a fellow servant is one of the risks of the employment assumed by a servant, and if you believe, from the evidence, that the injury to the deceased in this case was caused solely by the negligent act of a fellow servant, then it is your duty to find the defendant not guilty.⁶⁸

§ 3799(5). Michigan

You are instructed that the undisputed testimony is that the depression in the south rail of the track, described and referred to in the testimony, was not the result of any error or fault in the original construction of the track, or its plan, but was caused, if there was any such depression, by the ordinary use of the track by trains running over it. There being such depression existing, it was the duty of the sectionmen to repair it. (2) Sectionmen or trackmen are fellow servants of the brakemen; and if the accident was the result of, or was caused by, a depression in the track, the existence of the depression was the negligence of the trackmen, and therefore the plaintiff cannot recover. But in this connection you are instructed that, if defendant had actual or constructive notice of such defect, the negligence of a fellow servant would be no defense.⁶⁹

§ 3799(6). Missouri

You are instructed that, if you find from the evidence that the motorman in charge of the car knew, or might have known by the exercise of ordinary care, the condition of the track at the point of the accident, and that he negligently ran his car upon the point at which the track was sunken or depressed without slowing it down and reducing the speed to one of safety, then the plaintiff is not entitled to recover, and your verdict will be for the defendant.⁷⁰

The jury are further instructed that defendant is not responsible for the negligence of plaintiff's fellow servants, if the jury believe from the evidence that plaintiff's fellow servants were guilty of

⁶⁷ Warren v. Harlan & Hollingsworth Corporation, 84 A. 215, 3 Boyce, 182.

⁶⁸ Wells v. O'Hare, 70 N. E. 1056, 209 Ill. 627.

⁶⁹ Anderson v. Michigan Cent. R. Co., 65 N. W. 585, 107 Mich. 591.

⁷⁰ Houts v. St. Louis Transit Co., 84 S. W. 161, 108 Mo. App. 686.

negligence, and that such negligence caused the accident by which plaintiff was injured. The term "fellow servants," as used in this instruction, means those who are engaged with the plaintiff in the same work, without any relation to each other except as collaborators, and without rank.⁷¹

§ 3799(7). **North Carolina**

The jury are instructed that, if they should find, by the greater weight of the evidence, that while the plaintiff was carrying the log he stumbled and fell, and while down, his fellow servants, when they could have prevented the injury by holding the log, negligently and carelessly threw down their end of the log, when by the exercise of ordinary prudence they could have held it and prevented the injury, then it would be chargeable to the negligence of defendant's employes, and if this negligence of fellow servants was the proximate cause of the injury, they would answer the first issue "Yes."⁷²

§ 3799(8). **Oklahoma**

The court instructs the jury that, although you may find from the evidence that Conductor ——— violated the rules and orders of the railway company with reference to movement of the freight train whose collision with the passenger train caused the death of deceased, the railway company is not liable to the plaintiffs by reason of such acts of the conductor.⁷³

The court instructs the jury that, although you may find from the evidence that the conductor of the freight train was negligent in permitting the said train to go out on the main track in the direction of ——— at the time he did permit said train to go out, the railway company is not liable to the plaintiffs on account of such negligent acts of the conductor.⁷⁴

§ 3799(9). **Pennsylvania**

The court instructs the jury that, the plaintiff's witnesses ——— and ———, having testified that ———, the foreman, ordered them to take out the bolts "when the job" was finished, and that they went to the frame and saw that the job was not done and went away, and later returned and took the bolts out, the act of plaintiff's witnesses in taking out the bolts before the plaintiff had finished painting was the negligence of coemployes, for which the defendant cannot be held liable, and the plaintiff cannot recover in this case.⁷⁵

⁷¹ Kaminski v. Tudor Iron Works, 67 S. W. 221, 167 Mo. 462.

⁷² Rushing v. Seaboard Air Line Ry. Co., 62 S. E. 890, 149 N. C. 158.

⁷³ Missouri, K. & T. Ry. Co. v. Lenahan, 171 P. 455.

⁷⁴ Missouri, K. & T. Ry. Co. v. Lenahan, 171 P. 455.

⁷⁵ Sterner v. S. Morgan Smith Co., 81 A. 889, 233 Pa. 27.

§ 3799(10). Texas

The jury are instructed that, if you find and believe from the evidence that any fellow servant or fellow servants of plaintiff failed to exercise ordinary care for his safety on the occasion of his being injured, and that such failure or failures, if any, proximately caused plaintiff to be injured, then you will find for the defendant unless such failure or failures, if any, concurred with the negligence, if any, of the defendant, as hereinbefore defined, and unless such concurring negligence, if any, on the part of the defendant proximately caused plaintiff to be injured.⁷⁶

The jury are instructed that, when a servant accepts employment of a master, he thereby assumes all the risks of being injured ordinarily incident to the kind of work in which he is engaged; and one of the risks so assumed by the servant is the risk of being injured by a failure on the part of one of his co-servants to exercise ordinary care, or, indeed, any kind of care, as well as the risk of being injured by accident. Therefore, if the servant is injured by any of these things, and not through the failure of the master to exercise ordinary care, as hereinbefore stated, the servant cannot recover any damages from the master on account of such injury, unless the master has failed to exercise ordinary care for the injured servant's safety in employing or in retaining in employment the servant whose want of care caused the injury.⁷⁷

§ 3800. Who are fellow servants or vice principals**§ 3800(1). United States**

There seems to be some misunderstanding, gentlemen, as to just what I said with respect to the consideration to be given to the situation if ——— worked with his hands a fourth of the time, a half of the time, or three-fourths of the time, or nine-tenths of the time. I did not intend to say to you that such expressions on the part of the witnesses would control, or, if you should find he did actually work a large portion of the time, that the question of superintendence would necessarily turn upon that fact alone, for the reason that there is some evidence in this case that the man, while at work, was also engaged in the line of superintendence; that, even if working with his hands, he was engaged in keeping an outlook upon the work and giving directions to the men. Of course, if a man was engaged in nine-tenths of the time, or perhaps three-fourths of the time, or more than half the time, in actual manual labor, giving up entirely during that period all idea

⁷⁶ *Southwestern States Portland Cement Co. v. Riser* (Civ. App.) 137 S. W. 1188.

⁷⁷ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

of superintendence or direction, throwing off his responsibility and becoming altogether a common laborer, and having no reference to the direction of the work or outlook upon what was going on, then it probably would follow that he was not a superintendent, or not a superintendent whose chief duty was superintendence. But if at the same time that he was laboring he was giving directions, and adhering to his right to direct and superintend, and was actually keeping an outlook and directing, then it would become a question for you to determine, notwithstanding the fact of manual labor for a greater or less portion of the time; it would be a question for you to settle upon all the evidence, taking into consideration all the evidence, the amount of labor, the importance of superintendence, the extent of direction—all together—for you to determine whether his chief duty was that of superintendence.⁷⁸

§ 3800(2). Idaho

You are instructed that, in order to constitute the plaintiff a fellow servant with the fellers of timber, they must have been employed by the master in some common line of employment, by which employment they would co-operate in the particular business then in hand in the same line of employment, or whose usual duties would bring them into habitual association so that they might exercise mutual influence upon each other promotive of proper caution; but if you find in this case that the plaintiff and the fellers of timber did not associate together in the same common work but were employed in different lines of work, and were engaged in working separately from each other, the one not knowing what the other was doing or how the work was being carried on by him, and nothing of their work in common, and not associating together in performing the work, but acting entirely independent in a different part of the work, they would not be fellow servants under the law, and the defendant could not escape liability for any injury caused by one to the other.⁷⁹

§ 3800(3). Illinois

The court instructs the jury that to constitute defendant's servants, who were switching the caboose in question, fellow servants of ———, deceased, so as to exempt the defendant from liability on account of the death of deceased from the negligent acts of defendant's said servants (provided you believe from the evidence deceased's death was caused by the negligent acts of said servants) said servants and deceased should be actually co-operating, just before, and at the time of, the collision which caused deceased's death,

⁷⁸ Canney v. Walkeine (C. C. A. Mass.) 113 F. 66, 51 C. C. A. 53, 58 L. R. A. 33.

⁷⁹ Brayman v. Russell & Pugh Lumber Co., 169 P. 932, 31 Idaho, 140.

in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety.⁸⁰

§ 3800(4). Iowa

You are instructed that one of the defenses urged by the defendant in this case is that the injury which plaintiff claims to have sustained was occasioned by the negligence of a fellow servant. You are instructed that if such defense is true that plaintiff cannot recover. On this point the law is that, if a foreman is engaged in the work of superintending, then his negligence while so engaged whereby an inferior servant is injured will be the negligence of the master; but if notwithstanding his office of foreman he is engaged in the common work with the other servants, and while in that capacity an injury results to another servant from his want of ordinary care, such an injury would be one inflicted by one fellow servant upon another, and the master would not be liable. On the other hand, if the foreman, exercising the power conferred upon him by the master, sends a man who is working under his orders to a dangerous place to work or puts him at dangerous work, this will be the act of the master, and not the act of the fellow servant, because it is not the act of mere service with the other, but is an act of authority which can only be exercised by virtue of an office of vice principal for the master for whose acts the master is liable. In this case if you find that, while ——— and plaintiff were engaged together in the same work, the injury was inflicted upon plaintiff by reason of something which he and ——— were doing together, they would be fellow servants and plaintiff could not recover. On the other hand, if at the time plaintiff was injured you find that ———, as superintendent or boss, did negligently send or order plaintiff to perform the work of adjusting the hitch upon the smoke box, the danger of which was known to ——— but not known to plaintiff, and the said ——— did not have reasonable grounds to believe the same were known to plaintiff, then such negligence, if any, would be the negligence of defendant, and not the negligence of a fellow servant.⁸¹

§ 3800(5). Missouri

The jury are instructed that if the defendant railway company had a gang of men, among whom was plaintiff, digging down the embankment, as disclosed by the evidence, and if said men were

⁸⁰ Pittsburgh, C. & St. L. Ry. Co. v. Bovard, 79 N. E. 128, 223 Ill. 176.

⁸¹ Jacobson v. United States Gypsum Co., 130 N. W. 122, 150 Iowa, 330

under the control and management and subject to the directions of a superintendent or foreman of said defendant railway company, then said superintendent or foreman was the vice principal, and his acts in directing and controlling said men were the acts of the defendant.⁸²

§ 3800(6). Oklahoma

You are instructed that for two or more persons to constitute fellow servants they need not at the time be engaged in the same particular work. It is sufficient if they are in the service of the same employer, engaged in the same common work, and performing duties and services for the same general purpose. Within this rule one engaged in hauling coal from a mine by means of a horse or team, and those engaged in blasting and loading such coal in the mine, and all employed by a common master, are fellow servants.⁸³

§ 3800(7). Oregon

I instruct you that all persons who were engaged in sending wheat down the chute and turning it and packing it were fellow servants, and the negligence of any one of them resulting in injury to the plaintiff is a complete and perfect defense to the master.⁸⁴

The court instructs the jury that, if you find from a preponderance of the evidence that the plaintiff and his coemployé, ———, were working under the orders and directions of the outside foreman, ———, and were required to obey the orders and directions of such outside foreman, then the outside foreman was a vice principal of the defendant, and if you find that he was negligent in failing to perform the duties which the law imposes on the defendant, as stated in these instructions, if he did so fail, then his negligence, if any, was the negligence of the defendant.⁸⁵

§ 3800(8). Texas

You are instructed that a vice principal is one who has authority to hire, direct, and discharge employés, or to whom the employer delegates a duty owing to the employés. Where one employé is placed under the control of another by an employer, the orders of said employé so placed in control respecting the work coming within the scope of such authority are the employer's orders, and the acts, directions, instruction, or conduct of said employé so placed in authority with reference to said work, over which there has been given supervision and control by the employer, are the acts, instructions, and conduct of the vice principal.⁸⁶

⁸² Bradley v. Chicago, M. & St. P. Ry. Co., 39 S. W. 763, 138 Mo. 293.

⁸³ Henryetta Coal & Mining Co. v. O'Hara, 150 P. 1114, 50 Okl. 159.

⁸⁴ Shields v. W. R. Grace & Co., 179 P. 265, 91 Or. 187.

⁸⁵ Adams v. Corvallis & E. R. Co., 152 P. 504, 78 Or. 117.

⁸⁶ Reliable Steam Laundry v. Schuster (Civ. App.) 159 S. W. 447.

§ 3800(9). Virginia

The court further instructs the jury that the conductor in charge of the train upon which plaintiff was at the time he was injured was a superior officer. Therefore all other employes on said train were subject to his orders.⁸⁷

§ 3801. Same—Section boss

The court instructs the jury that a section master of a railroad company, in charge of a particular section of the company's road, with a force of hands under him, to take care of and preserve said section, is not merely a coemployé with said hands, on an equal footing with them, but that the relations between the section master and those working under him are those which exist between a superior and a subordinate, and that, in all matters pertaining to the particular department in which the section master is engaged, he is the representative of the company, and, therefore, if one who is employed by the section master to work under him on his section is injured by the negligence of the section master while engaged in and about said employment, the company cannot escape liability for said injury upon the ground that the injured party was the coemployé of the section master; but the jury are further instructed that this will not prevent the company from showing, if it can, that on other grounds or for other reasons it is not liable to the injured party for the injuries he has sustained.⁸⁸

§ 3802. Duty not to employ incompetent or reckless fellow servants**§ 3802(1). United States**

The jury are instructed that in this case, while the defendant did not guaranty to its servants, or to this plaintiff, that the engineer on the switch engine in its yard at ——— should be careful or skillful or competent, yet it was bound to exercise proper care to get a person in all respects fit for the place, and if, after defendant had employed such engineer, it learned, or had reason to believe, that he was careless, reckless, or incompetent, it was its duty to discharge him; that if the defendant was careless, either in employing or retaining in its service a reckless, incompetent, or careless engineer on said engine, and on account of the recklessness, incompetence, or carelessness of such engineer the plaintiff was injured, without fault or negligence on his part, then, in such case, the railroad company is liable to him for the damage resulting from such injury; that sound sense and public policy require that railroad companies should not be exempt from liability to

⁸⁷ *Virginia & S. W. Ry. Co. v. Bailey*, 49 S. E. 33, 103 Va. 205.

⁸⁸ *Tyler v. Chesapeake & O. R. Co.*, 13 S. E. 975, 88 Va. 389.

their employés for injuries resulting from the incompetency, negligence, or carelessness of coemployés, when, by the exercise of proper diligence, such injuries might be avoided; that the plaintiff had a right to suppose, and assume that the railroad company had used proper diligence and care in the employment and retention of an engineer; that what will amount to proper care and diligence in the selection of a servant for a particular duty, or in the retention of such servant, will in part depend on the character and responsibility of that duty which said servant is to perform. The greater the danger from the negligence, incompetence, or carelessness, the greater the care should be in his selection or retention; for instance, the same degree of diligence or care which is required in the employment of a locomotive engineer would not be required in the employment of a fireman.⁸⁹

The jury are instructed that if B., the engineer in the yard at ———, was careless, reckless, or incompetent, and if such carelessness, incompetency, or recklessness caused the injury to the plaintiff, then if the agents or servants of this defendant, whose duty it was at that time to employ and discharge him if unfit, did not exercise due care in the employment of B., or if, after he was employed, they in fact knew that he was careless, reckless, or incompetent, or if, by the exercise of due care, they would have discovered that he was careless, reckless, or incompetent, then the railroad company is liable to the plaintiff for any injury he may have suffered from such carelessness, recklessness, or incompetency of B. if the plaintiff himself was not guilty of any negligence which contributed to that injury. Ordinary care or due care in such cases is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless. Ordinary care in the selection or retention of servants in such cases implies that degree of diligence and precaution which the exigencies of the particular service reasonably require; that is, such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered.⁹⁰

§ 3802(2). Delaware

You are instructed that it is the duty of the employer to exercise reasonable care in the selection and retention of his employés, to the end that fellow servants or coemployés may not be endangered in the performance of their duties by the conduct of other employés of the defendant who are unskillful or careless in the performance

⁸⁹ Northern Pac. R. Co. v. Mares, 8 S. Ct. 321, 123 U. S. 710, 31 L. Ed. 296.

⁹⁰ Northern Pac. R. Co. v. Mares, 8 S. Ct. 321, 123 U. S. 710, 31 L. Ed. 296.

of their duty. The employer is required to employ and retain in his service coworkers and fellow servants reasonably competent and careful for the performance of the particular work in which they are engaged. The degree of care thus required of the employer in the selection and retention of his employés is proportioned to the risk or hazard of the particular business in which the employé is engaged.⁹¹

§ 3802(3). Minnesota

The court instructs the jury that the first question, then, is: Was the man ———, who was in charge of the engine in question and which has been referred to in the evidence, an incompetent and unfit person to perform the services at which he was engaged? This is to be determined by a consideration of all the evidence in the case having a bearing thereon, including a consideration of the character of the service, the necessity, if any, of a previous experience thereat, the length of experience, if any, which ——— had, and the character of the particular act or failure of his which it is alleged caused plaintiffs' injuries. The particular negligence of ——— here relied on and alleged may or may not be of such a character as to indicate his competency or otherwise. A particular act which in itself is negligent may indicate that it was performed by reason of incompetence on the part of the person so performing it, or it may be a mere fugitive act of negligence, performed by one who is possessed of all the necessary qualifications. You are to say in this case whether ——— was competent—that is, fit—to perform the grade of services at which he was engaged, or whether he was not. If ——— was not an unfit and incompetent person to do the work at which he was engaged, there can be no recovery on this ground. If, however, he was an incompetent and unfit person, the next question is: Was the defendant negligent in employing him or in retaining him in its employ? You have heard all the evidence. Defendant claims therefrom that, even if ——— was in fact an incompetent person, the defendant did all that could be required of it under the circumstances in making inquiries and in seeking to advise itself concerning his fitness to do what they wanted him to do. Plaintiffs claim that what it did fell far short of what it should have done in this regard. If, in fact, he was incompetent, and you so find, a presumption then arises that defendant was negligent in employing him. In this connection, also, you are advised that ———, not having received a license under the laws of this state which would authorize him to have charge of the instrumentalities which he had in this case, a presumption arises that de-

⁹¹ Warren v. Harlan & Hollingsworth Corporation, 84 A. 215, 3 Boyce, 182.
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defendant was negligent in employing him to perform such work as that at which he was engaged. These presumptions operate in favor of the plaintiffs, and in support of the claims they make as to the negligence of the defendant in employing —; but such presumptions are not conclusive by any means, and you will say from all the evidence whether defendant was negligent in the respect here under consideration, or whether it was not. If, then, — was incompetent and unfit to operate the engine in question, and if you further find that defendant was negligent in employing him under the circumstances of this case, and if you find that plaintiffs' injuries were caused by the acts or failure of — arising from his unfitness or incompetency, the plaintiffs are entitled to recover, unless they were themselves negligent in such manner as contributed directly to cause their own injuries.⁹²

§ 3802(4). Texas

The jury are instructed that if you believe from the evidence that A. was a reckless or careless person, and a person unsafe to work with others, and believe further from the evidence that the defendant's foreman, S., knew this, or in the exercise of ordinary care ought to have known thereof, before plaintiff received his said injury, and that, so knowing or having notice thereof, the said S. employed the said A. to work with plaintiff and other workmen, or that, after so knowing or having notice that the said A. was careless, reckless, and unsafe to work with other workmen, the said S. retained the said A. in employment, and if you believe further, from the evidence, that the said S., before plaintiff was injured, knew or had notice that the said A. was such a kind of man, you will find for plaintiff, if you further believe from the evidence that the said A. failed to exercise ordinary care in removing one of said blocks, and, by reason of his failure to exercise ordinary care, let said block fall and injure plaintiff, while plaintiff himself was exercising ordinary care for his own safety.⁹³

You are instructed that, if you believe from the evidence that the said S., in employing the said A., and in retaining him in employment, exercised ordinary care for the safety of the other servants employed by the said S. for the defendant, you will find for defendant, even though you should believe from the evidence that the said A. was a careless, reckless, and unsafe person to work with others, unless you should find for plaintiff, under paragraph No. — of this charge. In this connection, you are further instructed that, although you should believe from the evidence that A. was

⁹² Kunder v. Shenango Furnace Co., 112 N. W. 1012, 102 Minn. 162.

⁹³ Sherman Oil & Cotton Co. v. Stewart, 42 S. W. 241, 17 Tex. Civ. App. 59.

not a skilled mechanic, yet unless you should further believe from the evidence that he was not a man of ordinary prudence in the doing of the work for which he was employed, or was not ordinarily competent for such work, and that the said S. knew this, or in the exercise of ordinary care ought to have known this, before plaintiff was injured, then you cannot find for plaintiff on account of the said A.'s employment or his continuance in such employment.⁹⁴

§ 3803. Duty not to employ incompetent foreman

You are instructed that it is the duty of the master to ascertain the character of the servants whom he employs and retains as to being careless or otherwise. This duty is especially applicable in the case of a foreman. A foreman is one who has immediate charge of a gang of workmen, and whose orders and authority, in and about and concerning their work, the workmen are bound to obey. A master is under the duty towards his servants not to place incompetent or unfit persons in authority over his other servants. And in respect to a servant that has been in the master's employ for a long time, the master is charged with knowledge of such servant's general reputation in the community as to carelessness or incompetency.⁹⁵

§ 3804. Liability for negligence of incompetent fellow servant

§ 3804(1). Delaware

We now especially direct your attention to the distinction to be made between the negligence of a competent fellow servant and the negligence of an incompetent fellow servant. The employer is not liable for the negligence of a competent fellow servant, but he is liable for the negligence of a careless and incompetent fellow servant, in the selection and retention of whom he has not exercised due and reasonable diligence, if it be shown at the same time that the injured coemployé used ordinary care and prudence to avoid the injury. The plaintiff insists that the defendant was negligent in failing to provide a reasonably competent and careful person to operate the said steam hammer at the time of the accident. Was ———, the hammer man, competent or incompetent to operate the steam hammer at the time of the accident? If you find from the preponderance or greater weight of the evidence that he was reasonably competent for the performance of the duties to which he had been assigned, your investigation of this case should stop there, and you should return a verdict for the defendant. If you

⁹⁴ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

⁹⁵ *Johansen v. Pioneer Mining Co.*, 137 P. 1019, 77 Wash. 421.

should find that ——— was not reasonably competent for the work assigned to him, had the defendant reason to know it? If the defendant had reason to know that ——— was incompetent, and if knowing it, or by the exercise of due care and caution could have known it, and continued him in its employment, and if the plaintiff was injured by reason of such incompetency, without the fault or negligence of the plaintiff operating at the time, the plaintiff would be entitled to recover. If the defendant had not reason to know that ——— was not reasonably competent to perform the duties assigned to him, or, as we have said, if the injury to the plaintiff did not arise from his coemployé's incompetency, the plaintiff cannot recover.⁹⁶

You are instructed that by a competent servant is meant a servant reasonably safe for the performance of the duties assigned to him, considering the nature of the work and the general safety of those engaged with him in a common employment. Incompetency may exist in the disposition with which a servant performs his duties. Although he may be physically and mentally able to do all that is required of him, his disposition toward his work, and toward the general safety of the work of his employer and of his fellow servants, may, or may not, tend to make him an incompetent servant, according to the facts and circumstances of the particular case.⁹⁷

§ 3804(2). Wisconsin

You are instructed that the duty of the defendant was to use ordinary care and diligence in respect to employing competent servants, having regard always to the character of the particular service, and the consequences that might result from incompetency in such service. If the defendant exercised such care and diligence in retaining in its employ ——— at the time of the accident, the defendant was not guilty of negligence in so doing, notwithstanding the fact that ——— may have been incompetent at such time, and notwithstanding the fact that an injury to the plaintiff may have resulted by reason of such incompetency.⁹⁸

§ 3805. Same—Proximate cause

You are instructed that, if you should believe from the evidence that plaintiff's injury was caused by the said H.'s letting go the rope and block that the said H. was engaged in removing, and thereby jerking the block out of A.'s hand, and causing the same

⁹⁶ Warren v. Harlan & Hollingsworth Corporation, 84 A. 215, 3 Boyce, 182.

⁹⁷ Warren v. Harlan & Hollings-

worth Corporation, 84 A. 215, 3 Boyce, 182.

⁹⁸ Odegard v. North Wisconsin Lumber Co., 110 N. W. 809, 130 Wis. 659.

to fall on plaintiff while said A. was exercising ordinary care, you will find for defendant, even though you should believe from the evidence that the said A. was a careless, reckless, and unsafe person to do the work that he was engaged in doing.⁹⁹

§ 3806. Notice to servant of incompetency of fellow servant

You are instructed that an employé is entitled to assume that his employer has exercised due care and diligence in the selection and retention of reasonably competent and careful coemployés, and is not chargeable with knowledge of the incompetency or carelessness of his coemployés until he has notice thereof by information or circumstances reasonably sufficient for that purpose. Whether an employé is chargeable with knowledge of the general reputation of his coemployé for incompetency or carelessness will depend upon the length of time he has known, or had an opportunity of knowing, the reputation of his coemployé, and upon all the circumstances of the particular case.¹

§ 3807. Effect of continuing in employment with knowledge of incompetency or recklessness of fellow servant

The jury are instructed that it is also true that, if the plaintiff had full knowledge of the reckless and careless habits of the engineer, B., as complained of by him, or had reason to know of such recklessness and carelessness, he should either have quit the service or reported the facts to the officers of the company having the power to discharge him, and a failure to do so might be negligence on his part; but, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard. While this rule of law above stated is generally true, a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but a short time, and only a part of that time with or under this engineer, B. Now, had he such knowledge, or had he such an opportunity to know, of the careless and reckless habits of B. that rendered it dangerous for him to work with him, and made it his duty to have refused to continue in such service, or have reported him to the officers of the company?²

§ 3808. Failure to provide safe working place for others

The court further instructs the jury that under the rules of the defendant company, which were read in evidence to the jury, with

⁹⁹ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

¹ *Warren v. Harlan & Hollings-*

worth Corporation (Del.) 84 A. 215, 3 Boyce, 182.

² *Northern Pac. R. Co. v. Mares*, 8 S. Ct. 321, 123 U. S. 710, 31 L. Ed. 296.

reference to the duties of coal diggers and machine men, in looking after and making safe the roof of the mine in their respective working places, the intent and meaning of the said rules was that said machine men and said coal diggers should look after the roof of the mine in their said places, and make the same safe in so far as it was necessary to protect themselves, respectively, from danger, but that the rules of the company, read in evidence as aforesaid, were not intended to mean, and did not mean, that the said machine men and coal diggers should be charged with the duty of making their respective working places safe for others to work in; that so far as other persons were concerned, that is, persons other than the said machine men and coal diggers, the duty rested upon the mine boss to use ordinary care to see that the said places were safe, and if the company, through its mine boss, did use ordinary care to see that the roof which caused the accident in this case was safe, then the company cannot be held liable for any negligence on the part of the said machine men, or coal diggers, if such there was, in failing to use ordinary care to see that such place was safe.³

§ 3809. Negligence of master co-operating with negligence of fellow servant

§ 3809(1). Alabama

The jury are instructed that while, if the negligence of ——— was the sole proximate cause of the death of ———, plaintiff could not recover, yet if the jury are reasonably satisfied from the evidence that the defendant was guilty of negligence which proximately helped to cause the death of ———, then the negligence, if any, of ———, even though it also helped to cause the death, would be no answer to the said negligence of the defendant, if any.⁴

§ 3809(2). Illinois

The court instructs the jury that, if the defendant was itself guilty of negligence and the plaintiff was injured thereby, then, even though it should appear that some fellow servant of the plaintiff was guilty of negligence partly contributing toward causing the injury, such negligence of said fellow servant would not, in that case, prevent the plaintiff from recovering a verdict if he was otherwise entitled thereto under the instructions and the evidence.⁵

³ Colonial Coal & Coke Co. v. Gass, 75 S. E. 775, 114 Va. 24.

⁵ Klofski v. Railroad Supply Co., 85 N. E. 274, 235 Ill. 146.

⁴ Sloss-Sheffield Steel & Iron Co. v. Milbra, 55 So. 890, 173 Ala. 658.

§ 3809(3). Iowa

The court instructs the jury that, if you believe that the plaintiff and the man referred to by the name of T. were engaged together in work, and the injury of which the plaintiff complains was inflicted by reason of the failure of the said T. to exercise ordinary care, independent of any negligence on the part of the defendant, then plaintiff cannot recover. But even though said T. was negligent, and you further find that the defendant was negligent in the respects charged, and such negligence of the defendant concurred with and contributed to the injury of which plaintiff complains, then you will find that the said injury was caused by the negligence of the defendant, and not by the negligence of a fellow servant.⁶

You are instructed that under the evidence it was the duty of the motorman, ———, to approach the barn with his car under control so that he could make a reasonably quick stop at any time after he left the line on ———, and before he reached the barn, and if said motorman failed to perform this duty, and if plaintiff was injured as a result of the negligence of said motorman alone, and without any fault or negligence on the part of the defendant company, then plaintiff is not entitled to recover, and, in that event, your verdict should be for the defendant. If, however, the motorman, ———, was negligent, and the defendant was also negligent, as alleged by plaintiff, and if plaintiff, without contributory negligence on his part, was injured as the direct and proximate result of the concurrent negligence of said ——— and defendant, then plaintiff is entitled to recover.⁷

§ 3809(4). South Carolina

I charge you that the master is not liable for an injury occurring through the act of a fellow servant; but if the act of a fellow servant merely co-operated or contributed, along with some independent act of negligence on the part of the master, such as a failure of the master to use ordinary care to provide a safe place of work, or a safe way for the servant to use in passing from his work to a toilet provided for his use during the hours of employment, and returning from the toilet to the place of work, then the fact that an injury may have been caused by the act of a fellow servant would not be a defense, if it was also caused by the negligence of the master in failing to furnish a safe place or a safe way for the use of the servant, under the circumstances which I have stated to you. As I have said, the mere fact that an injury may have been

⁶ Donnelly v. Ft. Dodge Portland Cement Corporation, 148 N. W. 932, 163 Iowa, 393.

⁷ Doran v. Waterloo, C. F. & N. Ry. Co., 147 N. W. 1100.

due to the act of a fellow servant would not be a defense, unless it was the sole cause of the injury, or unless you find there was no negligence on the part of the master. The master is not responsible for the act of a fellow servant, but he would be responsible for his own negligence, if he were guilty of negligence, in failing to provide a safe place for work, or safe means and a safe way for the servant while at work, and for such negligence in failing to provide a safe place or safe way for the use of the servant while at work, he would be responsible, if it caused injuries to the servant, notwithstanding that the negligent act of a fellow servant might have contributed to those injuries also as a proximate cause.*

The jury are instructed that, in order to relieve the master from liability, the negligence of the fellow servant must have been the sole cause of the injury, if any, and not have commingled with or combined with the master's negligence as a proximate cause of such injury.⁹

§ 3809(5). Texas

In this connection, and in connection with the instruction contained in paragraph No. — of this charge, you are further instructed that, in order for the defendant to be liable to plaintiff on account of any failure on the part of the said S. to exercise ordinary care for the plaintiff's safety, such failure on S.'s part to exercise such care must have been the cause of the injury that plaintiff received, if he received any. So, even if you should believe from the evidence that the said S. himself, or by one L. as his mouth-piece, directed or caused the said A. and H. to go up on a derrick, and remove some ropes and blocks from the top of said derrick, while plaintiff was at work beneath, winding up a rope on the windlass to said derrick, and that, in so doing, the said S. failed to exercise ordinary care for plaintiff's safety, still, if you should believe from the evidence that the said H. and A., or either of them, failed to use ordinary care for plaintiff's safety in doing said work or removing said ropes and blocks from the top of said derrick, and that this failure on the part of the said H. and A., or on the part of either of them, to exercise such care, caused the injury to plaintiff, then you will find for defendant, unless you find for plaintiff, under the instruction contained in paragraph — of this charge.¹⁰

§ 3809(6). Virginia

The court instructs the jury that, if they shall believe from the evidence that the negligence of the defendant company was the

* Harwell v. Columbia Mills, 112 S. C. 177, 98 S. E. 324.

⁹ Elms v. Southern Power Co., 60 S. E. 1110, 79 S. C. 502.

¹⁰ Sherman Oil & Cotton Co. v. Stewart, 42 S. W. 241, 17 Tex. Civ. App. 59.

proximate cause of the injury complained of in this action, the defendant company is not relieved from liability on account of the fact that the negligence of a fellow servant of the plaintiff also contributed to the injury.¹¹

§ 3810. Modification or abolition of common-law doctrine of fellow servants

§ 3810(1). Oklahoma

You are instructed that one who employs others to labor is in law termed the master, and the one employed is called the servant. When the master is engaged in the operation of a railroad it is its duty to guard its servants against probable injury so far as it can do so by the exercise of ordinary care and caution in the employment of careful, cautious, and competent fellow servants to assist in such master's work; and, if a servant is injured while engaged in performing his duties to such master, by some act of one of his fellow servants who is also employed by such master of which such fellow servant would not have been guilty had he been at the time in the exercise of such a degree of care for the safety of his injured coservant as an ordinarily careful and prudent man would have exercised under like or similar circumstances, the master will be liable to the injured servant in damages proximately flowing from such negligent act of the fellow servant.¹²

You are instructed that the Constitution of the state of _____ contains the following provision: "The common-law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employé of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employé shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employé or employes of a common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty."¹³

You are instructed that in the event you find from the evidence that the plaintiff was injured, as alleged in his petition, while in the employment of the defendant in the mining of coal within the state of _____, by reason of the act or omission of any other employé or employes of the said defendant, and not by his own fault

¹¹ *Darby Coal Mining Co. v. Shoop*, 83 S. E. 412, 116 Va. 848.

¹² *Chicago, R. I. & P. Ry. Co. v. Pruitt*, 170 P. 1143.

¹³ *Henryetta Coal & Mining Co. v. O'Hara*, 150 P. 1114, 50 Okl. 159.

or negligence, then the plaintiff has the same right to recover from the defendant for the injuries suffered by him as though the same were occasioned by the act or omission of the defendant himself.¹⁴

§ 3810(2). **Texas**

The court instructs the jury that, if you find from the evidence that while plaintiff was sitting on the scaffold and was raising the beam into position with a screw jack, one or more of his fellow servants was prizing on the beam with a bar, and if you further find that, while plaintiff was so operating the jack, his said fellow servants suddenly jerked the beam with the bar and that this released the weight on the jack and caused plaintiff to lose his balance and fall, and if you further find that the jerking of the beam with the bar, if it was so jerked, was negligence, and that such negligence was the direct and proximate cause of plaintiff falling, and if you further find that plaintiff sustained in such fall any of the injuries alleged in his petition, then you should return a verdict for plaintiff.¹⁵

You are instructed that under the statute now in force, known as the Employers' Liability Act, it is provided that a corporation operating a railroad in this state shall be liable in damages to any of its employes suffering injury proximately caused by negligence of its agents or employes, and that the fact, if a fact, that the injured employe may have been guilty of contributory negligence shall not bar a recovery, but that in such event the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Under this statute, an employer, such as defendant, is not an insurer of the safety of its employes, but negligence of its employes, if committed within the scope of their employment towards another employe, is chargeable to such employer, and deemed in law its own.¹⁶

§ 3811. **Rule under federal Employers' Liability Act—Liability for injuries to foreman through negligence of men under him**

The jury are instructed that, if the jury shall believe from a preponderance of the evidence that the servants of the defendant in the exercise of ordinary care should have known of the loose roof upon the wrecked car that was being placed upon the track, and that in the exercise of ordinary care they failed to remove the same

¹⁴ *Henryetta Coal & Mining Co. v. O'Hara*, 150 P. 1114, 50 Okl. 159.

¹⁵ *Galveston, H. & S. A. Ry. Co. v. Reinhart* (Civ. App.) 182 S. W. 436. Plaintiff alleged that two Mexican fellow servants were negligent, and

the objection to the instruction was that, in referring to the negligence of fellow servants, it was not limited to the negligence of Mexicans.

¹⁶ *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

or failed to tie it so that it would not slide off the car, or if the jury shall believe that the servants of the defendant moved said car without orders from plaintiff, and shall further believe that such act or acts was negligence, and that such negligence, if any, was the proximate cause of the injury, then it will be your duty to find for the plaintiff; otherwise, you will find for the defendant.¹⁷

9. *Proximate Cause*

§ 3812. Negligence of master as proximate cause of injury

§ 3812(1). *United States*

The jury are instructed that it is contended on behalf of defendants' counsel that, even conceding a faulty condition of the crossing over this highway, it was not the proximate cause of the injury, and therefore not such negligence as would make the defendants liable. The rule is well settled that the plaintiff cannot recover except for what is called the proximate or immediate cause of the injury, and that remote causes do not constitute such negligence as would make the defendants liable. In this case it is a question for you to determine, gentlemen, where the injury occurred, and whether, considering where it occurred, it was the proximate and direct cause of the negligence on the part of the railroad company. The whole unfortunate accident took place within a few seconds, as stated by most of the witnesses. The petition avers that the decedent, after he had perfected the coupling of the cars, had his foot caught on this defective planking, but that he had about recovered himself from stumbling on this defective planking, so far as that part of the accident is concerned, and would have probably righted himself, and been able to throw himself out from the cars, if it had not been for the hole between the ties, into which his foot finally went, and from which he was unable to extricate himself. The contention by the defendants is that this hole, being the last place where he was caught, was the proximate and direct cause of the injury, and that the slipping and falling on the crossing cannot be considered as the negligence which caused the injury. That is a question of fact for you, gentlemen of the jury, to determine under the instructions I have given you as to proximate cause, and under the facts as they have been stated to you; and it will be very important for you to consider closely the facts which bear on this part of the case, because it is the only negligence charged for which the defendants would be liable.¹⁸

¹⁷ *Wight v. Morgan* (Tex. Civ. App.)
220 S. W. 295.

¹⁸ *Herrick v. Quigley* (C. C. A.
Ohio) 101 F. 187, 41 C. C. A. 294.

§ 3812(2). **Arkansas**

The court instructs the jury that, even if you should believe from the evidence that typhoid fever contributed to cause the death of deceased, yet if you further believe from the evidence that deceased received an injury as alleged, and that said injury was caused by the negligence of the defendant's agents and servants as alleged, and that said injury, together with typhoid fever, caused the death of deceased, and that but for said injury deceased would not have died, then your verdict should be for the plaintiff.¹⁹

§ 3812(3). **Illinois**

The court instructs you that in this case the burden is upon the plaintiff to prove by a preponderance or greater weight of the evidence, not only that his alleged injuries now exist or have existed, but that they are the result of the explosion of the molten metal from the furnace coming in contact with water which was on the ground under the furnace; and in determining whether or not the plaintiff has sustained the alleged injuries, and whether such injuries resulted from the explosion in question, and whether or not the explosion was caused by the molten metal coming in contact with the water, you should consider all the evidence in the case and all the facts and circumstances proved on the trial, and if, after such consideration, you determine that such alleged injuries do not and have not existed, or that they did not result from the explosion in question, or that said explosion did not result from the dumping of the molten metal in water which is alleged to have been on the ground under the furnace, then the plaintiff cannot recover in this case.²⁰

§ 3812(4). **Indiana**

You are instructed that in this action the complaint alleges that the defendant carelessly and negligently maintained the grating in question "so that the said grating was not close up flush with the oven, but said grating extended to within ——— or ——— inches of said oven." Before the plaintiff can recover in this action, he must show that his injuries were traceable directly and proximately to the said negligence of the defendant. And if the plaintiff purposely or carelessly did any act which caused him to fall, or accidentally lost his balance and fell, and that the falling was not produced by the existence of the alleged opening between the said grating and oven, then such opening is not the proximate cause of the injury, and the plaintiff cannot recover in this action, and your verdict should be for the defendant.²¹

¹⁹ St. Louis, I. M. & S. Ry. Co. v. Steel, 197 S. W. 288, 129 Ark. 520.

²⁰ Ozech v. International Harvester

Co. of New Jersey, 115 N. E. 178, 277 Ill. 63.

²¹ Kokomo Brass Works v. Doran, 105 N. E. 167, 59 Ind. App. 583.

§ 3812(5). Iowa

The court instructs the jury that, if you believe in this case that the plaintiff was injured, and that the system of signaling adopted by the defendant was negligent and unsafe, and it is further shown by a preponderance of the evidence because and on account of said unsafe system of signaling that the dolly was started as charged and caused the injury to the plaintiff, then you will find that said negligence was the proximate cause of plaintiff's injury. But if the injury to the plaintiff was caused in some other way not concurrent with the system of signaling and contributed to by the same, then the negligence of defendant, if you find it was negligence, would not be the proximate cause of plaintiff's injury, and he cannot recover.²²

§ 3812(6). Michigan

You are instructed that, to make defendant liable, she must have been herself careless, and such carelessness must have been the sole cause of the boy's injury.²³

You are instructed that the fact that the plaintiff was requested to go to the field to keep chickens out of the grass, and that pursuant to such request he did go into the field, and that except for such request plaintiff would not have been injured, will not of themselves justify you in rendering a verdict in plaintiff's favor. In other words, inviting him into the field and asking him to take care of the chickens is not the direct, immediate, proximate cause of the injury. A person might go into a field and drive chickens a month and not run into a mowing machine. The proximate cause of the injury was the knives coming in contact with his leg, and the question is in reference to his right to recover, whether he was careless in getting there, and also whether defendant was careless in not preventing the accident.²⁴

§ 3812(7). Missouri

The court instructs the jury that, if you find the issues for the plaintiff, you cannot, in determining what injuries you will compensate him for, consider such as were inflicted by the log first striking the plaintiff, but only such as were sustained by him by reason of the log being permitted negligently to drop upon him after he had fallen, and then dragged across his body, provided that you find only that such dragging was negligently done.²⁵

²² *Donnelly v. Ft. Dodge Portland Cement Corporation*, 148 N. W. 982, 168 Iowa, 393.

²³ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

²⁴ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

²⁵ *Allen v. Quercus Lumber Co.*, 168 S. W. 794, 182 Mo. App. 280. Plaintiff was employed in connection with a derrick in lifting logs around from place to place in a lumber yard.

The court instructs the jury that, even though you find from the evidence that the engineer carelessly handled the engine and derrick and log on the occasion when plaintiff was injured, plaintiff is still not entitled to recover unless he had proved by the greater weight of the evidence that such carelessness was the sole and only and direct cause of his injuries.²⁶

You are further instructed that, before plaintiff can recover for any injuries inflicted upon him by the log striking him after he was knocked down, the burden is upon him to prove by the greater weight of the evidence that, after the log struck him and knocked him down, the engineer saw, or by the exercise of ordinary care could have seen, that he had been knocked down, and that said engineer then carelessly and negligently permitted said log to fall on him, and, unless plaintiff has so proved both of these facts, he cannot recover for any injuries inflicted upon him by reason of the log striking or falling on him after he was first struck by it and knocked down.²⁷

§ 3812(8). North Carolina

You are instructed that, if you find from the evidence by its greater weight that the defendant was negligent in the respect alleged, you must further find, before answering the first issue, "Yes," that such negligence was the proximate, that is, the real or moving, cause of the injury. In other words you must find from the evidence by its greater weight, not only that this defendant was negligent in the manner alleged, but that the injury would not have occurred otherwise, and if you are not satisfied, then you are instructed to answer the first issue, "No."²⁸

The jury are instructed that, in order to establish actionable negligence, it is necessary for the plaintiff to show to the jury, by the greater weight of evidence, that there has been a failure by the defendant in the exercise of reasonable care to discharge some duty which it owed the plaintiff under the circumstances in which they were placed, "reasonable care" being that care which a prudent man would exercise under similar circumstances, when surrounded by like conditions; and not only this, but he must also show that such failure of duty was the proximate cause of the result, "proximate cause" being that which produces the result in a continuous sequence, and one without which the result would not have happened, and one from which a man of ordinary prudence could foresee that such result would likely happen.³⁰

²⁶ *Allen v. Quercus Lumber Co.*, 168 S. W. 794, 182 Mo. App. 280.

²⁷ *Allen v. Quercus Lumber Co.*, 168 S. W. 794, 182 Mo. App. 280.

²⁸ *Ainsley v. John L. Roper Lumber Co.*, 81 S. E. 4, 165 N. C. 122.

³⁰ *Midgett v. Branning Mfg. Co.*, 64 S. E. 5, 150 N. C. 333.

§ 3812(9). Oklahoma

You are instructed that negligence as the proximate cause of an injury is a cause such that a man of ordinary experience and sagacity could foresee that the result might probably ensue.³¹

You are instructed that in this case the plaintiff claims that he is suffering from pain and paralysis of the lower limbs, which is incurable and permanent, and that such condition is the natural and necessary consequence of an injury which he claims to have sustained on ———, while in the employment of the defendant as an engineer and which he claims to have been caused by the negligence of said defendant on that day; now, gentlemen of the jury, you are instructed that unless you believe from a preponderance of the evidence on said ———, the plaintiff was in the employment of the defendant as engineer, and while so employed was injured by the negligence of the defendant, and that such injury, if any, that he received at said time was the natural and necessary cause of his present condition and present injury, then and in that event you cannot find for the plaintiff for any sum on account of permanent injury.³²

You are instructed that before the plaintiff is entitled to recover herein, he must show by a preponderance of the evidence that he was injured in the way and manner stated in his petition, and that he received such injury while in the employment of the defendant company and as a proximate result of the negligence of the agents and servants of the defendant company in furnishing the plaintiff, as locomotive engineer, a defective engine and locomotive that caused said injury, and that said injury was not the proximate result or contributed to by any negligence of the plaintiff; but in case you find against the plaintiff upon these issues you will then return a verdict in favor of the defendant.³³

You are instructed that the proximate cause of the injury is a cause which directly produces the injury without the intervention of any intermediate independent and efficient cause without which the accident would not have occurred, and a cause is not a proximate cause when the intermediate or independent cause directly produces the accident.³⁴

§ 3812(10). Texas

In this connection you are also charged that by "proximate cause" is meant that which in a natural and continuous sequence unbroken by any new and independent cause produces the event,

³¹ Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141, 61 Okl. 4.

³² Wichita Falls & N. W. Ry. Co. v. Puckett, 157 P. 112, 53 Okl. 463.

³³ Wichita Falls & N. W. Ry. Co. v. Puckett, 157 P. 112, 53 Okl. 463.

³⁴ Henryetta Coal & Mining Co. v. O'Hara, 150 P. 1114, 50 Okl. 159.

and without which the event would not have happened, and from which it could and should have reasonably been anticipated that injury would result therefrom as a natural and probable consequence under the circumstances.³⁵

You are instructed that by "proximate cause" of an injury is not necessarily meant the nearest time or physical sequence, but is meant a cause without which the injury would not have happened, and from which the injury in question, or some like injury, might reasonably have been anticipated as a natural and probable consequence.³⁶

The court instructs the jury that, if you find that the plaintiff did not fall and receive injury while attempting to set the brake on the occasion in question, you will find for the defendant, or if the plaintiff fell and was injured while attempting to set the brake, yet if you do not find that such fall directly and proximately resulted from a defective condition of the ratchet dog, and that defendant failed to use ordinary care to inspect and discover same, you will find for the defendant.³⁷

The jury are instructed that in this case it is entirely immaterial whether the defendant's oil mill track, in its yard at ———, the place where it is alleged plaintiff sustained the injuries complained of, was ballasted or surfaced up between the rails, as the evidence, without conflict, shows that the injuries of which the plaintiff complains were not caused or produced by reason of any defect, or want of proper condition, in the said track. The jury are also instructed that, in determining plaintiff's right to recover herein, they are not to take into consideration any alleged facts or peculiarity about the oil-tank cars which the plaintiff was attempting to couple at the time he received his injury. The law is that that negligence only is actionable which produces, or contributes to producing, the injury complained of, and any other negligence cannot be considered.³⁸

§ 3813. Concurrent negligence of master and third person

You are further instructed that if an accident occurs from two causes, both of which causes are due to the negligence of different persons or corporations, but which two causes together are the efficient cause of the accident or injuries, then all of the persons or corporations whose acts contribute to the accident are liable for an

³⁵ Kirby Lumber Co. v. Bratcher (Civ. App.) 191 S. W. 700.

³⁶ St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

³⁷ St. Louis Southwestern Ry. Co.

of Texas v. Downs (Civ. App.) 153 S. W. 714.

³⁸ Missouri, K. & T. Ry. Co. of Texas v. Kirkland, 32 S. W. 588, 11 Tex. Civ. App. 528.

injury resulting from such accident, and the negligence of one furnishes no excuse for the negligence of the other.³⁹

The jury are instructed that, if you believe from the evidence that the plaintiff was not guilty of contributory negligence, as hereinbefore defined, and that he was injured, as alleged, and that his said injuries were not caused by, and did not result from the risks ordinarily incident to his employment, as hereinbefore defined, and you further find that the defendant telephone company failed to exercise ordinary care, as hereinbefore defined, to furnish the plaintiff with reasonably safe appliances with which he was required to work, if he was so required, or that the defendants, or either of them, failed to exercise ordinary care to discover the exposed condition of the said electric light wire, if you believe it was exposed, and that thereby it became dangerous, and likely to divert a current of electricity, and that said current was diverted from said wire to said rope, and into or through the person of the plaintiff, and that the defendant telephone company did furnish said wet rope to the plaintiff, if it was so furnished, and that said rope was likely to and did transmit said current of electricity into the plaintiff, and that the doing and the failure on the part of the said defendants, or either of them, to do or perform the things herein mentioned, if they did so do and did fail to so do and perform them, constituted negligence, and that such negligence was the direct and proximate cause of the injury to the plaintiff, if any, you should find a verdict for the plaintiff.⁴⁰

You are instructed that if you find and believe from the evidence that the plaintiff was in the employ of the defendant telephone company and that it was part of his duty to go upon the telephone poles and handle and use the rope mentioned in the pleadings in this case, in the manner alleged in taking down said wires, and you further believe that said rope became entangled with an awning in front of a building adjoining to where he was required to work, and that it was a part of his duty to disentangle said rope, and that he went upon said awning in the course of his employment for the purpose of disentangling said rope, and that said rope had been permitted by said defendant telephone company to become wet, and that in such condition it would transmit a current of electricity, and that without any fault or negligence on the part of the plaintiff the said rope did come in contact with one of the exposed wires of the defendant light company, and that by reason thereof a current of electricity was caused to pass through said rope into his

³⁹ *Southwestern Telegraph & Telephone Co. v. Sanders* (Tex. Civ. App.) 138 S. W. 1181.

⁴⁰ *Southwestern Telegraph & Telephone Co. v. Sanders* (Tex. Civ. App.) 138 S. W. 1181.

body, and caused him to fall from said awning, and that he was injured thereby, then you are instructed if you believe from the evidence that both of said defendants were guilty of negligence in the respect as herein submitted to you, and that both of their said negligent acts co-operated or combined to cause the injuries to the plaintiff, and that he was injured as alleged by him, then you are instructed, if you so believe and find, the plaintiff would be entitled to recover against both of said defendants, and you will in that event find a verdict in his favor against both of them. But, on the other hand, if you believe that the plaintiff was injured, but that his injuries were the direct and proximate result of the negligent acts of only one of said defendants, then you are instructed that he would be entitled to recover a judgment against only the said defendant whose negligent acts caused his said injuries, and in that event the other defendant will be entitled to go free.⁴¹

§ 3814. Injuries during extraordinary storm

§ 3814(1). Missouri

The jury are instructed that, while the defendant was not bound to provide against the effects of a storm which it could not reasonably anticipate, yet if they believe, from the evidence, that the bridge over ——— was not reasonably safe on account of its being a pile bridge, or because some of the piling had become rotten and decayed, or because there was not sufficient earth or dirt around said piling, and that the fall of the bridge was caused by its defective condition in any of the particulars aforesaid, and not by reason of the extraordinary force of the storm, then the fact that the bridge fell during said storm will not prevent a recovery in this case.⁴²

§ 3814(2). North Carolina

Defendant contends, then, that you should find from the evidence that this was what is known as an unusual and extraordinary wind, and that the injury caused the plaintiff, if you find that it was caused by the removal of the car roof, was due to the unusual and extraordinary velocity of the wind, over which the defendant had no control and for which it could not, in the exercise of reasonable care, have provided. If you find from the evidence that on the occasion referred to the wind was unusual and extraordinary, and that the top of the car would not have been displaced and the plaintiff would not have been injured except for such unusual and extraordinary character of the wind—that is to say, if you find that the unusual and extraordinary character of the wind was the proxi-

⁴¹ *Southwestern Telegraph & Telephone Co. v. Sanders* (Tex. Civ. App.) 138 S. W. 1181.

⁴² *Copeland v. Wabash R. Co.*, 75 S. W. 106, 175 Mo. 650.

mate cause of the plaintiff's injury—you will answer the first issue; "No." Now what is meant by a wind that is unusual and extraordinary? In the meaning of this instruction, an unusual and extraordinary wind is such as could not reasonably have been anticipated and expected by the defendant in the climate at the season of the year and in the section of the country when and where the injury is alleged to have occurred. Now, applying this definition to the evidence, how do you find? Was this wind an extraordinary wind? Was it a wind which could not reasonably have been anticipated and expected by the defendant at that season of the year, at that place, in that climate, at the time the injury is alleged to have occurred; or was it such wind that the defendant might reasonably have anticipated and expected? These are questions, gentlemen, for you to determine from the evidence. The defendant contends that it was unusual and extraordinary. Plaintiff contends that it was not.⁴³

§ 3815. Negligence of plaintiff or of servant injured as sole proximate cause of injury

§ 3815(1). Kentucky

The court instructs the jury that if they believe from the evidence that the plaintiff consented to the employment of said minor by said defendant, and if the injury complained of was caused by said minor's own negligence, then there can be no recovery on the part of plaintiff, and the jury must find for the defendant.⁴⁴

§ 3815(2). Texas

You are instructed that, if you believe from the evidence that negligence on the part of plaintiff as just submitted to you, if any, was the sole proximate cause of alleged injuries to him, if any, or if you believe that, as he was approaching with the train in his charge, he saw and appreciated the fact that the extra freight train was on the main line in sufficient time for him, by the use of the means at hand, to avoid a collision or injury, and that he then failed to make all reasonable use of the means at hand to avoid a collision and injury, and thereby brought about his alleged injuries, if any, then return your verdict for the defendant. Under the second alternative just submitted, failure of plaintiff to use all reasonable means at hand to avoid collision or injury after he actually saw and appreciated the fact that the extra was on the main track, if he did so fail, would be the sole proximate cause of his injury, if any, and

⁴³ *Ridge v. Norfolk Southern R. Co.*, 83 S. E. 762, 167 N. C. 510, L. R. A. 1917E, 215.

⁴⁴ *Union News Co. v. Morrow*, 46 S. W. 6, 20 Ky. Law Rep. 302.

negligence, if any, of defendant's employes operating the extra train would in that event be a remote cause, and not actionable.⁴⁵

10. *Matters Pertaining to Remedy*

§ 3816. Right to sue under federal Employers' Liability Act

§ 3816(1). *Kentucky*

Gentlemen of the jury, the court instructs you that it is admitted by the pleadings, and must be taken as true, that — met his death at the time and place stated as the result of a collision between two trains on the defendant's railroad, and that the said — was at the time in the employ of the defendant as engineer on one of said trains. The court further instructs you as a matter of law that the defendant company was at that time engaged in commerce between several of the states, and that the said — was at the time of his death employed in commerce between several of the states.⁴⁶

§ 3816(2). *Maryland*

The jury is instructed that, in order to recover a verdict against the defendant under the pleadings in this case, the plaintiff must prove by the greater weight of the evidence that the defendant negligently caused or directed him to use in the paint gun mentioned in the evidence material which was poisonous or deleterious to the health of the operator of said gun when expelled therefrom in the shape of spray, without providing the plaintiff with a respirator to be used by him in connection with the use of said gun, and that in so using said gun the plaintiff was employed by the defendant in doing an act or service which had some real or substantial relation to interstate commerce, which is the movement of commodities or articles of traffic from one state into another.⁴⁷

§ 3816(3). *Oklahoma*

You are instructed that if you find by a preponderance of the evidence in this case that the deceased on — was engaged as boiler washer in the town of — in washing boilers used to haul commerce from the state of — to another state, or from another state to the state of —, and that he registered off about —, and that he was requested to return to wash the boiler of the pile driver, which boiler was used in hauling said pile driver, or commerce from the state of — to another state, or from another state to the state of —, and that in obedience to said duty he returned to the defendants' yards in — preparatory to en-

⁴⁵ St. Louis B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

⁴⁶ Louisville & N. R. Co. v. Hollo-

way's Adm'r, 173 S. W. 343, 163 Ky. 125.

⁴⁷ Baltimore & O. R. Co. v. Branson, 98 A. 225, 129 Md. 678.

tering upon the duty of washing said boiler, and that while there, waiting to further engage in said duties as boiler washer, he was injured in that event he would be engaged in interstate commerce.⁴⁸

You are instructed that the first question to be determined by you, after entering upon your deliberations, is whether the plaintiff, at the time he sustained the injuries alleged, was employed by the defendant in interstate commerce. In order to so find, it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that he was at the time of the alleged injuries actually engaged in assisting in the movement or transportation of a car or cars of freight destined for movement from a point in one state to a point in another state. It is immaterial whether there was any freight in any of the other cars of the train that was to be transported between interstate points; but plaintiff must show by a fair preponderance of the evidence that the car or cars that he was engaged in switching at the time of the injury, or the freight in such cars, was destined for movement between interstate points. If you so find, then the act of Congress of ——— will apply to this case. If, on the other hand, plaintiff has not proved that he was employed in interstate commerce at the time of the injury, then the act of Congress of ——— would not apply in this case, and in such event the plaintiff cannot recover.⁴⁹

§ 3816(4). Washington

You are instructed that, if you find from the evidence that among the cars in the string that was being moved by the switching crew or trainmen of the defendant, at the time ——— was injured, if he was injured, there was a box car loaded with dressed or finished lumber destined for ———, or some other point without the state of ———, which car had been actually started for its destination, or the lumber in which had theretofore been delivered to the defendant for transportation to ———, or to some other point without the state of ———, then I charge you that the plaintiff was employed in interstate commerce at the time of receiving such injury. And, if his injury resulted in whole or in part from the negligence of any of the employes of the defendant, the defendant is liable in damages, and your verdict should be for the plaintiff.⁵⁰

§ 3817. Confining plaintiff to negligence alleged in complaint

You are instructed that the only negligence for which the defendant would be liable in this case is the negligence set forth in the complaint. So that in this case, if you should find that the

⁴⁸ Lusk v. Bandy, 184 P. 144, 76 Okl. 108.

⁴⁹ St. Louis & S. F. Ry. Co. v. Fraser, 183 P. 478, 75 Okl. 265.

⁵⁰ Bolch v. Chicago, M. & St. P. Ry. Co., 155 P. 422, 90 Wash. 47.

defendant is guilty of negligence, which is not alleged in the complaint, it is not liable for such negligence so not alleged, even if you should find it was the proximate cause of the injury, and the reason is that the defendant received its notice of the particular charges of negligence from the pleadings, and as those are the only charges set up, those are the only charges that it is called upon to refute; and the particular charge, as I have before indicated, is a charge of failing to provide the plaintiff with regulation mask and gloves.⁵¹

§ 3818. Presumptions and burden of proof

§ 3818(1). Alabama

The court charges the jury that the burden is on the plaintiff to reasonably satisfy the jury as to the proof of every material allegation in either the first or second count of his complaint, and if he has not discharged this burden to the reasonable satisfaction of every member of the jury, the jury cannot find the issue in favor of the plaintiff.⁵²

§ 3818(2). Delaware

You are instructed that this case is founded upon the negligence of the defendant. In order to recover the plaintiff must show to your satisfaction that there was negligence on the part of the defendant which was the proximate cause of the death of the deceased. Such negligence is never presumed. It must be proved by the plaintiff.⁵³

§ 3818(3). Georgia

The jury are instructed that the burden of proof in this case is upon the plaintiff. It is incumbent upon him to establish by proof the material allegations of his petition that are not admitted by the defendant. After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the defendant company was to blame; or, if he will show, on the other hand, that the defendant company was to blame, the law presumes, until the contrary appears, that the plaintiff was not to blame. So that to make a *prima facie* case and change the burden of proof the plaintiff need not go further than to show by evidence one or the other of these two propositions—either that the plaintiff was not to blame, or that the defendant was to blame. The defendant company, taking at this stage the burden of proof, can defend successfully by disproving either

⁵¹ *Helser v. Shasta Water Co.*, 143 P. 917, 71 Or. 566.

⁵² *Jones v. Union Foundry Co.*, 55 So. 153, 171 Ala. 225.

⁵³ *Coughlan v. Philadelphia, B. & W. R. Co.*, 67 A. 148, 6 Pennewill, 242.

proposition. The disproof of both is not necessary; but until one or the other shall be overcome, the defense is not complete.⁵⁴

§ 3818(4). *Iowa*

You are instructed that the burden is upon the plaintiff in this case to establish by a preponderance of the evidence the claim that set screws in question and the revolving shaft were not guarded as required by law, and it is for you to determine from all the evidence before you whether or not the plaintiff has sustained this proposition. If the plaintiff has failed to do this, he cannot recover, and you should find for the defendants.⁵⁵

§ 3818(5). *Michigan*

The court instructs the jury that the burden of proving the issue in this case is upon the plaintiff; that is, he must sustain and support every charge made by him by the fair preponderance of the evidence in the case. By the preponderance of evidence is meant, as I have stated, not that the greater number of witnesses must be produced, but only that the facts shall appear by the greater weight of the testimony submitted to you, as may seem to you most worthy of credit, under all the conditions and circumstances of the case. By the preponderance of evidence is really meant that it is more satisfactory and is more convincing to your minds on a given proposition than the opposite position taken.⁵⁶

You are instructed that the fact that the plaintiff had an accident whereby he was injured is not evidence that the employment at which he was injured was hazardous. I instruct you that accidents may happen on all kinds of machinery, and in nearly every vocation of life, and that the fact that such an accident has happened to the plaintiff is not conclusive evidence that the carrying away of the boards from the machine upon which the plaintiff was injured, in the manner that has been described to you, is a hazardous employment. The simple fact that an accident has happened to the plaintiff, who is a young man under the age of ——— years, does not make the defendant liable. And, if the young man received his injury as a result of an unavoidable accident plaintiff cannot recover, and the defendant is not liable.⁵⁷

§ 3818(6). *Missouri*

You are instructed that the fact that the engineer, on occasions previous to the one on which plaintiff was injured, may have operated the engine and derrick unskillfully and carelessly; does not prove or even tend to prove that he handled said derrick and en-

⁵⁴ *Central of Georgia Ry. Co. v. McGuire*, 73 S. E. 702, 10 Ga. App. 483.

⁵⁵ *Stephenson v. Sheffield Brick & Tile Co.*, 130 N. W. 586, 151 Iowa, 371.

⁵⁶ *Radic v. Thomas Jackson & Co.*, 146 N. W. 136, 178 Mich. 618.

⁵⁷ *Radic v. Thomas Jackson & Co.*, 146 N. W. 136, 178 Mich. 618.

gine unskillfully and carelessly on the occasion when plaintiff was injured.*

The jury are instructed that the burden of proof is on the plaintiff to show that a piece of the hammer used by him when hurt chipped off and struck him in the eye, and if they should find from the evidence in the case that some other substance, and not a piece of the hammer, struck him in the eye and caused the injury complained of, then they must find a verdict for defendant.⁵⁸

§ 3818(7). *Oregon*

You are instructed that the plaintiff alleges that he was injured through the negligence of the defendant, by and through its agent, ———, at that time, in the manner of handling the machinery. But it is for the plaintiff to prove that by a preponderance of the evidence, as I have instructed you, before he can recover any damages in the case.⁵⁹

The court instructs the jury that in a case of this kind negligence is not presumed from the mere fact that an accident happened, or that a party may have been injured. On the contrary, the law presumes that both plaintiff and defendant exercised due care, and the party who attempts to establish negligence on the part of either must establish it by a preponderance of the evidence.⁶⁰

§ 3818(8). *Tennessee*

The jury are instructed that, in an action for injuries claimed to have been sustained on account of defective appliances, it is presumed that the master has discharged his duty to the employé, ———, by providing suitable appliances, and by keeping them in proper condition; and the burden is on the plaintiff to show the contrary.⁶¹

The jury are instructed that the law furnishes a further presumption that, if the car was in good repair at a date prior to the accident, it continued to remain in a like good condition until the accident occurred. The burden is on the plaintiff to show that the contrary is true.⁶²

§ 3818(9). *Texas*

You are instructed that the burden of proof is upon the plaintiff to prove this issue by a preponderance of the evidence, and if he fails to discharge such burden as to all, or any, of the elements

* *Allen v. Quercus Lumber Co.*, 168 S. W. 794, 182 Mo. App. 280.

⁵⁸ *Duerst v. St. Louis Stamping Co.*, 63 S. W. 827, 163 Mo. 607.

⁵⁹ *Hudson v. Brown Lumber Co.*, 154 P. 533, 80 Or. 506.

⁶⁰ *Heiser v. Shasta Water Co.*, 143 P. 917, 71 Or. 566.

⁶¹ *East Tennessee & W. N. C. R. Co. v. Lindamood*, 78 S. W. 99, 111 Tenn. 457.

⁶² *East Tennessee & W. N. C. R. Co. v. Lindamood*, 78 S. W. 99, 111 Tenn. 457.

charged to you in the next preceding paragraph, your verdict will be for the defendant; or if you find that he was warned as to the hazard and the extent thereof, with reference to the disease as incident to the employment, if it was incident thereto, or that the defendant was not negligent; or if you find that the injury, if any, did not result from such negligence, if any occurred—in either event you will find for defendant on the issue charged.⁶³

§ 3818(10). Washington

I instruct you that if the scaffolding was built by defendants for the use of plaintiff in doing the work he was engaged to do, and that plaintiff was rightfully thereon, and that it fell while being used by him in a proper manner for the purpose for which it was built, the presumption is that the scaffolding was either defective in material or construction in the first instance, or had become so since it was put to use; and the defendants would be liable to plaintiff for the injuries, if any, sustained by him from the falling of said scaffold.⁶⁴

§ 3818(11). West Virginia

The jury are instructed that, if they believe from the evidence that the ground of the plaintiff's action is negligence, it rests upon the plaintiff to trace the fault of the injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, from the circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to the plaintiff, he has, by proving the circumstances, disproved his right to recover, and, on the plaintiff's evidence alone, the jury should find for the defendant.⁶⁵

§ 3819. Same—With respect to right to sue under federal Employers' Liability Act

The court instructs the jury that the burden is on the plaintiff to establish by a preponderance of the evidence that he was injured while engaged in interstate commerce in the employment of the defendant, and also to establish by a preponderance of the evidence that such injury was caused by the negligence of the defendant.⁶⁶

§ 3820. Burden of proof as to knowledge by master of defects in appliances

You are instructed that the law presumes that the master did his duty and did not know of any defects, if any existed, in the guide

⁶³ *Missouri Valley Bridge & Iron Co. v. Ballard*, 116 S. W. 93, 53 Tex. Civ. App. 110.

⁶⁴ *Cleary v. General Contracting Co.*, 101 P. 888, 53 Wash. 254.

⁶⁵ *Glebell v. Collins Co.*, 46 S. E. 569, 54 W. Va. 518.

⁶⁶ *Baltimore & O. R. Co. v. Branson*, 98 A. 225, 128 Md. 678.

rail around the platform. It is incumbent upon the plaintiff to show by a preponderance of the evidence that the death of ——— was caused solely or was contributed to by reason of a defect in the guide rail and that this defect in such guide rail was known to the defendant, or that such defect could have been known to the defendant by the exercise of ordinary care and that such defect was not known to ———.⁶⁷

§ 3821. Burden of proof as to assumption of risk

§ 3821(1). California

You are instructed that, if you believe from the evidence that plaintiff sustained injury from a fall from the walking beam at this well, by reason of the collapse of the roof over the same, knocking him off, or causing him to fall while the plaintiff was in the discharge of his duties as a well puller, and that such duties had nothing to do with the construction or repair of said roof, then the burden of proof is on the defendant to show that the plaintiff knew or ought to have known of such defect in the roof, if you find that the roof was defective, and the danger because of such defect.⁶⁸

§ 3821(2). North Carolina

The court instructs the jury that the burden is upon the defendant to satisfy you, and by the greater weight of the evidence, that plaintiff's intestate assumed the ordinary risk and hazards incident to his occupation and employment, and which are known to him and are plainly observable, and that the occurrence which threw him from the train was a risk or hazard which he assumed, ordinary and incident to his employment in some degree. If you so find, you will answer this issue, "Yes"; if you do not so find, you should answer this issue, "No."⁶⁹

§ 3821(3). South Dakota

You are instructed that the defendant in his answer seeks to avoid liability for the claim of the plaintiff herein of damages occasioned by the loss of his right hand while employed by the defendant in operating a certain sausage machine described in the proceedings in this action upon the ground that the said plaintiff, by accepting employment in the use of said machine, assumed the risk of all ordinary dangers incident to his said employment. You are hereby instructed that the burden of proof of maintaining said defense is upon the defendant, and that in order to maintain said defense and justify a verdict in his favor, based thereon,

⁶⁷ *Railways Ice Co. v. Howell*, 174 S. W. 241, 117 Ark. 198.

⁶⁸ *Ingalls v. Monte Cristo Oil &*

Development Co., 139 P. 97, 23 Cal. App. 652.

⁶⁹ *Weldon v. Seaboard Air Line Ry.*, 98 S. E. 375, 177 N. C. 179.

he must convince you, by a preponderance of the evidence, that the plaintiff, at the time of his employment and at the time of the accident, not only knew the condition of said machinery, whereby the same was rendered dangerous, if it appears that it was dangerous, but also that he knew and understood and appreciated the danger, or else that the danger was so obvious that his appreciation of it is a necessary inference.⁷⁰

§ 3822. Burden of proof as to contributory negligence

§ 3822(1). United States

Bear in mind, now, the situation: The plaintiff seeks to recover of the defendant because of its negligence. The burden of proof, therefore, rests upon him to establish the negligence of the company. The defendant, as one of its defenses, says that the plaintiff himself was guilty of negligence. The burden of proof, therefore, rests upon the company to show, by a fair preponderance of the credible evidence that the plaintiff was guilty of negligence; and unless it has done so, and unless you so find, of course, you must find that the plaintiff himself was not negligent in the way in which he did that work.⁷¹

§ 3822(2). Arkansas

The court instructs the jury that the defendants contend that the deceased, ———, was guilty of contributory negligence which contributed to the injury and death of the said deceased. The law presumes that the deceased was in the exercise of ordinary care and caution for his own safety at the time of his alleged injury, and the burden of proving that he was guilty of contributory negligence is upon the defendants, unless it sufficiently appears from the evidence of the plaintiff. By contributory negligence is meant such a want of care on the part of the plaintiff's intestate for his own safety as an ordinarily prudent and careful person would have exercised under the circumstances existing at the time, and which caused or contributed to the injury sued for in this action.⁷²

You are instructed that contributory negligence cannot be presumed, but must be proved, and the burden of proving it is on the defendant.⁷³

§ 3822(3). Colorado

You are further instructed that the question of contributory negligence of the plaintiff is a matter of defense, and the burden of proof is on the defendant to establish such negligence by a preponder-

⁷⁰ *Iverson v. Look*, 143 N. W. 332, 32 S. D. 321.

⁷¹ *Illinois Cent. R. Co. v. Nelson* (C. C. A. Iowa) 203 F. 956, 122 C. C. A. 258.

⁷² *Lusk v. Osborne*, 191 S. W. 944, 127 Ark. 170.

⁷³ *Aluminum Co. of North America v. Ramsey*, 117 S. W. 568, 89 Ark. 522.

ance of the evidence. If upon this question of contributory negligence you should find that the evidence is equally balanced, then upon such question it would be your duty to find in favor of the plaintiff.⁷⁴

§ 3822(4). Iowa

The court instructs the jury that the plaintiff must also prove by the weight or preponderance of the evidence that he was not himself at fault or negligent as hereinafter explained.⁷⁵

The court instructs the jury that the plaintiff must show that the negligence of the defendant or its employes caused the injury complained of, and that the deceased in no way directly contributed to the injury.⁷⁶

§ 3822(5). Missouri

The court instructs the jury that the defendant in this case sets up as a defense to this action that plaintiff himself was guilty of contributory negligence. The court instructs you that the burden is on the defendant to prove to your satisfaction by the greater weight or preponderance of the evidence that the plaintiff was guilty of such contributory negligence, and unless the defendant proves to your satisfaction by the greater weight or preponderance of the evidence that the plaintiff was guilty of such negligence, then you cannot find for the defendant on the ground that the plaintiff was guilty of negligence.⁷⁷

The jury are instructed in this case: The defendant pleads contributory negligence by deceased. Upon that issue the burden of proof is on the defendant, and it devolves upon the defendant to prove such contributory negligence by a preponderance of the evidence to the satisfaction of the jury, before you are warranted in finding for defendant on that issue, unless the evidence offered by plaintiff shows that he was guilty of contributory negligence. And in this connection you are further instructed that the law presumes that the said deceased was in the exercise of ordinary care, in the absence of evidence to the contrary.⁷⁸

§ 3822(6). Utah

The court instructs the jury that it is a presumption of law that every man exercises due care for his own safety when in a place of danger, and the presumption is that the deceased did so at the time and place when and where it is claimed he met his death.⁷⁹

⁷⁴ Rapson Coal Mining Co. v. Michell, 164 P. 311, 62 Colo. 330.

⁷⁵ Bird v. Hart-Parr Co., 146 N. W. 74, 165 Iowa, 542.

⁷⁶ Locke v. Sioux City & P. R. Co., 46 Iowa, 109.

⁷⁷ Wagner v. Gilsonite Const. Co., 220 S. W. 890.

⁷⁸ Hegberg v. St. Louis & S. F. R. Co., 147 S. W. 192, 164 Mo. App. 514.

⁷⁹ Davis v. Denver & R. G. R. Co., 142 P. 705, 45 Utah, 1.

§ 3822(7). *Vermont*

The jury are instructed that the burden is on the defendant to show that plaintiff's intestate was negligent in not depositing torpedoes and fuses in the rear of his train.⁸⁰

§ 3822(8). *Virginia*

The court instructs the jury that the law presumes that ——— exercised due and proper care at the time he was injured, and the burden of proving his contributory negligence is upon the defendant, unless such contributory negligence appears from the plaintiff's evidence; and, if the jury believe from the evidence that the bridge was dangerous and unsafe as stated in instruction ——— and that the said ——— knew this fact, the defense of contributory negligence cannot rest alone upon such knowledge, but such knowledge, if it existed, is rightly to be considered by the jury along with all the evidence in the case in determining whether the said ——— used due and proper care required in the situation in which he was placed when the injury occurred.⁸¹

§ 3823. *Matters considered in determining issues*§ 3823(1). *Georgia*

The jury are instructed that as to whether or not the defendants were negligent in this case, or whether or not the negligence of the defendants was the cause of the death of the plaintiff's husband, are questions solely for you to determine from the evidence in the case, as well as the question of negligence or want of ordinary care and diligence on the part of the deceased. In determining these questions you are to take into consideration all the facts and circumstances in the case—the place where the occurrence took place, its publicity, the amount of travel across the railroads at that place, the amount of care and caution which these required of the defendants, that they be on the lookout and to have their locomotives under control, the diligence or want of diligence shown to have been exercised in respect to these matters at this time and place.⁸²

§ 3823(2). *Michigan*

You are instructed that the defendant in this case is only chargeable with the use of ordinary care; that is, she should use the care and caution that an ordinarily careful and prudent person would use or exercise in the same place and under the same or similar circumstances. You should consider all of the circumstances attending her movements and her conduct that morning.

⁸⁰ *White Adm'x v. Central Vermont Ry. Co.*, 89 A. 618, 87 Vt. 330.

⁸¹ *Chesapeake & O. Ry. Co. v. Rowsey's Adm'r*, 62 S. E. 363, 108 Va. 632.

⁸² *Louisville & N. R. Co. v. Barrett*, 85 S. E. 923, 143 Ga. 742.

Have in mind the field, the tree, her proximity to it and the boy, and where he was, and what he was doing as she saw him, and all the circumstances that will enable you to determine whether at the time of the accident, or immediately preceding it, she was guilty of carelessness, of not observing that due care which an ordinarily careful and prudent person would in the same place, amid the same surroundings, and under the same circumstances, observe.⁸³

§ 3823(3). North Carolina

You are instructed that, if you find from the evidence that the defendant used the car for the purpose of carrying his employes from the mine to the surface, and that the intestate boarded the car for that purpose, and the car was derailed while in transit, before it reached the surface, and the intestate thereby thrown down the shaft and killed, you may consider such derailment as a circumstance in connection with other evidence in finding whether the defendant was negligent in the respects complained of; that is, you may consider the fact of derailment, if you find from the evidence that the car was derailed, as a circumstance tending to show negligence. Plaintiff contends that there is other evidence which should be considered by the jury in connection with this, and that upon all the evidence the jury should find that there was negligence on the part of the defendant; that the car referred to was a self-dumping car; that the bail was connected with the car near the rear part; that there was no chain or other appliance used in connection with the car for the purpose of securing it upon the rails. The defendant contends that the car was such as was approved and in general use among the mines at that time for the purpose for which it was installed; that it was not intended for use by the employes in the mine, and that it was safe for the purpose for which it was constructed and operated. Now you are to consider the evidence relating to these contentions of the parties, and, after finding the facts from the evidence and applying the principle which has been stated, say whether the plaintiff's intestate was killed by the negligence of the defendant, and whether such negligence was the proximate cause of his death.⁸⁴

§ 3823(4). North Dakota

The court instructs the jury that, in determining the question of negligence, both on the part of the plaintiff and the defendant, you should consider all the circumstances under which the defendant caused the acts to be performed alleged in the complaint, and

⁸³ *White v. Cowing*, 171 N. W. 450, 205 Mich. 318.

⁸⁴ *Hardister v. Richardson*, 85 S. E. 304, 169 N. C. 186.

under which he failed to act, if you find that he did fail in such respect. You have a right to take into consideration the conditions surrounding the injury, the situation of the parties, the character and location of the machinery and appliances and the building under construction, and their location with respect to each other, the fact that the employment of the plaintiff was or was not a dangerous one, the fact that the plaintiff was or was not aware of the nature of such employment, the fact of whether or not it was necessary that a code of signals be promulgated and enforced in order to insure the reasonably safe carrying out of the operations then in hand—in fact, all of the facts and circumstances and conditions existing at the time of the alleged accident. You will take into consideration all of the evidence bearing upon the question of negligence, and, in the light of it all, determine whether the defendant was, in fact, negligent as charged, and whether the plaintiff was, in fact, negligent in such manner as to contribute to the injury.⁸⁵

§ 3823(5). Texas

The jury are instructed that, in determining as to whether or not said defendants, or either of them, was guilty of negligence in reference to the condition of said electric light wire, or in failing to exercise ordinary care to discover the exposed and dangerous condition of the same, if you believe from the evidence that said wire was exposed and dangerous, or in doing or omitting to do any of the things alleged in plaintiff's petition, and herein submitted to you, to have caused said injuries to the plaintiff, if any, or whether or not the plaintiff was himself guilty of negligence in being upon said awning or in using said wet rope, if it was wet, and if he did so use it at the time, place, and manner in which he did use it, or in his conduct while upon said awning, you should consider all the facts and circumstances in evidence which tend to throw light upon these questions.⁸⁶

§ 3823(6). Virginia

The court instructs the jury that, in determining the question of negligence in this case, they should take into consideration the situation and conduct of both parties at the time of the alleged injury as disclosed by the evidence; and if they believe from the evidence that the injury complained of was caused by the negligence of the defendant, and without any greater want of ordinary care and caution on the part of the plaintiff than was reasonably to be expected from one of his age, experience, and mental capacity,

⁸⁵ *Wylde v. Patterson*, 153 N. W. 630, 31 N. D. 282.

⁸⁶ *Southwestern Telegraph & Telephone Co. v. Sanders* (Civ. App.) 138 S. W. 1181.

under all the circumstances, then the plaintiff is entitled to recover.⁸⁸

§ 3824. Matters considered on question of contributory negligence

§ 3824(1). United States

Now, the defendant has shown its book of rules, and that book of rules puts certain duties upon the flagman and certain duties upon the conductor. You will take those rules and consider them, and find what bearing they have upon this negligence or contributory negligence. You will take into consideration such evidence as has been offered by the defendant, and consider it in the light of such evidence as has been offered by the plaintiff, as to the length of time the train remained there, as to the evidence of the conductor and the flagman being in the caboose together, as to how they left the caboose, what the conductor went about, what the flagman went about, what knowledge the conductor had of the conduct of the flagman; take into consideration whether or not the flagman, with the knowledge and consent of the plaintiff, remained there, instead of performing his duty; that is, how far did the conductor's conduct, so far as has been offered in evidence, contribute to the flagman's remaining there. You will take all the evidence surrounding—there is not a great deal of it, but you will take all the evidence surrounding—the time of the accident, from the time the train reached the running track, the time consumed by the engine coming around on track ——— and passing over the switches and coupling up, all the conductor and the flagman did up until the time the conductor went in between the cars, the locomotive and the caboose, to put on the air hose; you must consider all that testimony and from it determine whether or not this plaintiff contributed to the injury which came to him; and determine in what proportion it contributed, whether in part or in whole. If in part, then what part. And if altogether, then there could be no verdict for the plaintiff, because the amount to be deducted if his contributory negligence was the sole cause of the accident, would wipe out the damages.⁸⁹

§ 3824(2). Iowa

The court instructs the jury that, in determining whether plaintiff was guilty of contributory negligence, it is proper for you to take into consideration all the facts and circumstances disclosed by the evidence in reference to the scale and the scale pit and its surroundings.⁹⁰

⁸⁸ United States Leather Co. v. Showalter, 74 S. E. 400, 113 Va. 479.

⁸⁹ Pennsylvania R. Co. v. Gough-

nour (C. C. A. Pa.) 208 F. 961, 126 C. C. A. 39.

⁹⁰ Bird v. Hart-Parr Co., 146 N. W. 74, 165 Iowa, 542.

§ 3824(3). Oklahoma

You are instructed that, in determining whether or not plaintiff's decedent was guilty of contributory negligence in causing his injury, you should take into consideration all the facts and circumstances surrounding him at the time he was injured, as well as his own conduct at and just prior to the accident, his age, his intelligence and understanding, the length of time he had been working in and about the defendant's yards at ———, his previous experience in the railroad business, and, from all the circumstances and facts surrounding the deceased at the time of his injury which have been introduced in evidence before you, say in your judgment whether or not he was guilty of contributory negligence, and, if, in your opinion, he was not, then the plaintiff herein is entitled to recover; if, on the other hand, you believe that his own conduct and his own acts in some manner and in some degree contributed to his injury, then plaintiff would not be entitled to recover, and your verdict should be for the defendant.⁹¹

§ 3825. Sufficiency of evidence**§ 3825(1). California**

You are instructed that all that is required of the defendant is that it produce enough evidence to offset the effect of plaintiff's evidence, and if at the end of the case the plaintiff has not shown by a preponderance of evidence that the defendant was guilty of carelessness or negligence directly causing the accident or injury complained of, or if the evidence is equally balanced, then I instruct you that your verdict in this case must be in favor of the defendant.⁹²

§ 3825(2). Michigan

You are instructed that the burden of proving both of these propositions—that the plaintiff was free from contributory negligence and that defendant was guilty of negligence which was the sole and only cause of the injury complained of—rests upon the plaintiff. It does not have to be made out beyond a reasonable doubt, as is necessary in criminal cases to sustain a conviction. It is only necessary that it be made out to the satisfaction of the jury by a preponderance of the evidence or the greater weight of the evidence. That is, after considering all that the jury believes the evidence sustains, or considering all the jury considers true in the case, the greater probabilities must be in favor of the plaintiff, or the plaintiff cannot recover.⁹³

⁹¹ *St. Louis & S. F. R. Co. v. Long*, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915O, 432.

⁹² *Williams v. Southern Pac. Co.*, 160 P. 660, 173 Cal. 525.

⁹³ *White v. Cowling*, 171 N. W. 450, 205 Mich. 318.

§ 3826. Sufficiency of evidence of want of contributory negligence

In considering this case on the question pertaining to due care and want of negligence on the part of the deceased at the time of the injury complained of, you are instructed that positive evidence that the said deceased did not by his own negligence contribute to the injury is not required, where such evidence cannot be obtained, as, in this case, and it is proper for you to consider the instincts of men which naturally lead them to avoid danger, as evidence of due care on the part of the said deceased.⁹⁴

§ 3827. Sufficiency of evidence of cause of accident

The jury are instructed that, if you are not able to determine whether the accident was caused by a chain being too long, and wrapping and slipping off itself, or whether it was caused by the rubbing of the eyebolt or nut on the deadwood, and its sudden release therefrom, then I charge you that the plaintiff cannot recover on either of the two counts of his declaration.⁹⁵

§ 3828. Form of verdict

The jury are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence all the facts necessary to entitle him to recover. If you find for the plaintiff against both of the defendants, the form of your verdict may be as follows: "We, the jury, find for the plaintiff against both of the defendants and assess his damages at \$—— (naming the amount)." If you find for the plaintiff, but against only one of the defendants, the form of your verdict may be as follows: "We, the jury, find for the plaintiff against the defendant —— (naming it) and assess his damages at \$—— (naming the amount), and we also find for the other defendant —— (naming it)." If you find for both of the defendants, you will say, "We, the jury, find for the defendants."⁹⁶

You are instructed that, if you find for the plaintiff, the form of your verdict may be, "We, the jury, find for the plaintiff, and assess his damages at —— dollars," filling in the blank with the amount you assess. If you should find for the defendant, you will simply so state. In any event, let your verdict be signed by your foreman.⁹⁶

⁹⁴ *Stephenson v. Sheffield Brick & Tile Co.*, 130 N. W. 586, 151 Iowa, 371. In this case there was no eyewitness of the accident, and it could not be said as a matter of positive law that the position of deceased was such as to constitute contributory negligence.

⁹⁵ *East Tennessee & W. N. C. R.*

Co. v. Lindamood, 78 S. W. 99, 111 Tenn. 457.

^{*} *Southwestern Telegraph & Telephone Co. v. Sanders* (Civ. App.) 133 S. W. 1181.

⁹⁶ *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. 241, 17 Tex. Civ. App. 59.

D. LIABILITY OF MASTER FOR INJURIES TO THIRD PERSONS

§ 3829. Relation of master and servant—Liability of one hiring vehicle and driver for negligence of driver

§ 3829(1). Connecticut

The jury are instructed that, if you find that this driver was in the general employment of the A.'s and at the same time in the special employment of S. and that both had authority over him and control over him at the time of the accident, he had in fact two masters, and where a servant is thus in the employ of two masters, either or both of them may be held for his negligent acts. If you find from a careful consideration of all the evidence that the sole and exclusive control of this driver and team was with the A.'s at the time this accident occurred, then the A.'s, some or all, are responsible for the acts of the driver. If you find the direction and control were in part with the A.'s and in part with S. then both are liable, and if the exclusive control was at the time with S., then only S. is responsible, notwithstanding that the team was owned and the driver paid by the A.'s.⁹⁷

§ 3829(2). Washington

Members of the jury, it is the law that one who hires from another a vehicle and driver, and agrees to pay therefor a given amount per day, is responsible for any accident or injuries caused by such vehicle and driver, if due to the negligence and want of care of the driver, even though such driver might be paid by the owner of such vehicle. In other words, after the owner has turned such rented vehicle and driver over into the control of the person renting or leasing same, then such latter person stands in the same position with third persons as though he were the owner, and is liable to any third persons for all injuries caused by such vehicle or truck, due to the negligence and want of care of the driver of same.⁹⁸

§ 3830. Liability of owner to servants of independent contractor

See, also, ante, § 3616(1).

§ 3830(1). United States

The jury are instructed that it is the law that, if the owner of a railroad engaged in constructing that railroad lets out a general contract for the construction of the road, and, knowing that that contract has been let and that large numbers of men are to be employed, or have been employed, in the actual work of construction,

⁹⁷ Gannon v. Siak, 112 A. 697, 95 Conn. 639.

⁹⁸ Olson v. Clark, 191 P. 810.

furnishes an explosive to be used by the individuals who are to actually do the definite construction of the work, it is the duty of the owner of the railroad furnishing that explosive, under those circumstances, to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous.⁹⁹

§ 3830(2). *Alabama*

The court charges the jury that, if you are reasonably satisfied from the testimony that H. had a contract with defendant for the purpose of taking out ore, and was an independent contractor in the sense that defendant reserved no right to interfere with the details of H.'s work, but only to require this to be done by H. and those men under him whom he had employed, so as to conform to his contract and the mining rules, then I charge you that the defendant would not be responsible to plaintiff for intestate's death resulting from the negligence of said H., if you believe it did so result.¹

§ 3830(3). *Nevada*

The jury are instructed that if they find from the evidence that the defendant furnished to the independent contractor an instrumentality, such as the railroad track in this case, for the use of the independent contractor in carrying out the provisions of the contract upon his part, and if they further find from the evidence that such instrumentality so furnished was in a defective and dangerous condition, and if the jury further find from the evidence that the defendant knew, or, by the exercise of ordinary care, might have known, of the existence of such defect or danger, and if the jury further find from the evidence that by reason of such defective or dangerous condition, as the proximate cause, an employé of the independent contractor, while in the discharge of his duty and while exercising ordinary care and caution for his own safety, is injured, then the jury are instructed that the defendant is liable to such employé for the damages caused by such injury.²

The jury are instructed that the mere fact alone that the plaintiff was in the employ of one sustaining the relation of an independent contractor to the defendant is not in itself a defense to the cause of action stated in the complaint.³

§ 3830(4). *North Carolina*

The jury are instructed that it is contended by the defendant that it had contracted its mill to C. It is accepted law that where a contract is for something that may be lawfully done and is proper

⁹⁹ *Katalla Co. v. Johnson* (C. C. A. Wash.) 202 F. 353, 120 C. C. A. 481.

¹ *Porter v. Tennessee Coal, Iron & R. Co.*, 59 So. 255, 177 Ala. 406.

² *Flodin v. Verdi Lumber Co.*, 142 P. 531, 37 Nev. 294.

³ *Flodin v. Verdi Lumber Co.*, 142 P. 531, 37 Nev. 294.

in its terms, and there has been no negligence in selecting a suitable person to contract with, in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is done is interested only in the ultimate result of the work, and not in several steps as to progress; the latter is not liable to a third person for the negligence of the contractor; but liability of the superior master depends upon his right to control the conduct of the person with whom he contracts in the prosecution of the work. If you find from the evidence that C. leased the mill of the defendant company under contract by which C. was to employ the labor and bear all the expense of running the mill, was to receive the logs of the company from the trucks, manufacture the same into timber, and deliver it aboard cars for shipment at \$—— per —— feet, with guaranty that he should make as much as \$—— per month, and that defendant did not retain the right to control the conduct of C. and was interested only in the ultimate result of the work, then the defendant is not liable, and you will answer the first issue, "No." But if you find from the evidence that there was a general control of the operation of the mill reserved by the defendant company in respect to the general operation of the mill, then go further and consider the question of negligence raised.⁴

§ 3830(5). Texas

You are instructed that an original employer or owner is not ordinarily under duty of care to the employes of an independent contractor, nor liable to them for the acts or omissions of such independent contractor, to whom the work has been let, and over whom such original employer has retained no control or authority as to the mode or manner of doing the work.⁵

§ 3831. Same—Where owner furnishes place and machinery for doing work

You are instructed that, if an original employer or owner, pursuant to agreement with a contractor, should furnish the space and a machine or machines to be used by the contractor's employes in doing the work for which the contractor is engaged, then the original employer would be under duty, inuring to the benefit of the contractor's employes in that behalf, to exercise ordinary care to furnish such as were reasonably safe, when used as such employer intended or might reasonably have expected.⁶

You are instructed that, if an original employer or owner, pur-

⁴ *Midgette v. Branning Mfg. Co.*, 64 S. E. 5, 150 N. C. 333.

⁵ *Continental Paper Bag Co. v. Bosworth* (Civ. App.) 215 S. W. 126.

⁶ *Continental Paper Bag Co. v. Bosworth* (Tex. Civ. App.) 215 S. W. 126.

suant to agreement with a contractor, should furnish the place and a machine or machines to be used in doing the work which the contractor is engaged to perform, and if the work done at such place and with such machine or machines, as contemplated to be done, should be so inherently or intrinsically dangerous that injury would probably be occasioned thereby to the contractor's employé or employés in the course of their service in doing such work, unless precautions were taken, then it would be the duty of the original employer or owner to such employé or employés to exercise ordinary care to take such proper precautions, although the contractor might also be under duty to them to take some necessary step or steps to avoid the danger.⁷

§ 3832. Scope of employment

You are instructed that the acts of a chauffeur, in operating an automobile, within the authority of his employment, are the acts of a servant for which the owner is responsible.⁸

§ 3833. Same—Acts in disobedience of orders of master

The jury are instructed that the fact that the engineer, having the control of the engine, whose collision with the engine on which plaintiff was riding caused the injury for which he sues, was forbidden to run on that track at that time, and had acted in disobedience of orders, is not a defense to this action.⁹

§ 3834. Liability for negligence of servant with respect to fires

You are instructed that, if you find from the evidence that the defendant, either by himself or his servant, acting within the scope of his employment, negligently set out, or negligently suffered to escape, the fire which ran upon, burned over, and injured plaintiff's premises, and that such injury was the proximate consequence of such negligent act or omission, then you should find for the plaintiff, and award him just compensation for the loss which he has sustained.¹⁰

§ 3835. Liability for negligence of servant in throwing articles

You are instructed that, if you believe from the preponderance of the evidence that on or about the ——— day of ———, an agent, servant or employé, of the defendant threw a copy of the ——— toward the plaintiff, and that the same struck her and injured her substantially as alleged, and if you further believe from the evidence that the act of such servant, agent or employé of defendant

⁷ *Continental Paper Bag Co. v. Bosworth* (Tex. Civ. App.) 215 S. W. 126.

⁸ *Travers v. Hartman* (Del.) 92 A. 855, 5 Boyce, 302.

⁹ *Philadelphia & Reading R. Co. v. Derby*, 55 U. S. 468, 14 L. Ed. 502.

¹⁰ *Wickham v. Wolcott*, 95 N. W. 360, 1 Neb. (Unof.) 160.

in throwing said ———, if he did, constituted negligence upon his part, as the term has heretofore been defined to you, and that such negligence, if any, was the proximate cause of the injury sustained by the plaintiff therefrom, as the term "proximate cause" has heretofore been defined to you, then you will find your verdict in favor of the plaintiff as against the defendant, and assess her damages as hereinafter instructed.¹¹

You are instructed that, if you do not believe from the preponderance of the evidence that the plaintiff was struck and injured as alleged by her, or do not believe that such striking was caused by the act of a servant, agent or employé of the defendant, or do not believe that in throwing said paper and striking plaintiff, if you find such to be the fact, the servant, agent or employé, if any, of the defendant, was guilty of "negligence" as that term has been hereinbefore defined, or do not believe that the injuries, if any, of the plaintiff were proximately caused by the act of such servant, agent or employé, if any, or do not believe that the injury to plaintiff, if any, was one which might have been reasonably foreseen by a person of ordinary prudence, in the light of the attending circumstances, as likely to result from such an act, then, in either one or more of such events, let your verdict be for the defendant.¹²

§ 3836. Liability for assault by employee

Assault by employee of carrier on passenger as within scope of employment, see ante, § 1734.

§ 3836(1). Alabama

The court instructs the jury, if they believe from the evidence that ———, while acting as the manager of the ——— Hotel, and while acting in the line and scope of his authority as such manager, wrongfully struck at, assaulted, and beat plaintiff, then Mrs. ———, doing business under the name and style of the ——— Hotel, as well as ——— himself, are liable in damages for such assault and battery, and the plaintiff is entitled to recover in this case.¹³

§ 3836(2). Missouri

The court instructs the jury that, if they believe from the evidence that on the ———, plaintiff, at or near the station of ———, got upon a freight train of defendant the ——— Railway Company, for the purpose of being transported from said station to ———, and that defendant ——— was at said time said railway company's conductor and servant on and in charge of said train;

¹¹ Houston Chronicle Pub. Co. v. Lemmon (Tex. Civ. App.) 193 S. W. 347.

Lemmon (Tex. Civ. App.) 193 S. W. 347.

¹² Houston Chronicle Pub. Co. v.

¹³ Morris Hotel Co. v. Henley, 40 So. 52, 145 Ala. 678.

and if you further find from the evidence that while plaintiff was so on said train at said date, and while said train was running through or near the station of ———, the defendant ———, as such conductor and servant, while in charge of said train and in the line of his duties to said railway company, approached plaintiff and wrongfully and with great and unusual force and violence kicked, forced, and ejected plaintiff from said train to the ground, whereby he was injured—then the defendants are liable in this case, and the jury will return a verdict for the plaintiff and against both of the defendants.¹⁴

§ 3837. Liability for malicious prosecution

The court charges the jury that if you believe that the defendant, through its servant, wrongfully, vexatiously, and purposely made the affidavit complained of, and procured the issuance of the search warrant, and without probable cause for so doing, then you must find the defendant guilty, provided you find that ——— was acting within the scope of his authority, or was authorized by the railroad to so act, or that the railroad company has since ratified his action.¹⁵

¹⁴ *Whiteaker v. Chicago, R. I. & P. R. Co.*, 160 S. W. 1009, 252 Mo. 438.

¹⁵ *Gulsby v. Louisville & N. R. Co.*, 52 So. 392, 167 Ala. 122.

CHAPTER CCII

MECHANICS' LIENS

- § 3838. Necessity of filing notice of lien.
3839. Time of filing lien.
3840. Presumptions and burden of proof.

§ 3838. Necessity of filing notice of lien

You are instructed that, if you find from the evidence that plaintiff filed this action within ——— days from the date it furnished the last material to the defendant, it is not necessary to give the ——— days' notice as provided by the statute, or file its amount with the clerk as provided by the statute.¹

§ 3839. Time of filing lien

The court instructs the jury that if they believe from the evidence that in ———, the plaintiff the ——— Fire Extinguisher Company was engaged in doing work upon the sprinkler system described in the evidence, and that at the time said work was being done the contract work and material thereof had not been fully completed, or accepted by the parties in the contract as completed, and that it was understood and agreed between the plaintiff, the ——— Elevator Company, and defendant that said work was being done by the plaintiff under and for the purpose of fully complying with and completing its said written contracts with defendant, which have been admitted in evidence, then the court instructs the jury they must not find that the work under said contracts was completed at an earlier date. In this connection, you are further instructed that neither the acts nor agreements or statements of ——— can bind the ——— Elevator Company unless the said ——— had authority from the said company or its board of directors to represent them, and that he did act for them and in their behalf.²

You are instructed that the indebtedness accrued when the work called for by the contract was completed, or when the parties to the contracts themselves accepted the work as complete. If, therefore, you find from the evidence that the said contract in regard to the furnishing of the fire extinguishers was completed, and the last work was done, and the last material was furnished under the said contract, prior to ———, or that the fire extinguisher plant was accepted by all the parties in the contracts as complete prior

¹ Marianna Hotel Co. v. Livermore Foundry & Machine Co., 154 S. W. 952, 107 Ark. 245.

² General Fire Extinguisher Co. v. Schwartz Bros. Commission Co., 65 S. W. 318, 165 Mo. 171.

to ———, then plaintiff is not entitled to a mechanic's lien in this case against the property of ———.³

§ 3840. Presumptions and burden of proof

The court instructs the jury that, if you find from the evidence that plaintiff furnished the materials as alleged in the complaint, that the same were used in the building of the defendant, and that the amount charged for said material was less than the contract price for the construction of said building and has not been paid, then plaintiff has established a prima facie right to a lien on said building for the balance due it, and casts the burden of proof on defendant to show that plaintiff is not entitled to a lien, provided this suit to recover said money due and establish said lien was filed within ——— days after the last material was furnished.⁴

³ General Fire Extinguisher Co. v. Schwartz Bros. Commission Co., 65 S. W. 318, 165 Mo. 171.

⁴ Marianna Hotel Co. v. Livermore Foundry & Machine Co., 154 S. W. 952, 107 Ark. 245.

CHAPTER CCIII

MINES AND MINING

- § 3841. Discovery.
- 3842. Requisites of valid location.
- 3843. Marking boundaries of claim on ground.
- 3844. Relocation.
 - 3844(1). Colorado.
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- 3845. Effect of amendment of location certificate.
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- 3847. Prevention, by party asserting priority of location, of performance of assessment work.
- 3848. Extralateral rights.
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- 3854. Contract to mine ore on another's land—Duty of landowner to furnish certain appliances.
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- 3857. Injuries to owner of surface—Right to subjacent support.
 - 3857(1). Maryland.
 - 3857(2). Virginia.
- 3858. Same—Liability of operator of mine for diverting waters from spring.
 - 3858(1). Pennsylvania.
 - 3858(2). Virginia.
- 3859. Same—Necessity of showing cause of injury.
- 3860. Persons liable for injuries caused by operation of mine—Lessor or lessee.
- 3861. Damages for removal of subjacent support.
- 3862. Right to dump waste—Implied terms of deed.
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- 3864. Same—Increase of value through labor and expenditures of wrongdoer.
 - 3864(1). United States.
 - 3864(2). Illinois.
- 3865. Same—Presumption and burden of proof as to whether trespass intentional.
- 3866. Same—Matters considered in determining cost of removing property to place where found.

§ 3841. Discovery

The court instructs the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the exploration of the property.¹

¹ *Charlton v. Kelly* (C. C. A. Alaska) 156 F. 433, 84 C. C. A. 295, 13 Ann. Cas. 518.

You are instructed that if you shall find and believe from the evidence in this case that ———, ———, and ——— found the colors and the particles of gold so testified to by them in the draw or small water course on the surface of the ground in dispute, then you should determine whether or not such finding was of sufficient character and found in such places, and under such conditions as to constitute such a discovery of mineral as will satisfy the law. You are instructed that mere indications, however strong, are not sufficient to answer the requirements of the statute.³

§ 3842. Requisites of valid location

You are instructed that to perfect a valid location of a mining claim, under the law, the locator must first discover a vein, ledge, or deposit of rock in place, carrying gold, silver, lead, or other valuable deposit. He must post, at the point of discovery, on the surface, a plain sign or notice, containing the name of the lode, the name of the locator, and date of discovery. He must also, within sixty days from the date of discovery, sink a discovery shaft to the depth of at least ten feet from the lowest part of the rim thereof at the surface, or deeper, if necessary to discover the vein thereof. Within three months from the date of discovery, and before the filing of the location certificate hereinafter referred to, he must erect six substantial posts, hewed on the sides in towards the claim, to-wit, one at each corner, and one at the center of each side line thereof, and, within three months of the date of discovery, he must further file with the clerk and recorder of the county in which the claim is located a location certificate, containing the name of the lode, the name of the locator, the date of location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, as near as may be, and such a general description as shall identify the claim with reasonable certainty: Provided, that if such location certificate is not filed within three months from the date of discovery, but is so filed afterwards, and before third parties have acquired rights in the premises, it is sufficient compliance with this requirement of the law. An open cut or tunnel, which shall cut the lode at the depth of ten feet perpendicularly below the surface, or an adit of at least ——— feet in along the vein from the point at which the same is discovered, shall hold the lode the same as though a discovery shaft had been sunk as aforesaid. If you find from the evidence that plaintiffs, during ———, made a location of the premises in dispute by a full compliance with the law, as stated in the foregoing instruction, and that, during the year ———, they placed thereon

³ *Charlton v. Kelly* (C. O. A. Alaska) 156 F. 433, 84 C. C. A. 295, 13 Ann. Cas. 518.

\$—— worth of work or improvements, or both, then you will find a verdict for the plaintiffs: provided, you further find from the evidence that the date of their discovery preceded the discovery of defendant.³

§ 3843. Marking boundaries of claim on ground

You are instructed that a claim may be marked upon the ground by stakes or other permanent monuments, but you are instructed that the law requires a claim to be so distinctly marked upon the ground that its boundaries can be readily traced. The requirements of the statute in this respect are not necessarily fulfilled by merely setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground and the surrounding conditions are such that a person accustomed to tracing lines of mining claims can, after reading a description of the claim in the posted or recorded notice of location or upon the stakes, by a reasonable and bona fide effort to do so, find all of the stakes and thereby readily trace the boundaries. Where the country is broken, or the view from one stake or monument to another is obstructed by intervening timber or brush, it may be necessary to blaze trees along the line, or cut away the brush, or set more stakes at such distances that they may be seen from one to the other, in a way to indicate the lines so that the boundaries can be readily traced. But it is not for the court to say what is a sufficient marking of the boundaries. It is your duty to determine, from all the evidence in the case and from the topography of the ground in question, whether or not a sufficient marking of the boundaries of the claim by the plaintiffs was made so that the same could be readily traced by a person making a reasonable effort to do so. If you find from the evidence in this case that this location was so definitely marked on the ground by the plaintiffs or their agents that its boundaries could be readily traced, then I instruct you that the plaintiffs have complied with this requirement of the law. If not, then I instruct you that they have failed in one of the essentials of a valid placer mining location, and that your verdict must be for the defendant.⁴

§ 3844. Relocation

§ 3844(1). Colorado

You are instructed that, if you find from the evidence that plaintiffs failed to make a valid location of the premises in dispute, and that defendant has made the same by a full compliance with the

³ *Craig v. Thompson*, 16 P. 24, 10 Colo. 517.

⁴ *Charlton v. Kelly* (C. C. A. Alaska) 156 F. 433, 84 C. C. A. 295, 13 Ann. Cas. 513.

law, as aforesaid, and, during the year ———, defendant has performed the annual assessment work by the expenditure thereon of \$———, as aforesaid, then you will find for defendant.⁵

§ 3844(2). *New Mexico*

The court instructs the jury that the defendants' location certificate offered in evidence does not purport to be, and is not, an original location of a mining claim, but is a relocation of the claim known as the ———, the right to the possession of which the plaintiffs claim, and, as they set up title only as the relocators of the original lode claim, they impliedly admitted the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property.⁶

The court instructs the jury that if they believe from the evidence that the defendants' location was a relocation of the ———, and that plaintiffs were owners of said ——— claim, then defendants' relocation admits the validity of plaintiffs' location; and if the jury should further find from the evidence that plaintiffs had done or expended at least \$——— in labor and improvements on said claim during the calendar year ———, and that the defendants entered upon said claim, and attempted to relocate the same, after the performance of said labor and improvements, then they should find for the plaintiffs.⁷

§ 3845. *Effect of amendment of location certificate*

You are instructed that, if you believe from the evidence that the defendant discovered, located, and recorded the ——— lode according to the requirement of law, as stated in other instructions, prior to the filing of plaintiffs' amended location certificate, ———, you cannot consider such amended certificate of location of the ——— lode for any purpose whatever, and must entirely discard the same in making up your verdict.⁸

§ 3846. *Performance of assessment work*

You are instructed that, if you believe from the evidence that neither party has made a valid location of the premises in dispute; under the law, or if you find that both parties failed to perform the work, or make their improvements thereon, required annually, for the year ———, you will find your verdict that neither party is entitled to the possession of the premises.⁹

⁵ *Craig v. Thompson*, 16 P. 24, 10 Colo. 517.

⁶ *Wills v. Blain*, 20 P. 798, 4 N. M. (Johns.) 378.

⁷ *Wills v. Blain*, 20 P. 798, 4 N. M. (Johns.) 378.

⁸ *Craig v. Thompson*, 16 P. 24, 10 Colo. 517.

⁹ *Craig v. Thompson*, 16 P. 24, 10 Colo. 517.

§ 3847. Prevention by party, asserting priority of location, of performance of assessment work

You are instructed that, if you find from the evidence that plaintiffs were prevented from performing the annual assessment work of ——— by defendant, his agents or employés, by force or violence, or by threats or intimidation, then, in law, plaintiffs are in the same position as though the same had been performed, and you should find that such assessment work had been done and performed.¹⁰

§ 3848. Extralateral rights

The jury are instructed that the law has established a presumption that all ore found under the surface of a mining claim belongs to the owner of that claim, and unless the person who may have taken the ore from under the claim of another can show to the satisfaction of the jury that the ore was a part of a vein having its top or apex in his claim, and so situated that he is entitled in law to follow such vein on its dip, he is a trespasser, and is accountable to the owner of the surface for the ore taken. By the term "top" or "apex" of a vein is meant the highest part of a vein along its course.¹¹

§ 3849. Mining leases—Avoidance of mining lease for false representations in procuring it

The court instructs the jury that this is a replevin suit in which the plaintiff seeks to recover a lot of diamonds which he claims to be the owner of and entitled to the immediate possession of the same. In order for the plaintiff to recover in the replevin suit, the burden is upon him to prove, by a preponderance of the testimony, that he is the owner and entitled to the immediate possession of the property. The defendants hold the diamonds under the lease which was executed between them and the plaintiff, and the diamonds were mined and washed under that lease and under that lease contract which provides that the plaintiff shall be entitled to one-fourth of the diamonds and the defendants entitled to three-fourths of them, and the plaintiff seeks to recover the diamonds and claims to be the owner of the entire lot on the ground that the defendants procured the lease by means of false and fraudulent representations and for the purpose of getting possession of the diamond property and discrediting it and ultimately buying it up for a nominal consideration, and that they had no intention to honestly and faithfully carry out the lease contract at the time they entered

¹⁰ *Craig v. Thompson*, 16 P. 24, 10 Colo. 517.

¹¹ *Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co.* (C. C. A. Colo.) 203 F. 795, 112 C. C. A. 113.

into it, and further alleges that the defendants have not, in good faith, complied with the terms of that contract, and that these diamonds were mined in furtherance of that alleged false and fraudulent intent with which it is alleged that they entered into the contracts originally. Now, if you believe from a preponderance of the testimony, or greater weight of the testimony, that the defendants did procure the lease by means of false and fraudulent representations, with the intent to get possession of the property and to discredit it and to conceal the real value of the diamonds taken, with the false and fraudulent intent to acquire the ownership of the property for less than its value, and that they mined these diamonds in furtherance of this false and fraudulent intent, and that they have not substantially complied with the terms of the contract, you would find for the plaintiff the diamonds or their value, which is testified to be in the neighborhood of \$——. If you fail to find these facts by a preponderance of the evidence, then your verdict would be for the defendants. The burden is upon the plaintiff to prove, by a preponderance of the testimony, that the contract was procured by means of fraud, by false and fraudulent representations, and that the defendants had no real intention of carrying it out in good faith, and that they have not carried it out, and that the diamonds were mined with that false and fraudulent intent.¹²

§ 3850. Same—Obligation of lessee to operate mine with diligence

You are further instructed that it was the duty of the plaintiffs, if they were in lawful possession of said mine, to pursue the operation of same with due diligence, and, if they (the plaintiffs) failed, neglected, and refused to pursue the operation of said mine with due diligence, then, as a matter of law, the defendant had the right to enter upon the said premises, take charge of and evict the plaintiffs therefrom, and the defendant, under such circumstances, could not be held to account for damages for such eviction. However, the mere temporary cessation of operation of said mine with the consent, if any, of the superintendent of the defendant company would not justify the defendant in taking charge of said mine and evicting the plaintiffs therefrom.¹³

§ 3851. Same—Right to cancel oil lease

The jury are instructed that, if you find from the evidence that defendant did not begin a well for the development of oil upon lands in the general locality of plaintiff's lands within one year from ——, or if you find that such well was so begun within said time limit, but further find that same was not prosecuted with due

¹² Mauney v. Millar, 175 S. W. 402, 117 Ark. 633,

¹³ Bokoshe Smokeless Coal Co. v. Bray, 155 P. 226, 55 Okl. 446.

diligence as herein defined, then, and in either event, you will find for the plaintiff.¹⁴

The jury are instructed that, if you find from the evidence that within one year from ———, defendant began a well for the development of oil within the general locality of plaintiff's lands, and if you further find that such well, if any, was prosecuted with due diligence to this date, then and in that event you will find for the defendant.¹⁵

§ 3852. Same—Obligation to pay royalty as dependent on possibility of profit

You are instructed that, under the lease or contract in this case, the defendant is required to remove all the coal which is capable of being mined, by the exercise of reasonable skill and effort, but when further mining on the premises cannot be carried on, with reasonable expenditure of money and labor, in accordance with the methods approved among practical miners in that territory, it is no longer required to continue the mining operations, and its obligation to pay royalty ceases when the production of coal becomes either impossible or financially impracticable.¹⁶

The court instructs the jury that the term "merchantable and minable coal," as used in these instructions, means coal that can be mined and sold at some profit to the operator, with reasonable expenditure, labor, and effort, in accordance with the methods approved among practical miners in that territory.¹⁷

§ 3853. Same—Obligation with respect to condition of property on termination of lease

The court instructs you that it is admitted that plaintiff in ———, leased to defendant its mine, including certain personal property, consisting of mules, wagons, cars, rails, and office fixtures, for the period of ——— years beginning ———, and that afterwards said lease was by said defendant transferred to the ——— Company; that under and by the terms of the lease contract the property was to be returned to the plaintiff at the expiration of the lease in a better condition and repair than it was when taken possession of under the lease; so, if you shall believe from the evidence that the mine and personal property was not returned or surrendered by the lessee at the expiration of the lease in a better condition and repair than when it was taken possession of under the lease, then and in that event you should find

¹⁴ *Sunshine Oil Corporation v. Rands* (Tex. Civ. App.) 226 S. W. 1090.

¹⁵ *Sunshine Oil Corporation v. Rands* (Tex. Civ. App.) 226 S. W. 1090.

¹⁶ *Ellis v. Cricket Coal Co.*, 148 N. W. 887, 166 Iowa, 656.

¹⁷ *Ellis v. Cricket Coal Co.*, 148 N. W. 887, 166 Iowa, 656.

for the plaintiff in such a reasonable amount as you may believe from the evidence it would have required on ———, to put the property in a better condition and repair than it was at the beginning of the lease, not exceeding the sum of \$———, the amount claimed; subject, however, to such credit or deduction as you may believe from the evidence has been paid to the plaintiff on account of stock or material sold with the consent of the plaintiff; and also, if you find for the plaintiff, you should allow a credit for any permanent improvements put on said property, if any, by the lessee, such as a compressor, or main air pipe line, or mining machinery, not exceeding for said permanent improvements, if any, the reasonable value of such permanent improvements, if any, and not exceeding therefor the sum of \$———; but, unless you shall so find and believe from the evidence as above required, you should find for the defendants.¹⁸

The court further instructs you that if you shall believe from the evidence that said property was in a better condition and repair on ———, than it was on ———, the date of the commencement of the lease, you should find for the defendants.¹⁹

§ 3854. Contract to mine ore on another's land—Duty of land-owner to furnish certain appliances

The jury are instructed that the defendant was bound by the contract to furnish one track scales at the ore bank. The plaintiffs claim that the defendant failed and refused to furnish such track scales, and that, by reason thereof, they were damaged \$———, and they claim that they demanded such scales under the contract of the defendant. If the defendant failed and refused to furnish such scales, and the plaintiffs were damaged thereby, they would be entitled to recover such damages as they have sustained, if they have sustained any on this account.²⁰

§ 3855. Same—Acquiescence in deviation from contract

The jury are instructed that if the plaintiffs, while the ore was being delivered, acquiesced in the manner of weighing the ore and in the use of defendant's scales in ———, and did not object thereto or give defendant reasonable notice that scales would be required as provided by the contract, at the chute or ore bank, then they would not be entitled to recover damages on this account, nor would they be entitled to damages on this account, if they have received credit for all the ore actually delivered. The defendant in such case was bound to furnish the weights of the

¹⁸ Henderson Min. & Mfg. Co. v. Nicholson (Ky.) 126 S. W. 139.

¹⁹ Henderson Min. & Mfg. Co. v. Nicholson (Ky.) 126 S. W. 139.

²⁰ Eaves v. Cherokee Iron Co., 73 Ga. 459.

ore to the plaintiffs, if he undertook to weigh it for them, and, if he did so correctly, no damages can be recovered on this account. If he did not, they can recover for any ore not credited to them by the defendant.²¹

The jury are instructed that if the plaintiffs were not ready on the ———, to comply with their part of the contract, or if the ore was then and thereafter, and until ———, being mined and received in less quantities, and in manner otherwise than as the contract provided for, and if plaintiffs acquiesced therein, or if the plaintiffs, during the time, simply complained, and did not give the defendant reasonable notice that they were standing on their contract, and that he would be expected to receive daily, Sundays excepted, from ——— to ——— tons of ore, then the plaintiffs would not be entitled to recover damages on this account for defendant's failure to receive such amount of ore.²²

The jury are instructed that if the plaintiffs began work for the defendant, and continued to work, getting ore for him in irregular and less quantities daily than the contract called for, and the defendant so receiving it from ——— to ———, and if the plaintiffs did not reasonably demand, monthly or otherwise, the performance of the contract, but acquiesced in what was being done during the time, and received payment accordingly, then the plaintiffs would not be entitled to recover damages for any deficiencies on account of ore not mined and received during that period.²³

The jury are instructed that indefinite and uncertain complaints that the defendant was not taking as much ore as the contract required to be mined and received during this time would not alone entitle the plaintiffs to recover on this account. It must appear that the plaintiffs, during this time, stood on their contract, and if the contract was being departed from, notified defendant, with reasonable certainty, that an extra chute and screen and more braze were necessary and would be required, and that he would be expected to receive from ——— to ——— tons of ore per day, Sundays excepted, and that the plaintiffs were ready and able and willing to perform their part of the contract, so that, if ore was being mined and received in less quantities, and in manner otherwise than as the contract required, the defendant would be put on notice that the plaintiffs were standing on their contract, and that he would be expected to fulfill his part thereof, and that the defendant thereupon failed and refused to perform his part of it.²⁴

²¹ *Eaves v. Cherokee Iron Co.*, 73 Ga. 459.

²² *Eaves v. Cherokee Iron Co.*, 73 Ga. 459.

²³ *Eaves v. Cherokee Iron Co.*, 73 Ga. 459.

²⁴ *Eaves v. Cherokee Iron Co.*, 73 Ga. 459.

§ 3856. Liability for injury to riparian owner by mining operations

The court instructs the jury that one engaged in mining has a right to deposit his tailings in a running stream to a reasonable extent, but he has no right to flood a lower owner's land, and by depositing tailings and débris thereon to substantially injure or ruin the latter's property, although he may have used all reasonable means to prevent such damage. No person or corporation has a right, directly or indirectly, to cover his neighbor's land with mining débris, sand, and gravel, or other material so as to injure or damage the same. So I instruct you that if you find upon the evidence that the plaintiffs are in the possession of the land described in the complaint, and were in such possession at and during the times therein mentioned, and if you further find that while they were in such possession the defendant caused to be placed in the channel of ——— creek and upon the lands of plaintiffs a large obstruction, by placing in said creek and upon said land a large mass of earth, gravel, rocks, and boulders, which caused the waters of said creek to flow upon and against plaintiffs' land, washing it away and damaging and injuring it, and if you further find that said defendant, after making such obstruction, commenced mining operations by the hydraulic process upon its land and above plaintiffs' land and in so doing caused to be placed into ——— Gulch a large mass of earth, detritus, débris, gravel, rocks, and boulders, tailings from its mine, and if you further find that said detritus, débris, gravel, rocks, and boulders came down said gulch into ——— creek and were thence carried by the waters of ——— creek down stream to said obstruction and were there by reason thereof diverted to and upon the said land of plaintiffs, damaging and injuring the same, then you should render a verdict for the plaintiffs.²⁵

§ 3857. Injuries to owner of surface—Right to subjacent support
§ 3857(1). Maryland

The court instructs the jury that if you find from the evidence that the plaintiff has been the owner of the farm and premises described by the witnesses and in the deed of ——— offered in evidence for the last several years and the improvements thereon, and was in actual possession and enjoyment of the same at the time of and since the injuries to the property described by the witnesses, and that the said farm and the buildings thereon and trees and soil were supported by a vein of coal underlying the same, and that the defendant is now and at the time of the happening of said in-

²⁵ *Salstrom v. Orleans Bar Gold Mining Co.*, 96 P. 202, 153 Cal. 551.

jury was a corporation duly incorporated under the laws of ———, and that at the time of said injuries was engaged in mining and excavating the said coal, and if the jury further find that the defendant on or about the year ——— while digging and mining said coal underlying the said premises of the plaintiff and supporting the same, and while removing said coal (if they so find) so operated said mine, and so dug, excavated, and removed the said coal that the support to the said house, buildings, trees, and soil of the plaintiff's premises were taken away, and that thereby the plaintiff's premises before mentioned were damaged and injured, and that said damage and injury was due to the negligence of the defendant in excavating and removing the said coal, and in failing to leave or provide sufficient supports for said premises, then the plaintiff is entitled to recover in this action, and the verdict of the jury must be for the plaintiff.²⁶

The jury are instructed that, even if they find that the defendant mined and pillared the coal under the said premises in a skillful manner, yet, if the jury find that the defendant in such mining failed to leave sufficient support for the surface and that thereby the injuries were caused, then the plaintiff is entitled to recover.²⁷

§ 3857(2). Virginia

The court further tells the jury that, after the purchase by the plaintiff of the G. tract of land it was the duty of the defendant in mining the coal under the said tract of land to leave sufficient pillars, props, and other means of support to prevent the overlying strata from breaking and falling, and, if they further believe that the defendant mined said coal and failed to leave sufficient pillars, props, or other means of support to prevent said overlying strata from breaking and falling, and that as a result thereof the said strata was broken and fell and the spring on the D. tract drained and destroyed by reason thereof, then they should find for the plaintiff such damages as, in their opinion, he has sustained, not exceeding \$———. ²⁸

The court instructs the jury that the defendant had the right to mine and remove the coal under the tract of land in question known as the D. tract, and to take down such of the roof over said coal as was reasonably necessary in mining coal and removing same; and, if in so doing it tapped the source of the spring on said tract of land and drained it, the defendant is not liable. But

²⁶ *Piedmont & George's Creek Coal Co. v. Kearney*, 79 A. 1013, 114 Md. 496.

²⁷ *Piedmont & George's Creek Coal Co. v. Kearney*, 79 A. 1013, 114 Md. 496.

²⁸ *Stonegap Colliery Co. v. Hamilton*, 89 S. E. 305, 119 Va. 271, Ann. Cas. 1917E, 60. Plaintiff owned the surface of both the G. and the D. tracts.

the jury are further instructed that it was the duty of the defendant in mining said coal to leave sufficient props, pillars, or other means of support to prevent the overlying strata from breaking and falling; and, if they believe that the defendant failed to leave sufficient props, pillars, or other means of support for said overlying strata and that as a result of such failure it was cracked and broken and the spring on the said land thereby drained and destroyed, they should find for the plaintiff such damages as he sustained, so that the same shall not exceed \$——.²⁹

§ 3858. Same—Liability of operator of mine for diverting waters from spring

§ 3858(1). Pennsylvania

You are instructed that it is an undisputed legal proposition that the owner of land can sever the coal from the surface, and he can put the title to the coal in a different party than himself; that is, one man may own the surface of the land, and another man may own the vein of coal that is under the surface, with the right to remove the coal. But this severance, of course, imposes upon the owner of the coal certain duties and liabilities, and also gives him certain privileges. Where the owner of land conveys the coal to another, the latter has the right to remove the coal; and if, in so doing, he should interfere with the hidden streams of water that may be running through the earth, and thus drain the spring of another, he would not be liable for damages, if the spring failed simply because, in the ordinary operation of the mine, some subterranean stream was tapped, and by this means the water, in place of flowing to the opening in the ground where the spring was, flowed to some other place. I say he would not be liable, if that was the case, for the loss of the spring, because he has a right to take out his coal, and, if a hidden stream is interfered with, it cannot be helped, and he would not be responsible, because he would not know where those hidden streams were; and if the consequence is to divert the stream of water so that it fails to come out where it did before, but passes out some place else, he would not be liable.³⁰

You are further instructed that in the above case the owner of the coal is required to leave enough coal to support the surface, or, if he takes out all of the coal (he being the owner of it), he must substitute sufficient supports to keep the surface in place. That is a duty that is imposed upon him. Now, if he fails to leave sufficient support, either by leaving the natural coal, the natural sup-

²⁹ *Stonegap Colliery Co. v. Hamilton*, 89 S. E. 305, 119 Va. 271, Ann. Cas. 1917E, 60.

³⁰ *Kistler v. Thompson*, 27 A. 874, 153 Pa. 139.

port in the shape of pillars of coal, or fails to put in other supports in place of the coal that he takes out, or such as to give the owner of the surface sufficient support, and by reason of this failure to leave sufficient support the ground sinks, subsides, and cracks, and that sinking and cracking divert a stream of water, then he would be liable, because that would be the direct result of his wrongfully withdrawing the support that is necessary and sufficient to sustain the surface.³¹

§ 3858(2). *Virginia*

The court instructs the jury that, under the conveyances introduced in evidence in this case, it was the duty of the defendant in mining and removing the coal, under the tract of land known as the D. tract, to leave sufficient pillars, props, or other means of support to prevent the strata overlying the coal from breaking and falling; and, if they believe from the preponderance of the evidence that the defendant mined the coal in and under the plaintiff's tract of land known as the D. tract, without leaving sufficient pillars, props, or other means of support to prevent the strata overlying said coal from breaking and falling, and that as a result thereof the said strata was broken and the spring on the D. tract thereby drained and destroyed, they should find for the plaintiff such damages as he has sustained by reason of the draining of said spring.³²

The court instructs the jury that, even though they should believe from the evidence that the spring of the plaintiff on the D. tract of land was sunk or caused to go dry by reason of the mining of the coal thereunder, if they further believe that said spring came from undefined subterranean streams or percolations of water, and that defendant did its mining thereunder in the usual and ordinary way, and that, in consequence of so doing, the water ceased to said spring and it sunk or became dry, defendant is not liable therefor and the jury should so find.³³

§ 3859. *Same—Necessity of showing cause of injury*

The jury are instructed that, if the jury find from the evidence that the plaintiff's spring is ——— feet above the level of the coal, and that a cave of the rock in the mine might cause a break in the surface that distance away from a point directly over the cave, and if they further find that at or about the time when the break occurred in the plaintiff's lot there was a fall of rock in the

³¹ *Kistler v. Thompson*, 27 A. 874, 158 Pa. 139.

³² *Stonegap Colliery Co. v. Hamilton*, 89 S. E. 305, 119 Va. 271, Ann. Cas. 1917E, 60.

³³ *Stonegap Colliery Co. v. Hamilton*, 89 S. E. 305, 119 Va. 271, Ann. Cas. 1917E, 60.

A. mine within —— feet of the plaintiff's property, they must further find that at or before the time when the plaintiff's spring disappeared there had been a cave of rock in defendant's mine, and that this cave caused the loss of the spring; otherwise the plaintiff would not be entitled to recover, even if the defendant had been operating the mine.³⁴

**§ 3860. Persons liable for injuries caused by operation of mine—
Lessor or lessee**

The next question that I wish to call your attention to, that is legal in its character, is this: That where a man has the title to a coal vein or to a coal mine, and leases it, in general terms, to another, and he operates it—that is, the lessee operates it—with full control over the mine, as to the manner of operating, and the lessee withdraws the support, or fails to leave sufficient support, the lessee is liable, and not the owner of the coal mine, who in that instance would be the lessor. But, on the other hand, if, by the lease that is made, the lessor provides how the coal shall be mined, the extent of the support that is to be left, designates the size of the rooms, and the extent of the pillars or stumps or ribs that are to be left, and the lessee, accepting the conditions, mines the coal in accordance with the terms specified in the lease, leaving the support that the lessor specifies, and that is insufficient, and the surface in consequence falls, then the owner of the vein of coal—the lessor—would be liable, because he, in his lease, had indicated the support that ought to be left, and he would be liable, as well as the lessee who took out the coal. Or if, after a lease is made, which might be general in its terms, without any qualifications as to the manner in which the coal should be taken out, the lessee and lessor would agree and have an understanding that certain coal should be taken out, or certain supports then existing should be removed, and they were removed in consequence of that mutual agreement subsequently made by the lessor and lessee, then the lessor, or the owner of the vein of coal, would be liable, as well as the lessee.³⁵

The jury are instructed that, if you find from the evidence that, prior to the mining of the coal on entry No. ——, the defendant leased the mine by a written agreement to —— for a term of years, and that under that agreement the lessees had a right to mine all the coal they saw proper, beyond the minimum amount stipulated for annually, and that they were to pay the lessor a stipulated price per hundred bushels, this contract operated as a

³⁴ Kistler v. Thompson, 27 A. 874, 158 Pa. 139.

³⁵ Kistler v. Thompson, 27 A. 874, 158 Pa. 139.

sale of the coal in place, and the defendant is not responsible for the manner in which the lessees operated the mine, unless you should further find, as we have said in our charge, he reserved some right to direct the manner in which the coal should be taken out, and what amount of support should be left.³⁶

§ 3861. Damages for removal of subjacent support

The court instructs the jury that, if you find for the plaintiff, then, in estimating the damage, the jury are to consider the market value of the premises before the happening of said injuries as compared with the present market value of said premises in so far as they may find the market value has been reduced by injuries to the surface and to the improvements thereon, as set out in the plaintiff's ——— prayer, and allow to the plaintiff such damages as will compensate him for such injuries to his property.³⁷

§ 3862. Right to dump waste—Implied terms of deed

You are instructed that the law does not imply that kind of a right in the party who got the contract—in the defendant and his mother—simply because it might be convenient for them to dump on the ———. Such a right can only be implied by the law, in considering all the circumstances and the situation in hand, when the right is a necessity to the party who claims it; that is, the situation is such that he could not obtain, without unreasonable labor and expense, any other place or way to dump this material. He is required, not only to show that it would be convenient and beneficial to him to dump it on the ———, but, in order to sustain the right as an implication that the law gives to him, he must go further, as I have already said to you, and show that he cannot, at an outlay of an amount that is within reason, obtain dumping privileges elsewhere in the operation of the tunnel. And the law leaves to you to determine, from all the facts surrounding the situation at the time the contract was made, the purpose for which it was made, the condition and situation with which it dealt, to determine whether or not the defendant by necessity was given that right under the contract; and for the purpose of determining that question in this case you may take into consideration the nature of the surface of the ground where the right claimed to deposit rock and waste was situate, its adaptability and value for other uses, the accessibility of other places at convenient reach from the mouth of the tunnel where dumping privileges could be had, and the reasonable cost of acquiring and using such other place. And

³⁶ *Kistler v. Thompson*, 27 A. 874, 158 Pa. 139.

³⁷ *Piedmont & George's Creek Coal*

Co. v. Kearney, 79 A. 1013, 114 Md. 496. This was proper under the circumstances of the case.

if you find from the evidence in this case, considering the situation of the premises when the contract was made, the purpose for which it was made, that the defendant could obtain and use at a reasonable expense other places for dumping ground which were easily accessible from the mouth of the tunnel, then the law would not imply any right given by the contract to the defendant to dump on the ——— claim. The necessity which must exist in order to imply a right in the defendant to dump rock and waste material coming from mining claims other than the ——— lode mining claim upon the surface of the ——— lode mining claim must be more than convenient or beneficial, and it must appear affirmatively by a preponderance of the evidence, before such a right to dump upon the surface of the ——— lode mining claim can be implied, that the defendant had no other way or place which could be conveniently provided and used without unreasonable labor and expense.³⁸

§ 3863. Damages for wrongfully taking minerals from plaintiff's land

The jury are instructed that if they believe, from the evidence, that the defendant trespassed upon plaintiff's land, and mined coal therefrom, and converted it to its own use, the jury are to be in no wise limited by the value of the land itself, but must regard the instructions of the court upon the question of what is the proper measure of damages.³⁹

§ 3864. Same—Increase of value through labor and expenditures of wrongdoer

§ 3864(1). United States

Before asking you to give your attention directly to the facts and issues involved in this case, it may be helpful to you, in considering those issues, to first illustrate by a simple example the principles of law applicable here which must guide you in reaching a verdict, and I give you for that purpose this illustration: We will assume that A. enters upon the land of B., and cuts and removes from B.'s land a standing tree which he manufactures into lumber; thereupon B. sues A. for damages, claiming that the tree cut and removed contained ——— feet, board measure, of lumber, of the value of \$———. The fact alone that A. entered upon the land of B., and cut and removed a tree therefrom, constituted A. a trespasser, and rendered him liable to B. A., in his answer to the suit of B. for the \$——— claimed as the value of the ——— feet of lumber in the tree, sets up that he took the tree innocently or inad-

³⁸ *Himrod v. Ft. Pitt Min. & Mill. Co. (C. C. A. Colo.)* 238 F. 746, 151 C. A. 596.

³⁹ *Illinois & St. L. R. & Coal Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342.

vertently, believing that it was on his own land, and for that purpose he might show that his land and B.'s land adjoined, and the tree was taken from near the line. If the jury believed that he took it under the honest and mistaken belief that it was his own tree, then B. would not be entitled to recover the value of the board measure in the tree, to wit, \$——, but he would only be entitled to recover the value of the tree as it stood; and for that purpose that value might be ascertained by deducting all that it had cost to cut and remove and manufacture that tree into lumber. If that cost amounted to \$——, and the lumber was worth \$——, it would necessarily follow that the tree as it stood was worth the difference between \$—— and \$——, to wit, \$——, which would be all that B. could recover. If, upon the other hand, the jury should believe that A. did not make an honest mistake; but that he willfully went across the line, knowing that he was across the line, and cut and removed B.'s tree, or if he was reckless and indifferent about where he was cutting, and did not care or think as to whether it was his land or some other man's land on which the tree stood, then under those facts, or either of such facts, A. would be what is called an intentional, willful trespasser, and he would not be entitled to have the \$—— deducted; but being such willful trespasser, having taken the property of B. under those circumstances, the law lays down a higher measure of damages, gives him no credit for the labor and cost expended on the raw material, but charges him with the whole value of it in its manufactured state. Now, that is aside, of course, gentlemen of the jury, from the facts in this particular case, but it is by way of illustration, for the purpose of conveying to your minds the legal principles that we have to do with, and it is given because the testimony in this case is of a great mass, going into great detail, dealing with a subject with which few of you are likely to be at all familiar. This same rule to which I have called your attention has also been applied in the taking of coal; and in the taking of coal by one to whom it does not belong, the rule is that if the taking is the result of an honest mistake as to the true ownership of the mine, and the taking is not a willful trespass, then the measure of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine, if the trespass be an innocent one. If it be a willful one, then the measure of damages is the value of the coal at the mouth of the mine, without any allowance made for the expense and cost of getting it out.⁴⁰

⁴⁰ *Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co.* (O. C. A. Colo.) 203 F. 795, 122 C. C. A. 113.

§ 3864(2). *Illinois*

You are instructed that if the jury believe, from the evidence, that the defendant, by its servants and employees, mined coal from plaintiff's land without his consent, as alleged in the declaration, and did so by mistake or inadvertence, and without knowledge that the coal was being mined from plaintiff's land, then the jury are bound to allow plaintiff the value of the coal taken from his land within ——— years before this suit was commenced, estimated at the pit mouth, less the cost of carrying it where it was dug to the pit mouth, or, in other words, the plaintiff, under the above circumstances, is to be allowed the value of the coal at the pit mouth, less the cost of carrying it there from the place where it was dug, allowing defendant nothing for the digging, the verdict, however, not to exceed \$———. ⁴¹

§ 3865. *Same*—Presumption and burden of proof as to whether trespass intentional

The jury are instructed that the mere taking and converting to one's own use of the property of another constitutes, as already said, a trespass, and raises a legal presumption that the taker intended to do what he did do, and is thereby an intentional trespasser. In that event, and in the absence of any further evidence, the owner of the property taken would be entitled to a verdict fixed in amount by the higher measure of damages based upon said legal presumption. The law, therefore, places the trespasser under the burden of overthrowing, by proof, this presumption; that is, that the trespass was not willful and intentional. If the evidence introduced by the defendant in this case for that purpose creates a belief in your minds of the defendant's innocence and good faith in taking and converting the ores, then you should not find a verdict against the defendant based on the higher measure of damages, unless the persuasive force of that evidence showing such innocence and good faith is overcome by other substantial proof, facts or circumstances in the case, convincing you either that the defendant took the ores knowing at the time they were the property of the plaintiff, or at the time it took them acted in so doing in willful and reckless disregard as to whether they were its ores or the property of another. ⁴²

§ 3866. *Same*—Matters considered in determining cost of removing property to place where found

A large amount of testimony has been introduced relative to the cost of mining, transporting, and treating the ores taken from the

⁴¹ *Illinois & St. L. R. & Coal Co. v. Orla*, 82 Ill. 627, 25 Am. Rep. 342.

⁴² *Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co.* (C. C. A. Colo.) 208 F. 795, 122 C. C. A. 113.

trespassed workings. Should you find that the defendant was a willful, intentional, or reckless trespasser as herein defined, and therefore is answerable for the higher measure of damages referred to in these instructions, then all of such testimony as to cost becomes immaterial, because in that event the plaintiff is entitled to recover the full amount realized by defendant from the conversion of the ores to its own use, regardless of the expenditures incurred by it in so doing. In the event you are called upon to determine such cost, you must consider solely the cost to defendant of mining, transporting, treating, and converting into money the particular ores in question. The defendant is not entitled to deduct any portion of a general expense incurred by it in its mine operations, not attributable to the particular ores in question, and which it would have incurred, had it not mined any of these ores, but had confined itself to the mining, transporting and treatment of the remaining ores extracted from its own territory during the period in controversy. For example, all fixed charges, salaries of officers and employes, expenses of constructing, developing, or maintaining any portion of defendant's mine, mill, or plant, not incurred in or by reason of the extraction or treatment of the ores in controversy, are not to be considered, even though you may believe that by reason of the expense so incurred the cost of producing the particular ores in question may have been reduced. And in considering any testimony introduced at the trial, oral or documentary, relative to such costs, you must eliminate all items of the character above indicated, and you must also consider the reliability and accuracy of the data or records upon which such testimony is based.⁴⁸

⁴⁸ *Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co.* (O. C. A. Colo.) 203 F. 795, 112 O. C. A. 113.

CHAPTER CCIV

MONEY LENT

§ 3867. Liability of husband for money lent to wife.

§ 3867. Liability of husband for money lent to wife

You are instructed that it is necessary for the plaintiff, to entitle him to a verdict at your hands, to prove by a preponderance of the evidence the essential allegations of his complaint; that he in fact loaned the money; that it is due; that it has not been repaid to him. It is conceded on the part of the defendants that a verdict may be rendered against one of the defendants, that is, Mrs. ———, but the contention is that Mr. ———, the defendant, her husband is not liable in this action for the reason that the loan, if a loan was made, was made to the woman, and was not made to both of them, or not made to the man. Gentlemen, you are to determine from all the evidence in the case whether the money was loaned, if it was loaned, to the defendant the woman or to the defendants the woman and her husband.¹

You are instructed that you are to consider all this evidence, and if your minds are satisfied by a preponderance of the evidence that these two defendants—the man and wife—desired to borrow the money for the purpose of buying a property, either together or one of them, for the purpose of entering into a business, either together or one of them, and for that purpose the wife went to the plaintiff and received the money, and that her husband knew of the fact that she had gone for the money, or knew of the fact that she had brought it home, and they had previously understood between themselves that it was for the benefit of both of them, why, he is liable the same as she for that money.²

¹ Horka v. Wieczorek, 115 N. E. 949, 64 Ind. App. 387.

² Horka v. Wieczorek, 115 N. E. 949, 64 Ind. App. 387.

CHAPTER CCV

MONEY PAID

§ 3868. Recovery of money paid for goods never delivered.

§ 3868. Recovery of money paid for goods never delivered

You are instructed that the plaintiffs claim that \$—— of the \$——, was overdraft; that it was for thirty tubs of butter, which they claim the defendant never delivered, and which they say they never received. If that is true, the defendant received \$—— that did not belong to him, and the law implies a promise on his part to repay it.¹

¹ Noyes v. Parker, 24 A. 12, 64 Vt. 373.

CHAPTER CCVI

MONEY RECEIVED

§ 3869. Liability in general.

3869(1). Illinois.

3869(2). Kentucky.

§ 3869. Liability in general

§ 3869(1). Illinois

The court instructs the jury that the plaintiffs may recover in this suit, if the jury believe, from the evidence, that the defendant had in his possession, when this suit commenced, money which, in equity and good conscience, belongs to the plaintiffs; and if the jury believe, from the evidence, that said defendant received the proceeds of the grain described in the declaration, and that said grain belonged to the plaintiffs, then the jury will find for the plaintiffs; and if the jury so believe, and believe, from the evidence, that said defendant promised to pay to the plaintiffs the money in controversy in this case, then the jury will find for the plaintiffs.¹

§ 3869(2). Kentucky

You are instructed that, if the jury believe from the evidence that the plaintiff turned over to the defendant the notes mentioned in the pleadings and evidence for \$—— signed by herself and one ——, negotiable and payable at the Bank of ——, and defendant either advanced to her the money on said notes and retained \$—— of same or any less sum, or that the defendant discounted said notes in the —— Bank and —— Bank, or either of them, and retained out of the proceeds \$—— or any less sum, then the jury should find for the plaintiff such a sum as the defendant retained in excess of the interest thereon not exceeding \$——.²

You are instructed that, if the jury believe from the evidence that the defendant accounted to the plaintiff for all the money he received belonging to the plaintiff, and paid it to her or to persons or banks for her, or if the jury believe from the evidence that the defendant did not cash the notes and charge her any usury, then they should find for the defendant.³

¹ Reichwald v. Gaylord, 73 Ill. 503.² Stevenson v. Moore, 118 S. W. 951.³ Stevenson v. Moore, 118 S. W.

951.

CHAPTER CCVII

MONOPOLIES

- § 3870. Definition of "trust" or "monopoly."
- 3871. Elements of criminal liability for creating monopoly—Enhancement of prices.
- 3872. Elements of criminal liability for combination to suppress competition in violation of state statute.
- 3873. Same—Liability as dependent on whether alleged illegal contracts concern interstate commerce.
- 3874. Transactions of foreign corporation prior to obtaining permit to do business as cause for forfeiting permit.
- 3875. Burden of proof.
- 3876. Matters considered in determining issues.
- 3877. Limiting effect of evidence.

§ 3870. Definition of "trust" or "monopoly"

Upon the law of the case, you are instructed as follows: Under the laws of this state, a "trust" is defined as follows: A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state. Second. To increase or reduce the price of merchandise, produce, or commodities. Third. To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce. Fourth. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity or merchandise, produce, or commerce intended for sale, use, or consumption in this state. Fifth. To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall

agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity, that its price might in any manner be affected.¹

**§ 3871. Elements of criminal liability for creating monopoly—
Enhancement of prices**

The court instructs the jury that if you believe from the evidence to the exclusion of a reasonable doubt that the defendant, before the filing of the petition herein, entered into or became a member of a pool, trust, combine, agreement, confederation, or understanding with the ———, ———, ———, ———, and ———, or any of said companies, or another company or corporation, for the purpose of regulating, controlling, or fixing the price of fertilizers, grain drills, seeders, transplanters, disk harrows, potato diggers, potato planters, or the repairs of same, manufactured or produced, or to be manufactured or produced, by them, or any of them, and that the purpose and effect of said pool, trust, combine, agreement, confederation, or understanding was to enhance the price of said fertilizers, grain drills, seeders, transplanters, disk harrows, potato diggers, or potato planters, or either or any of them, above their real value, and if the jury further believe from the evidence beyond a reasonable doubt that the defendant company, in pursuance of and while a member of or a party to, or in any way interested in said pool, trust, combine, agreement, confederation, or understanding, in ——— county, and within ——— year before the filing of the petition herein, to wit, within ——— year before ———, and under the same market conditions that existed before the advance, if any, in price of said machinery or any of it, sold any fertilizer, grain drill, seeder, transplanter, disk harrow, potato digger, or potato planter, or transplanter, or any of them, or repair of same at more than their real value, then and in that event you should find the defendant guilty, and fix his punishment at a fine in any sum not less than \$———, and not more than \$———, in the discretion of the jury.²

The court instructs the jury that, although the jury may believe from the evidence to the exclusion of a reasonable doubt that the defendant entered into, or became a member of, such pool, trust, or combine, as set out in instruction No. ———, and that within ——— months prior to ———, the defendant, while a member of such pool, trust, or combine, sold some fertilizers, grain drills, seeders, transplanters, potato diggers, or potato planters, mentioned in instruction No. ———, in ——— county, either itself, or through

¹ *Waters-Pierce Oil Co. v. State*, 44 S. W. 936, 19 Tex. Civ. App. 1.

² *American Seeding Machine Co. v. Commonwealth*, 133 S. W. 972, 132 Ky. 589.

its agent, at a greater price than said machine was sold at before the defendant became a member of such pool, trust, or combine, as set out in instruction No. ———, yet if you believe from the evidence that the enhancement in the price of said machinery was due solely to the increased cost of labor or material, if any, in producing said machinery, you should find the defendant not guilty.*

§ 3872. Elements of criminal liability for combination to suppress competition in violation of state statute

You are instructed that if you find from the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into and performed a contract, in the state of ———, with any of the parties dealing in, buying, and selling oils, as named and set out in plaintiff's petition, since ———, by the terms of which contract it was agreed that said parties were to buy oil from the defendant company exclusively, for any specified time, and from no other source, in consideration of rebates allowed them by the defendant company, or for any other valuable consideration; or if you find that said company, so acting through its duly appointed and authorized agents, since said date, made, entered into, and carried out a contract in this state with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves, for a valuable consideration, to buy all their oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company; or if said defendant company, so acting since said date, made and entered into and carried out, in this state, a contract with any of the parties, as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company, either verbally or in writing, to buy all their oils exclusively from defendant company, and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents; and you further find that said sales of oils were not interstate commerce, as that is hereinafter explained to you, and that said officers or agents, so acting for said company in making said contracts, if any were so made, were acting in the scope of their employment and duty, and were authorized to make such contracts by the governing officers of said company, or that said governing officers, with a knowledge that

* *American Seeding Mach. Co. v. Commonwealth*, 158 S. W. 972, 152 Ky. 589.

said contracts had been made, consented to and ratified or carried out the same after they were made—then you are instructed that the defendant would be guilty of violating the law against trusts, of this state; and, if you so find the facts to be as above stated, you will return a verdict for the plaintiff against the defendant ———.⁴

You are instructed that the questions for you to determine in this case are: First. Were any of the contracts mentioned in section ——— of this charge made and entered into and carried out by the defendant company in this state since ———, acting through its agents? Second. Whether such agents were acting in the scope of their authority and employment in making such contracts, or, if not, whether same were ratified or acquiesced in by defendant company after they were so made. Third. Whether said contracts, if any, relate to interstate commerce or to business within this state.⁵

§ 3873. Same—Liability as dependent on whether alleged illegal contracts concern interstate commerce

You are further instructed that this court has no jurisdiction over, and the laws of this state do not apply to, interstate commerce; that is, to commerce between the different states of the United States. Shipments of oils or other products, made by the defendant from points without this state to its agents within this state, is interstate commerce, until such oils are sold by said company in the original packages in which it was shipped into this state, and as such is not subject to the laws of this state regulating the sale thereof; and if the evidence introduced before you shows any of the contracts set out in plaintiff's petition were made in reference to interstate commerce, then you will not consider such contracts further, as the laws of this state do not cover such transactions; but, on the other hand, if the defendant company shipped oils from points beyond this state to its agents to points within this state, and, after their receipt in this state, the same were sold by said agents in this state, to parties in this state, in broken packages or by retail, and not in the original packages in which said oils were shipped into this state, then such business is not interstate commerce, and is subject to the laws of this state. You are further instructed that, even though the contract may have reference to interstate shipments of oils, yet if the parties go further, and contract that such oils, after being sold by said defendant company to parties in this state, shall be sold by said parties at a price fixed by the duly authorized agents of defendant company, then you are informed that such dealing with said oils, after its sale to parties

⁴ Waters-Pierce Oil Co. v. State, 44 S. W. 936, 19 Tex. Civ. App. 1.

⁵ Waters-Pierce Oil Co. v. State, 44 S. W. 936, 19 Tex. Civ. App. 1.

in this state, is not protected by the interstate commerce laws, but such contracts, if made, are subject to the laws of this state.⁶

§ 3874. Transactions of foreign corporation prior to obtaining permit to do business as cause for forfeiting permit

You are instructed that the law against trusts in this state became a law on ———, and was amended in ———, and the defendant company obtained its permit to do business in this state on ———, and all transactions in evidence before you, of date prior to ———, are immaterial in this case, except where such contracts were continued and carried out subsequent to ———, and for the purpose of showing the course of dealing of said company in this state, and such transactions prior to ——— are no ground for forfeiture of defendant's permit to do business.⁷

§ 3875. Burden of proof

You are instructed that the burden of proof is on the plaintiff to show, by a preponderance of the evidence, the facts necessary to entitle it to recover.⁸

§ 3876. Matters considered in determining issues

You are instructed that there has been certain evidence introduced before you tending to show efforts and inducements offered by the agents of the defendant company to parties to handle oils of defendant company exclusively, and tending to show refusal of the agents of said company to sell parties handling other oils than those of defendant company, and of discrimination in prices against parties handling other oils than those of defendant company, and of cutting of prices by defendant company to break down competition. None of these things are unlawful, and was only admitted as bearing upon the question of the course of dealing of defendant company in this state, and as bearing upon the question whether or not the defendant company made or entered into the contracts, or any of them, as set out and mentioned in section No. ——— herein, and as to whether or not such contracts or course of dealing, if any such there was, was known to the governing officers of the defendant company or was authorized by them.⁹

You are instructed that there has been introduced in evidence before you a certain contract, known as the "——— Agreement," and certain evidence tending to show that the defendant company became a member of and entered into said agreement.

⁶ Waters-Pierce Oil Co. v. State, 44 S. W. 936, 19 Tex. Civ. App. 1.

⁷ Waters-Pierce Oil Co. v. State, 44 S. W. 936, 19 Tex. Civ. App. 1.

⁸ Waters-Pierce Oil Co. v. State, 44 S. W. 936, 19 Tex. Civ. App. 1.

⁹ Waters-Pierce Oil Co. v. State, 44 S. W. 936, 19 Tex. Civ. App. 1.

You are instructed that the evidence is not sufficient to show that defendant became a member of said organization, if at all, in a manner that violates the trust laws of this state, and you will therefore disregard all testimony upon this branch of the case.¹⁰

§ 3877. Limiting effect of evidence

You are instructed that there has also been introduced in evidence before you certain evidence in regard to a contract made by the defendant company with the ——— Company, and also with ———, with ———, and ———, in the state of ———, by which they purchased the business of such concerns. You are instructed that such transactions as these are not believed to be in violation of the laws of this state, and the evidence in regard to these transactions will only be considered by you as bearing upon the course of dealing of defendant company in this state.¹¹

¹⁰ Waters-Pierce Oil Co. v. State,
44 S. W. 936, 19 Tex. Civ. App. 1.

¹¹ Waters-Pierce Oil Co. v. State,
44 S. W. 936, 19 Tex. Civ. App. 1.

CHAPTER CCVIII

MORTGAGES

- § 3878. What deemed land subject to mortgage—Rock.
3879. Liability of assignor to assignee.
3880. Acquisition of equity of redemption by mortgagees.
3881. Foreclosure—Redemption.

See, also, Chattel Mortgages.

§ 3878. What deemed land subject to mortgage—Rock

The court instructs the jury that rock, in the common acceptation of the term, is real estate; and where land is conveyed with rock located thereon, unless the rock is reserved on the face of the deed, it passes to the grantee in the deed along with the land conveyed, and this is true whether the rock is piled up or scattered over the land conveyed.¹

The court instructs the jury that land signifies any ground forming a part of the earth's surface, whether soil or rock or water covered; that it is the solid material of the earth, whatever may be the ingredients thereof, whether soil or rock or other substance; and if you believe from the evidence that the railway company acquired of S. the right to place upon the lands then owned by him earth and rock taken from a railroad cut near by, with the understanding that the said earth and rock, when so placed, should be the property of the said S., and that, in pursuance of the said contract, the said company did place upon the lands of the said S. rock and soil, whether intermingled or not, then the said rock and soil became a part of the lands of the said S. upon which placed, and passed as land under the deed of trust to M., trustee, and is real estate in the hands of the purchaser from the said trustee, and cannot be recovered in this suit.²

The court instructs the jury that if they believe from the evidence that the said S. got from the railway company \$—— for the right to pile the waste from the railroad cut upon his lands, and for the temporary use of a portion of his land as a right of way, then the adaptability of the said waste for the uses of the said land is not to be considered by the jury in ascertaining whether the said S. intended to use such waste as real estate or personal property.³

¹ Eggborn v. Smith, 77 S. E. 593,
114 Va. 745, Ann. Cas. 1914C, 1148.

² Eggborn v. Smith, 77 S. E. 593,
114 Va. 745, Ann. Cas. 1914C, 1148.

³ Eggborn v. Smith, 77 S. E. 593,
114 Va. 745, Ann. Cas. 1914C, 1148.

The court instructs the jury that if they believe from the evidence that the railway company acquired from S. the right to waste rock and earth taken from the cut being excavated by it upon the land of the said S., and did so waste the said rock and earth, piling it in different piles with the understanding that same should be the property of the said S., then the said rock and earth became a part of the real estate upon which placed, and would pass as such, unless same was reserved under a deed for the said real estate, unless said S. did some act other than talking of selling it, to show he intended to utilize it as personal property.⁴

The court further instructs the jury that, if S. claimed the rock at the time of the conveyance from himself to M., trustee, he should have notified the said M. of his claim at the time of the conveyance to him; and, if he failed to do so, the rock passed to M., trustee, under the deed conveying the land, as a part of the land; and the burden is upon the plaintiff to show, by a preponderance of the evidence, that such notice was given; and this is true notwithstanding the jury may believe the rock was personal property.⁵

The court instructs the jury that if they believe from the evidence that the railway company acquired of S. the right to waste its rock and material taken from the railroad cut near the land of the said S. upon the said land, with the understanding that such waste material was to be the property of the said S. after the railroad company had finished therewith, and did so place same upon the land, and the said S. had in his mind an idea that he might thereafter be able to sell and dispose of the said material at some future date, if he got a price satisfactory to himself, and would not sell unless he did get a satisfactory price, then there was no fixed determination in his mind to remove the material from the land, except in the contingency of obtaining a satisfactory price therefor, and he cannot be said to have intended it as personal property, unless he could get a price at which he was willing to sell it.⁶

The court instructs the jury that if they believe from the evidence that the rock in the declaration mentioned is a pile covering an acre or more of land, such pile consisting of earth, rock dust, and rock of all sizes from the most minute particle up to rock taking several men to lift, and, from an inspection of the rock and the land adjoining, that this pile of material is evidently waste from a deep railroad cut, and that it had lain upon the land in

⁴ Eggborn v. Smith, 77 S. E. 593, 114 Va. 745, Ann. Cas. 1914C, 1148.

⁵ Eggborn v. Smith, 77 S. E. 593, 114 Va. 745, Ann. Cas. 1914C, 1148.

⁶ Eggborn v. Smith, 77 S. E. 593, 114 Va. 745, Ann. Cas. 1914C, 1148.

question from the time of its excavation from the said cut in ——— or ——— without being disturbed in any particular to the time of the conveyance of S. to M., trustee, then the said rock and other material therewith mixed is presumably real estate, and the burden is upon the plaintiff to show that he did some overt act or acts of which the defendant had notice or the public generally could have seen, indicating an intention to remove the said rock and use it as personal property.⁷

The court further instructs the jury that if they believe from the evidence, when the land on which the rock in question is located was conveyed to M., trustee, it was piled or scattered over from an acre and a half to two acres of the land conveyed, and from two to ten feet deep, with an annual growth of grass, weeds, and vegetation thereon, then, unless they believe from the evidence that the appearance of the rock pile itself was sufficient to put a reasonable man on notice that the said rock was claimed as personal property, they must find for the defendant; and this is true notwithstanding they further believe from the evidence that the said S. did claim the rock as personalty and treated it as such.⁸

§ 3879. Liability of assignor to assignee

You are instructed that, when one party assigns or transfers a paper purporting to be a genuine instrument, the transferror impliedly warrants that the paper is what it purports to be, and that the party who made it is real, and this warranty is not affected by the fact that the paper is assigned without recourse, nor by the fact that the party who transferred the paper did not know that the paper was not genuine. The transferror is still liable, unless it appears at the time of the transfer that he expressly told the purchaser that he would not warrant the paper to be genuine.⁹

You are instructed that the words "without recourse" in an assignment means that the party does not guarantee that the maker will pay a paper, but, notwithstanding these words, he still guarantees that the paper is genuine, unless the agreement between the parties was that he would not warrant their genuineness, and this is so even though the parties who made the transfer believed the papers were genuine, and had no suspicion that they were fictitious.¹⁰

§ 3880. Acquisition of equity of redemption by mortgagee

You are instructed that, it being admitted that on ———, ——— and wife reconveyed to plaintiff ——— acres of the ——— acre

⁷ Eggborn v. Smith, 77 S. E. 593, 114 Va. 745, Ann. Cas. 1914C, 1148.

⁸ Eggborn v. Smith, 77 S. E. 593, 114 Va. 745, Ann. Cas. 1914C, 1148.

⁹ Hall v. Latimer, 61 S. E. 1057, 81 S. C. 90.

¹⁰ Hall v. Latimer, 61 S. E. 1057, 81 S. C. 90.

tract, at which time plaintiff held a mortgage upon the whole tract, and the relation of mortgagor and mortgagee existed between them, then on account of this relation the law presumes that the transaction was fraudulent, but if the jury shall find from the evidence that the transaction was free from fraud or oppression, and that the price paid for the land, under all the circumstances, was fair and reasonable, then the presumption of fraud raised by the law is rebutted, and the sale and conveyance of the ——— acres of land would be valid, and the defendants would have no right to set the same aside upon this ground.¹¹

§ 3381. Foreclosure—Redemption

You are instructed that, in order to redeem land sold under mortgage, the mortgagor must tender to the purchaser the amount for which the land sold, with ——— per cent. interest; and if there be more than one tract of land sold, and the mortgagor desires to redeem only one of them, he must tender to the purchaser the amount for which said tract sold, with a statement or notification that he tenders the same to redeem that particular tract.¹²

¹¹ Jones v. Williams, 96 S. E. 1036, 176 N. C. 245.

¹² Alexander v. Bridgford, 27 S. W. 69, 59 Ark. 195.

CHAPTER CCIX

MOTOR VEHICLES

A. LIABILITY FOR INJURIES RESULTING FROM USE OR OPERATION

- § 3882. Duty towards children playing around machine.
3883. Liability of owner or operator of car to guest.
3884. Liability of owner of car for negligence of driver.
3885. Liability of owner of car for acts of son.
3886. Presumption that driver engaged in owner's service.

B. CRIMINAL LIABILITY FOR UNLAWFUL OPERATION

3887. Liability for operating motor vehicle without consent of owner or person having same in charge.
3887a. Duty of operator causing accident to make himself known.

C. AUTOMOBILE INSURANCE

3888. Damage by water—Duty of insured to mitigate damage.

A. LIABILITY FOR INJURIES RESULTING FROM USE OR OPERATION

See, also, Animals; Homicide; Streets and Highways.

§ 3882. Duty towards children playing around machine

The court instructs the jury that the defendant when he came from the house of his father-in-law, if he saw children there in his automobile or upon some portion of it—that is, if he did see them—was under the circumstances surrounding him at the time bound to use ordinary care to determine, from the size and appearance of the children, their age and their discretion, whether and what precautions should be taken to avoid injuring them, and to exercise care commensurate with the perils of the situation, if any perils then existed. If you find, however, that the defendant was exercising the degree of care the circumstances required and demanded before he put his automobile in motion, and that after the automobile was in motion the plaintiff jumped upon some portion of it, without knowledge on the part of the defendant that the plaintiff was about to do so, or had done so, then the defendant would not be liable for any injuries sustained by the plaintiff under such circumstances. If, however, the defendant had reason to believe that children, including the plaintiff, from their conduct and their actions would follow the car or automobile, or come from the side and attempt to climb or jump upon it, or some portion of it, he was bound to use ordinary care in the use of his eyes and senses to avoid injuring them, or any one of them. If he chased these children away, and warned them to keep away from his vehicle or car, what did ordinary care require or demand of him at the time he put the automobile in motion? Was he bound to anticipate

that the plaintiff would return, or that he would not return, or would return and place himself in a position of danger? What would a man of ordinary prudence have done under the circumstances? I say to you this defendant was bound to know that a child under the age of ——— years might act upon a childish impulse, and if the plaintiff was so close to the car as the defendant got into the car and started it, or put it in motion, and his conduct was such as to lead a prudent man to believe that he was about to jump upon the car, you have a right to inquire what ordinary care and prudence required of the defendant under such circumstances.¹

§ 3883. Liability of owner or operator of car to guest

See, also, post, § 4059.

I charge you, gentlemen of the jury, that if the defendant, at the time plaintiff's intestate was in said car, and at the time said car ran off said embankment and killed plaintiff's intestate, was exercising that degree of care and diligence which a man of reasonable prudence engaged in like business would exercise for his own protection and the protection of his family and property, then the defendant was not guilty of negligence, and you would not be authorized to find a verdict for the plaintiff under either count of the complaint.²

§ 3884. Liability of owner of car for negligence of driver

The court instructs the jury that, if you find that the defendant was, at the time of the accident, the owner of the automobile which caused the injury, and the person running or operating it was under his direction and control, then such operator was the servant of the defendant, and any negligence in the operation of the machine would be the negligence of the defendant. And the defendant would be liable for any injury proximately caused by such negligence, provided the person injured was not guilty of some negligence on his part that contributed to the injuries.³

§ 3885. Liability of owner of car for acts of son

Liability cannot be cast upon the defendant in this case because he owned the car, or because the driver at the time of the accident was his son, or because he permitted his son to use the car. There must be the further relation of master and servant between them, and the son at the time of the accident must have been using the car in the business of the defendant.⁴

¹ Ziehm v. Vale, 120 N. E. 702, 98 Ohio St. 306, 1 A. L. R. 1381.

² Galloway v. Perkins, 73 So. 956, 198 Ala. 658.

³ Grier v. Samuel (Del.) 86 A. 209.

⁴ Boyce, 106.

⁵ Farnum v. Clifford, 106 A. 344, 118 Me. 145.

§ 3886. Presumption that driver engaged in owner's service

You are instructed that it is admitted by the pleadings that the defendant was the owner and one of the occupants of the automobile at the time of the collision. This is prima facie proof that the driver was engaged in the owner's service, and a presumption arises that the car was in use for the owner's benefit. Testimony that the automobile was loaned to ———, the other occupant of the car, does not, as a matter of law, destroy the presumption unless it is believed by you. The truth or falsity of this testimony is for you to determine. The jurors are the exclusive judges of the credibility of the witnesses and the weight of the testimony. Therefore, if you do not believe that the said automobile was loaned to said ———, or in his possession, as claimed by the defense, then I instruct you that, if you find that the death of ——— was the result of the negligent operation of the car, your verdict must be for the plaintiffs, unless you further believe that the deceased was guilty of contributory negligence.⁵

B. CRIMINAL LIABILITY FOR UNLAWFUL OPERATION

Criminal liability for negligence in driving automobile, see ante, § 2892.

§ 3887. Liability for operating motor vehicle without consent of owner or person having same in charge

You are instructed that this statute was designed to protect the owners of motor vehicles in the possession and operation of their cars, and indirectly to protect the public from the consequences of the improper use of motor vehicles. According to this statute the offense consists of the taking or operating of the motor vehicle of another without the consent of the owner. In cases where this charge is made, the important point in controversy is very apt to be the matter of consent. The scope of this statute is not restricted to the taking and operation of a motor vehicle by one who has no relation whatever to the owner, but extends to and includes one who may have a general relation or a special relation to the owner, such as servant or bailee, for it is intended by the statute to prevent a servant or a bailee improperly taking and operating a motor vehicle quite as well as it is intended to protect the owner and the public from the taking of the same by a stranger. In other words, a chauffeur employed to operate a machine, or a garage manager or a garage employé engaged to care for or repair a machine, who exceeds the contract of his employment by taking and operating his employer's machine without his employer's consent, is just as amenable to the provisions and punishments of this law as one

⁵ *Randolph v. Hunt*, 183 P. 358, 41 Cal. App. 739.

who, without any relation to the owner, takes and operates a machine without the owner's consent. In the case under consideration the first question is not simply whether ——— was the servant or chauffeur of the owner, for the determination of that question alone would not determine the issue of his guilt or innocence under this statute, but whether, as the servant or chauffeur of the owner or in any other capacity, he took and operated the machine without the owner's consent. If he was the servant or the chauffeur of the owner and did not have the consent of the owner to take and operate the machine for his own private purpose and pleasure, then he violated the provision of this act. If on the contrary he has satisfied you from the evidence, that in taking and operating the machine, which facts are not denied, he did not take and operate the machine for his own pleasure and purpose, but did so under the particular direction and for the special purpose indicated by the owner, then he is not guilty. With respect to ———, therefore, the question for your determination is whether he took and operated the machine without the owner's consent.⁶

§ 3887a. Duty of operator, causing accident, to make himself known

The jury are instructed that, if you find from the evidence beyond a reasonable doubt that the collision between the machine operated by the defendant and the person of the boy mentioned in the evidence was the cause of the injury to him mentioned in the evidence, if you find that he was injured, then it is for you to say whether or not the state has shown you by its testimony, and you can find from the evidence, beyond a reasonable doubt, that defendant went away without stopping and making himself known. Under the statute the defendant must both have stopped and made himself known. To make one's self known is to disclose one's identity—to show or make known to some person or persons in the vicinity who one is, what his name is, and where he may be found. You are to say on the testimony here whether this defendant did in that sense make himself known. Under the statute the act of defendant in going away without making himself known, if he did so, must have been done knowingly to render him liable to this prosecution. He must have been aware that harm had been done to the boy; it must have been present in his mind that there had been an injury; and then, with that in his mind he must deliberately have gone away without making himself known.⁷

⁶ State v. Cusack (Del.) 89 A. 216,
⁴ Boyce, 469.

⁷ State v. Verrill (Me.) 112 A. 673.

C. AUTOMOBILE INSURANCE

§ 3888. Damage by water—Duty of insured to mitigate damage

The court instructs the jury that, in arriving at the damages inquired about in this issue you will take into consideration the reasonable, fair, market value of the car just prior to the accident on the ferry, and its reasonable, fair, market value just after it had suffered the damage from salt water as shown by the evidence, limiting the amount of damages which you may allow to what it would take to repair the parts that could be properly repaired, and to replace the parts that were necessary to be replaced in the car to put the same in substantially as good a condition as it was just prior to the accident. And should you further believe from the evidence that plaintiff, or those whom he selected for the purpose, did not exercise ordinary care in the matter of removing said automobile from the water and giving it further attention after it had been submerged in the water, and that failure in this regard caused additional damage over and above what the car would have sustained had he, or those whom he selected, used such care in the respect just mentioned, you will not include such amount in your answer to this question. By the term "ordinary care" is meant such care as a person of reasonable prudence would have used in the same or similar circumstances.⁸

⁸ *American Automobile Ins. Co. v. Fox* (Tex. Civ. App.) 218 S. W. 92.

CHAPTER CCX

MUNICIPAL CORPORATIONS

A. CONTRACTS FOR PUBLIC IMPROVEMENTS

- § 3889. Performance of contract for construction of sewer—Substantial performance.
3890. Authority of agent of city to change terms of contract.
3891. Conclusiveness of decision of engineer or other designated umpire.
3892. Same—Impeachment for fraud.

B. LIABILITY FOR INJURIES RESULTING FROM PUBLIC IMPROVEMENTS OR EXERCISE OF POLICE POWER

3893. Damages from opening street.
3894. Right to damages for change of grade.
3895. Measure of damages for change of grade of street.
 3895(1). Connecticut.
 3895(2). Georgia.
 3895(3). Iowa.
 3895(4). Missouri.
 3895(5). Pennsylvania.
3896. Same—Recovery for inconvenience sustained during progress of work.
3897. Same—Damages from diversion of surface water.
3898. Same—Deduction of benefits.
 3898(1). Connecticut.
 3898(2). Missouri.
 3898(3). Tennessee.
3899. Same—Effect of increase in value shared in by community as a whole.
3900. Liability for removal of lateral support of abutting lots.
3901. Right of city, as against abutting owner, to remove shade trees standing in street.
3902. Liability for injuries to property by maintenance of pesthouse in vicinity.
3903. Same—Damages.

C. LIABILITY FOR TORTS AND NEGLIGENCE IN GENERAL

3904. In general.
3905. Liability for negligence or mistake of policemen in making arrests.
3906. Liability for trespass on lands abutting on street.
3907. Negligence with respect to conduct and control of public places other than streets—Reservoirs.
3908. Duties with respect to jail and care thereof.
3909. Same—Liability for negligence of jailer or attendant.
3910. Same—Remote and proximate cause.
3911. Negligence with respect to equipment and operation of municipal electric light plant.
3912. Negligence of city with respect to water mains.
3913. Same—Plaintiff's failure to maintain sufficient drain as proximate cause of flooding by broken main.
3914. Same—Contributory negligence.
3915. Defective water plug.
3916. Duty with respect to preventing fires—Liability on account of fire alleged to have spread from city dump to adjacent property.
3917. Liability for destruction of property by mob.

- 3918. Burden of proof.
- 3919. Damages from defective water main or water plug.
- 3920. Damages for injury to land by fire.

D. LIABILITY ON ACCOUNT OF DEFECTIVE STREETS OR OBSTRUCTIONS THEREIN

1. *Liability in General*

- 3921. Power to delegate duty to repair to property owners—Manholes.
- 3922. Elements of cause of action.
 - 3922(1). Iowa.
 - 3922(2). Kansas.
 - 3922(3). Nebraska.
 - 3922(4). Pennsylvania.
 - 3922(5). Virginia.
 - 3922(6). Washington.
 - 3922(7). West Virginia.
- 3923. Liability for pure accidents.
 - 3923(1). Montana.
 - 3923(2). Washington.
- 3924. Proximate cause of accident.
 - 3924(1). Texas.
 - 3924(2). Washington.

2. *To What Streets or Traveled Ways Liability of City Extends*

- 3925. In general.
 - 3925(1). Alabama.
 - 3925(2). Minnesota.
 - 3925(3). Wisconsin.
- 3926. Duty with respect to keeping every part of street in repair.
- 3927. Duty as to unopened street.
- 3928. Streets laid out, but not accepted as such, by city.
- 3929. Duty with respect to sidewalks.
- 3930. Approach to public bridge.
- 3931. Crossing not constructed by city.

3. *What Constitutes Negligence on Part of City and Degree of Care Required*

- 3932. Degree of care required in general.
 - 3932(1). California.
 - 3932(2). Colorado.
 - 3932(3). Delaware.
 - 3932(4). Illinois.
 - 3932(5). Kansas.
 - 3932(6). Kentucky.
 - 3932(7). Missouri.
 - 3932(8). Montana.
 - 3932(9). Nebraska.
 - 3932(10). Oklahoma.
 - 3932(11). Tennessee.
 - 3932(12). Texas.
 - 3932(13). Virginia.
 - 3932(14). Washington.
 - 3932(15). West Virginia.
- 3933. Liability for conditions resulting from carrying out plan adopted by city.
- 3934. Duty to put street in condition to withstand elements.
- 3935. Sufficiency of inspection of sidewalks.
- 3936. Liability as dependent upon character of defects.
 - 3936(1). California.
 - 3936(2). Illinois.
- 3937. Care required as dependent on amount of travel.

- § 3938. Same—Sidewalks in suburbs.
 - 3938(1). Alameda.
 - 3938(2). Illinois.
- 3939. Duty to blind persons.
- 3940. Right of city to claim benefit of precautions taken by contractor.

4. Particular Defects or Obstructions

- 3941. Permitting obstructions or dangerous structures in street.
 - 3941(1). Kentucky.
 - 3941(2). Texas.
- 3942. Same—Acts of public contractor and abutting owner.
- 3943. Permitting rotten meter box in street.
- 3944. Loose boards in sidewalk.
- 3945. Obstruction of sidewalk and curbing by lumber pile.
- 3946. Permitting excessively smooth surface of walk or excessive slant.
 - 3946(1). Colorado.
 - 3946(2). Missouri.
 - 3946(3). Wisconsin.
- 3947. Permitting accumulation of ice and snow.
 - 3947(1). Illinois.
 - 3947(2). Iowa.
 - 3947(3). Virginia.
- 3948. Permitting nuisance in street attractive to children.
- 3949. Obstructions near to traveled way.
- 3950. Duty to place barriers or warning signals.
 - 3950(1). Illinois.
 - 3950(2). Maryland.
 - 3950(3). Missouri.
 - 3950(4). Utah.
- 3951. Same—Duty to guard against falling off embankment or precipice.

5. Depressions and Holes in Street or Sidewalk

- 3952. Duty of municipality in general.
 - 3952(1). Kentucky.
 - 3952(2). Missouri.
- 3953. Liability as dependent on extent of depression.
- 3954. Defect in crossing—Opening between stepping stones.
- 3955. Failure to cover catch or sink basin.
 - 3955(1). Missouri.
 - 3955(2). Oklahoma.
- 3956. Duty to cover or guard drain or gutter.
 - 3956(1). Pennsylvania.
 - 3956(2). Texas.
- 3957. Defective covering of coal hole.

6. Notice to Municipality of Defects

- 3958. Necessity of notice to municipality of defects.
 - 3958(1). Illinois.
 - 3958(2). Iowa.
 - 3958(3). Kansas.
 - 3958(4). Missouri.
 - 3958(5). Nebraska.
 - 3958(6). Oklahoma.
 - 3958(7). Texas.
- 3959. Same—Obstruction of street by third person.
- 3960. Same—Liability for latent defects.
- 3961. Necessity of actual notice to city.
- 3962. Necessity of notice as to defects in original construction.
 - 3962(1). Iowa.
 - 3962(2). Tennessee.

- § 3963. What constitutes actual notice.
 - 3963(1). Pennsylvania.
 - 3963(2). Tennessee.
- 3964. Notice to what employees or officers binding on municipality.
 - 3964(1). Iowa.
 - 3964(2). Washington.
- 3965. Constructive notice of defects as equivalent to actual notice.
 - 3965(1). Iowa.
 - 3965(2). Kansas.
 - 3965(3). Nebraska.
 - 3965(4). Virginia.
- 3966. What constitutes constructive notice of defects.
 - 3966(1). Illinois.
 - 3966(2). Kansas.
 - 3966(3). Michigan.
 - 3966(4). Tennessee.
 - 3966(5). Wisconsin.
- 3967. Constructive notice of obstruction of street.
- 3968. Duty to make repairs on receiving notice of defects.
- 3969. Right to city to reasonable time after notice to remedy defects.
 - 3969(1). New Hampshire.
 - 3969(2). Virginia.

7. Liability of Public Contractor

- 3970. Right of public contractor to temporarily obstruct street.
- 3971. Maintenance of nuisance attractive to children.
- 3972. Effect of stipulation to keep street in repair for stated time.

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- 3973. Duty of traveler to use ordinary care.
 - 3973(1). Georgia.
 - 3973(2). Idaho.
 - 3973(3). Illinois.
 - 3973(4). Iowa.
 - 3973(5). Michigan.
 - 3973(6). Missouri.
 - 3973(7). Pennsylvania.
 - 3973(8). Virginia.
- 3974. Effect of slight negligence.
- 3975. Duty to exercise ordinary care to discover defects.
- 3976. Circumstances increasing degree of care required.
- 3977. Assumptions permissible to traveler with respect to safety of street.
 - 3977(1). Delaware.
 - 3977(2). Virginia.
 - 3977(3). Washington.
 - 3977(4). West Virginia.
- 3978. Unnecessarily choosing dangerous way or duty to take safest route.
 - 3978(1). Illinois.
 - 3978(2). Iowa.
 - 3978(3). Texas.
- 3979. Right of pedestrian to cross street at points other than regular crossings.
- 3980. Care required in descending hill with series of curves.
- 3981. Effect of prior knowledge by injured person of dangerous or defective condition of street.
 - 3981(1). Alabama.
 - 3981(2). Delaware.
 - 3981(3). Iowa.
 - 3981(4). Michigan.
 - 3981(5). Missouri.

- 3981(6). Montana.
- 3981(7). Nebraska.
- 3981(8). North Dakota.
- 3981(9). Virginia.
- 3981(10). Washington.
- 3982. Violation of city ordinance.
- 3983. Acts in emergencies.
- 3984. Care required from children.
 - 3984(1). Virginia.
 - 3984(2). Washington.
- 3985. Intoxication of person injured at time of accident.
- 3986. Effect of contributory negligence.
 - 3986(1). Georgia.
 - 3986(2). Kentucky.
 - 3986(3). Michigan.
 - 3986(4). Texas.
 - 3986(5). Washington.
- 3987. Negligence of plaintiff not proximate cause of accident.

9. *Pleading and Evidence*

- 3988. Confining plaintiff to negligence alleged in declaration.
- 3989. Presumptions and burden of proof.
- 3990. Res ipsa loquitur.
- 3991. Burden of proof as to contributory negligence.
- 3992. Matters considered in determining whether locus in quo defective.
 - 3992(1). Colorado.
 - 3992(2). West Virginia.
- 3993. Conditions prior to accident.
- 3994. Matters considered in determining question of contributory negligence.
 - 3994(1). Iowa.
 - 3994(2). Missouri.
- 3995. Limiting effect of evidence—Defects at other places than that of accident.
- 3996. Sufficiency of evidence of cause of injury.

EL NEGLIGENCE WITH RESPECT TO DRAINS AND SEWERS

- 3997. In general.
 - 3997(1). Georgia.
 - 3997(2). Illinois.
- 3998. Liability as dependent on whether sewer or drain private or public.
- 3999. Liability with respect to private sewer.
- 4000. Duty to repair public sewer.
- 4001. Liability for injuries to abutting owners through overflow of sewage.
- 4002. Duty to provide for flood caused by extraordinary storm.
- 4003. Liability for pollution of waters by sewage.
- 4004. Same—Right of one buying property with knowledge of acts of city.
- 4005. Liability for diversion of surface waters.
 - 4005(1). Illinois.
 - 4005(2). Iowa.
- 4006. Diversion of surface water into water course.
- 4007. Contributory negligence.
- 4008. Damages for failure to keep sewer in repair.
 - 4008(1). Georgia.
 - 4008(2). Kentucky.
- 4009. Damages for pollution of water course by sewage.
- 4010. Measure of damages for diversion of surface water.
- 4011. Duty of plaintiff to mitigate damages resulting from negligence of city with respect to drain.

F. LIABILITY FOR OBSTRUCTING WATER COURSE

- § 4012. Flooding lands of riparian owner—Proximate cause.
 4013. Same—Damages.

G. MATTERS PERTAINING TO REMEDIES AGAINST CITY

4014. Conditions precedent to enforcement of claim—Presentation to council.

H. TAXATION

4015. Validity of special tax bills—Description of premises.

A. CONTRACTS FOR PUBLIC IMPROVEMENTS

§ 3889. Performance of contract for construction of sewer—Substantial performance

The court further instructs the jury that if you find and believe from the evidence that the best quality of 24-inch hard burned, salt glazed, vitrified clay pipe, laid in the manner prescribed in the contract between defendants ——— and ——— and the plaintiff city were insufficient, too weak or inadequate for the purposes for which the same were intended by the contract, and that the broken and cracked condition discovered by plaintiff or its agents on or about ———, was due to the condition of said pipe so specified, and that said materials were furnished and the work done substantially as provided by said contract, then your verdict must be for the defendants.¹

The court instructs the jury that even if you find and believe from the evidence that in laying the sewer referred to in this cause the defendants did not use sand, but, instead of sand, used fine earth, that fact alone will not entitle the plaintiff to recover in this case, unless you further find and believe from the evidence that the defective condition of said sewer which plaintiff claims to have discovered in ———, and which it claims to have repaired, was directly occasioned by such failure on defendants' part to so use sand.²

§ 3890. Authority of agent of city to change terms of contract

The court instructs the jury that neither the street commissioner, nor any of his agents, nor any other officer or servant of the plaintiff city, had any authority to change the provisions of the contract in evidence so as to permit or authorize the defendants to substitute for the best quality of hard burned, salt glazed, vitrified clay pipe any pipes which were of any other quality, nor so as to permit or authorize said defendants to perform the work of laying said pipes in any other way or manner than according to

¹ City of St. Louis v. Ruecking, 134 S. W. 657, 232 Mo. 325.

² City of St. Louis v. Ruecking, 134 S. W. 657, 232 Mo. 325.

the provisions of the said contract, or in substantial compliance with the same.³

§ 3891. Conclusiveness of decision of engineer or other designated umpire

You are instructed that the plaintiffs herein, as contractors, and the defendant, the city of ———, by their written contract, made the decision of the consulting engineer and public improvement committee final as to all matters of dispute submitted to them, between the city engineer and the said contractors, as to classification of material excavated from the trenches in the construction of the sewer system provided for in said contract.⁴

You are further instructed that neither party to said contract can avoid the decision of said consulting engineer and public improvement committee upon matters of dispute submitted to them, as to the classification of said material so excavated, unless you find that said constituted tribunal, consisting of said consulting engineer and public improvement committee, acted capriciously or fraudulently, or failed to exercise an honest judgment in respect to said dispute.⁵

You are instructed that, if you find from the testimony that the plaintiffs, as contractors, while constructing a portion of the sewer system under their contract with the city of ———, encountered ledges or rock which, in the opinion of the city engineer, did not require blasting for its removal, and you further find that said contractors disagreed with said city engineers as to the classification of such material, and such disagreement or dispute as to classification of such excavation was submitted to the consulting engineer and public improvement committee, and that said consulting engineer and public improvement committee sustained the contention of the city engineer, and refused to classify such excavation as hard rock, and that in so deciding the said consulting engineer and public improvement committee acted faithfully and honestly upon such dispute submitted to them, then you are charged that plaintiffs would not be entitled to have such disputed excavation classified as hard rock, although you may believe there was an error in the judgment of the said consulting engineer and public improvement committee upon the matter of such classification, and that such error, if any, was injurious to plaintiffs; for, if the consulting engineer and public improvement committee acted faithfully and honestly in passing upon such dispute submitted to them,

³ City of St. Louis v. Ruecking, 134 S. W. 657, 232 Mo. 325.

⁴ Marshall et al. v. City of San Antonio (Tex. Civ. App.) 63 S. W. 133.

⁵ Marshall et al. v. City of San Antonio (Tex. Civ. App.) 63 S. W. 138.

neither the plaintiffs nor the defendant can complain of their decision.⁶

§ 3892. Same—Impeachment for fraud

You are therefore charged that if you find from the testimony that the plaintiffs herein, as contractors, while constructing a portion of the sewer system, under their contract with the city of ———, encountered ledges or rock, which, in the usual, customary, and workmanlike manner, required blasting for its removal, and you further find that said contractors and the city engineer disagreed as to the classification of such excavations, and you further find that such disputes or disagreements were submitted to the consulting engineer and public improvement committee, who sustained the contention of the city engineer, and refused to classify such excavation as hard rock, and you further find that in so deciding the said consulting engineer and public improvement committee acted capriciously or fraudulently, or failed to exercise an honest judgment, then you are charged that plaintiffs were entitled to have such excavation classified as hard rock, should you find it was entitled to such classification under the contract, and estimated accordingly, and you should so find by your verdict.⁷

B. LIABILITY FOR INJURIES RESULTING FROM PUBLIC IMPROVEMENTS OR EXERCISE OF POLICE POWER

§ 3893. Damages from opening street

The jury are instructed that, in determining whether any such adjacent property is damaged, you will determine whether or not the remaining property is benefited, and, if the damage is in excess of the benefits arising from the opening of the proposed street, then you will assess the damages to the amount of such excess; but, if you find the benefit to the adjacent property is equal to the damage the adjacent property will sustain by reason of the opening of the street, then you will find the property is not damaged.⁸

§ 3894. Right to damages for change of grade

You are instructed, however, that, if improvements were not made on plaintiff's property subsequent to the establishment by the defendant city of a permanent grade on ——— street in front of the property, plaintiff could not recover in this action, and you are instructed that, if improvements were made on plaintiff's property subsequent to the establishment by the defendant city of a

⁶ *Marshall et al. v. City of San Antonio* (Tex. Civ. App.) 63 S. W. 138.

⁷ *Marshall et al. v. City of San Antonio* (Tex. Civ. App.) 63 S. W. 138.

⁸ *City of Tacoma v. Wetherby*, 106 P. 903, 57 Wash. 295.

permanent grade on ——— street in front of plaintiff's property, unless you should find that such improvements were made according to such established grade, that plaintiff could not recover. You are instructed that property is improved according to an established grade whenever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted while the street upon which it abuts is maintained at the grade so established.⁹

You are further instructed that if you find that improvements were made on plaintiff's property subsequent to the establishment of a permanent grade on ——— street in front of plaintiff's property, and that such improvements were made according to the established grade, but do not find such grade was thereafter altered by the defendant city in such manner as to damage, injure, or diminish the value of the property in controversy, then your verdict will be for the defendant. You are instructed that by change or alteration of the grade of a street is meant actual physical change in the surface of the street, and no claim for damages exists on any other account than for an injury done by work actually performed. You are further instructed that, if the defendant city did work in altering the grade in front of plaintiff's property and then ceased operations for such length of time as to make it appear that the work is completed, plaintiff would only be entitled to recover, if at all, for the injury, if any, occasioned by what was done, but for nothing more.¹⁰

§ 3895. Measure of damages for change of grade of street

§ 3895(1). Connecticut

The court instructs the jury that special damages are such damages as accrue to an adjoining owner by depriving him of some right that he has and that the general public have not, or by doing some injury to his interest in the land, as, for instance, by depriving him of or inconveniencing his right of access or entrance into his land, or by injuring fences or walls or sidewalks or trees appurtenant to his land, or damages of this character where necessarily resulting from the acts done.¹¹

§ 3895(2). Georgia

You are instructed that the city would not be liable for any depreciation of value, if there was such, due to any other cause than the grading. The city is liable, if at all, only for such damage, if any, that its grading and work caused; and it was to enable you

⁹ Meardon v. Iowa City, 126 N. W. 939, 148 Iowa, 12.

¹⁰ Meardon v. Iowa City, 126 N. W. 939, 148 Iowa, 12.

¹¹ Forbes v. Town of Orange, 82 A. 559, 85 Conn. 255.

to decide this single question that all this evidence was admitted—as to the cost of the property, cost of readjusting property to new grade, rental value of this and other nearby property before and during and after the grading, description of the property and street, comparison with other property and streets, sales of other property near by, offers to buy property in this vicinity, and the opinion of witnesses as to value of this and other nearby property for sale and for rent, and all such evidence as you have listened to in this case. This is the evidence as stated to you, that you are to consider in passing on the sole question submitted to you. You are not bound to take the opinion of witnesses as conclusive on the subject of value. You will take such evidence into consideration and give it such weight as you think it is entitled to, along with all the evidence in the case.¹²

§ 3895(3). Iowa

The court instructs the jury that the first question for you to determine in this case is whether or not the plaintiff has been damaged. If you have found that he has been damaged, then you are instructed that the measure of his damages is the difference in the value of the property as it was just before the change of grade and as it was just after as affected by the change. If, because of benefits resulting to the property from the change, it is rendered as valuable or more so than before, there is no damage. You may consider resulting benefits, if any, and the improvement of the street as contemplated by the ordinance changing the grade.¹³

§ 3895(4). Missouri

The jury are instructed that in weighing the evidence in this case and making up their verdict they should not give any consideration whatever to the fact that the cost of improving ——— avenue was charged as a special tax against the adjoining property. The law assesses such cost against the adjoining property and the city is in no event liable to pay such tax, and the owner of the land so assessed is not entitled under the law to recover the same from the city either directly or indirectly.¹⁴

§ 3895(5). Pennsylvania

You are instructed that you may consider these several matters as elements in the cause, but you are not to award damages for the building of walls or the filling up of lots as special damages, or for the likelihood of injuring the building, etc. You are not to take up these separate items, and award separate damages for

¹² *City of Atlanta v. Sciple*, 92 S. E. 28, 19 Ga. App. 694.

¹³ *Meardon v. Iowa City*, 126 N. W. 939, 148 Iowa, 12.

¹⁴ *Widman Inv. Co. v. City of St. Joseph*, 90 S. W. 763, 191 Mo. 459.

them, and add them together; and say that is the damage suffered. The law has given another rule for the measuring of damages, and that rule is as before stated, and which I will now repeat. The law is this: You are to consider the market value of the property before the change, and unaffected by it, and its market value with the grade, and as affected by it. - If the establishing of the new grade has added more value to the property than it has depreciated from it, the verdict should be for the defendant. If it has depreciated from the property more than it has added to it, the verdict should be for the plaintiffs, and the measure of damages should be the difference between its value before and its value after.¹⁵

You are instructed that loss of his business has nothing to do with the case, unless it effects an injury to his land. If water is thrown upon his premises, and lies upon his property, it is his duty to conduct the water away from the cellar if he can; and whatever that would cost would be his damage, if that was his only claim. But you will allow full and ample damage for all these elements when you take the value before and after, and allow the difference. In doing that, you get rid of all these claims; and that is the way the law lays down the rule.¹⁶

§ 3896. Same—Recovery for inconvenience sustained during progress of work

I charge you that the plaintiffs can recover alone by reason of the change in the grade, and any inconvenience sustained by them during the progress of the work could not be looked to by you, in ascertaining the amount of damages they are entitled to, if any.¹⁷

§ 3897. Same—Damages from diversion of surface water

You are instructed that if you find from all the evidence in this case that the plaintiffs are entitled to recover, then the measure of plaintiffs' damages is the depreciation in the value of the property in controversy, which you find from the evidence in this case has been caused or occasioned by the change of the grade of said street and sidewalk, or from the change of the grade of the sidewalk alone, or by the accumulation and diversion of surface water.¹⁸

§ 3898. Same—Deduction of benefits

§ 3898(1). Connecticut

The court instructs the jury that the defendant may prove any special benefit to the plaintiff's property by reason of the change of

¹⁵ Chambers v. Borough of South Chester, 21 A. 409, 140 Pa. 510.

¹⁶ Chambers v. Borough of South Chester, 21 A. 409, 140 Pa. 510.

¹⁷ Acker v. City of Knoxville, 96 S. W. 973, 117 Tenn. 224.

¹⁸ Naysmith v. City of Auburn, 146 N. W. 971, 95 Neb. 582.

grade, and for that purpose may show the condition of the road before and after the change in grade, the benefit involved in the establishment of a grade likely to be permanent; and likely to give opportunity for and make probable beneficial improvements; but he may not prove the effect on the value of the plaintiff's property of private improvements made by adjoining proprietors subsequent to the change of grade.¹⁹

The court instructs the jury that private improvements subsequently made by the plaintiff's neighbors in their property are not such special benefits as can be applied in reduction of the damages sustained by the plaintiff by the change of grade, and that the special benefits available for such reduction are the local and peculiar benefits received by the plaintiff from such change.²⁰

§ 3898(2). *Missouri*

You are instructed that if the jury believe from the evidence that the property of the plaintiff was in any manner specially benefited by the grading of ——— avenue adjoining the same, and that the amount of said special benefits is equal to or greater than the damages, if any, done to said property by reason of said grading, then the plaintiff cannot recover, and your verdict should be for the defendant.²¹

§ 3898(3). *Tennessee*

You are instructed that if there is any special benefit to this particular piece of property, if you should be of opinion for instance that the leaving of these lots on a higher grade from that of the street, after it was lowered, made these particular lots more desirable for residence purposes, by reason of not coming in contact with the dirt or any filth that may accumulate on the street, then the jury may take that into consideration in the estimate of damages, and to the extent that it is a benefit, it should be looked to by the jury to reduce damages which otherwise the plaintiffs would have been entitled to recover in this lawsuit, if you find plaintiffs are entitled to recover at all.²²

§ 3899. *Same—Effect of increase in value shared in by community as a whole*

You are instructed that if you should be of the opinion that the market value of this property was equal to, or greater than, the market value of it before the grading of this street was entered upon, and you should be of the opinion that it is owing to a general increase in the value of property in common with all other property

¹⁹ *Forbes v. Town of Orange*, 82 A. 559, 85 Conn. 255.

²⁰ *Pickles v. City of Ansonia*, 56 A. 552, 76 Conn. 278.

²¹ *Widman Inv. Co. v. City of St. Joseph*, 90 S. W. 763, 191 Mo. 459.

²² *Acker v. City of Knoxville*, 96 S. W. 973, 117 Tenn. 224.

in that neighborhood, or in the city of ———, growing out of the fact that additional facilities have been furnished to the citizens, or that the grading of this street has been more advantageous to all parties adjacent thereto and living upon that avenue, then these are considerations that the jury must disregard and not be guided by in coming to their conclusion in this case, for the reason that benefits and advantages and general increase in value of property shared in by a community as a whole cannot be looked to for the purpose of placing it to the disadvantage of a particular owner, who brings an action of this character.²³

§ 3900. Liability for removal of lateral support of abutting lots

You are instructed that, even if you find that the houses were damaged or totally destroyed, if you further find that the lots, after the sliding, were more valuable than before, and were so much more valuable that, even taking into consideration the houses were damaged, still the lots were of a greater value than they were before, why then you would disregard, of course, the value of the houses entirely in making up your verdict.²⁴

You are instructed that, if you find from the evidence that the said property was as valuable, on the market, after the slide as it would have been had it not slid, but had stood at a 1 to 1 slope, then the plaintiffs cannot recover.²⁵

§ 3901. Right of city, as against abutting owner, to remove shade trees standing in street

The court instructs the jury for the defendant that, if they believe from a preponderance of the evidence that the sidewalk where the trees mentioned in evidence were felled had been continuously and uninterruptedly used by the general public with the knowledge of the respective owners of lot No. ———, and that such use was exclusive and under a claim of right and for a period of ——— years prior to the cutting of said trees, and if the jury believe from the evidence that it was reasonably necessary to make said sidewalk reasonably safe and convenient for passageway to cut and remove said trees, then the defendant town had a right to cut and remove the same, and the jury will not assess any damages against the defendant on account of the loss of said trees for shade and ornament.²⁶

²³ *Acker v. City of Knoxville*, 96 S. W. 973, 117 Tenn. 224.

²⁴ *Casassa v. City of Seattle*, 134 P. 1080, 75 Wash. 367.

²⁵ *Casassa v. City of Seattle*, 134 P. 1080, 75 Wash. 367.

²⁶ *Town of Durant v. Castleberry*, 64 So. 657, 106 Miss. 699.

§ 3902. Liability for injuries to property by maintenance of pesthouse in vicinity

The court instructs the jury that the law of this state made it the duty of the city of ——— to locate and build a suitable smallpox pesthouse in ——— county, not nearer the city limits, however, than one mile. And the court further says to the jury said city had the legal right to locate, build, and carry on the smallpox pesthouse for the care of smallpox patients at the place described and complained of in plaintiff's petition. Yet, while this is true, if the jury shall further believe from the evidence that by reason of the proximity of said pesthouse to the tract of ——— acres of plaintiff's land, where he lives, the same has been injured in value, the law entitles him to recover in this action damages commensurate with such injury, sufficient to compensate him therefor, according to further instructions herein.²⁷

The court instructs the jury that if you shall believe, from the evidence in this case, that by reason of the nearness of said pesthouse to the said land of the plaintiff, or any portion thereof, there is real probable danger of the smallpox being communicated through the atmosphere from said pesthouse to and upon a portion or all of plaintiff's land, so as to really cause any persons thereon to take the smallpox, or to really place them in danger of taking it, and that by reason of such jeopardy the value of plaintiff's land is thereby lessened to the extent of a part or the whole of the tract, you will find for the plaintiff such sum in damages as you may believe from the evidence such portion or all of the tract has been so damaged or lessened in value by such proximity of said pesthouse, not exceeding the sum claimed in plaintiff's petition.²⁸

The court further instructs the jury that unless you shall believe, from the evidence in this case, that there is a real probable danger of the smallpox being carried through the air from said pesthouse to and upon said land of the plaintiff, and persons thereon becoming infected therewith and taking the smallpox, then, and in such case, there is no legal cause of action against the defendant in this case; and you should find for the defendant, although you may believe from the evidence many persons other than the plaintiff are alarmed and express their fears of the smallpox anyhow. The meaning of this instruction is that you should not find for the plaintiff unless you shall believe from the evidence there is real probable danger that the air or the wind from the

²⁷ City of Paducah v. Allen, 63 S. W. 981, 111 Ky. 361, 98 Am. St. Rep. 422.

²⁸ City of Paducah v. Allen, 63 S. W. 981, 111 Ky. 361, 98 Am. St. Rep. 422.

pesthouse will blow the smallpox onto and give it to people on plaintiff's said land.²⁹

§ 3903. Same—Damages

The court instructs the jury that, if they should find for the plaintiff, then that the criterion or measure of damage is whatever amount plaintiff's farm has been depreciated in market or salable value by reason of the defendant's locating of and the maintaining of its pesthouse and carrying on the same in proximity to his farm.³⁰

C. LIABILITY FOR TORTS AND NEGLIGENCE IN GENERAL

§ 3904. In general

You are instructed that a town or city is liable for such injuries as are the result of its negligence or default, or the negligence or default of its duly authorized agents, in the performance of a duty imposed upon it by law.³¹

§ 3905. Liability for negligence or mistake of policemen in making arrests

You are instructed the defendant is not answerable in damages for arrests made by policemen for violations of the ordinances of the town, and for the lawful commitment to prison made under such arrests; and if you find, therefore, that ———, the intestate of the plaintiff, was upon the streets or in a public place in the town on the evening of ——— in an intoxicated condition, or in such condition that to all appearances he seemed to be intoxicated, and the town police, having their attention called to his condition, thereupon took the deceased into custody, and carried him to the calaboose, to detain him until sober enough to be taken before the mayor, and discharged according to law, and the said intestate was allowed to remain in the calaboose for this purpose, and, while thus confined, died in the calaboose, the defendant in this case is not liable in damages to the plaintiff, except and unless his death was caused by the condition and defective construction of the calaboose itself.³²

You are instructed that, when the defendant town, through its policemen, causes the arrest of persons engaged in violating its ordinances, the town is discharging a governmental function—a duty and power conferred on it by its charter—and in this respect

²⁹ *City of Paducah v. Allen*, 63 S. W. 981, 111 Ky. 361, 98 Am. St. Rep. 422.

³⁰ *City of Paducah v. Allen*, 63 S. W. 981, 111 Ky. 361, 98 Am. St. Rep. 422.

³¹ *Stidham v. Delaware City* (Del.) 67 A. 175, 6 Pennewill, 359.

³² *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

acts in the same way that the state acts through and by its sheriff when he makes arrests for violation of the state laws; and, in the discharge of these duties and obligations by the town, it does not incur any liability for damages for the negligence or mistake of its policemen.³³

The court instructs the jury that, if the jury find that plaintiff's decedent was drunk, openly and publicly, in the town, on ———, or to all appearances was publicly in a drunken condition, it was the duty of the policemen to arrest him, remove him from public view, and confine him in the city prison until sober, and then carry him before the mayor to answer the charge; and it was not necessary for the policeman to have secured a warrant before he made the arrest and took said decedent into custody; and, for making the arrest under such circumstances, the defendant is not answerable in damages, and the defendant would not be liable to the plaintiff in damages in this case on account of the arrest, even if the policemen had gone to the extent of using violence in making the arrest, or had been careless and negligent in making the arrest and putting the said ——— in prison.³⁴

§ 3906. Liability for trespass on lands abutting on street

You are instructed that, if the jury believe from the evidence that at the time of doing the acts complained of, which are in evidence, there was a right of common and public highway in the defendant to a road of only about ——— feet or less in width over the land of the plaintiffs' testator, and that an excavation in excess of the defendant's right of highway and of about ——— feet in width was made by the defendant upon the land of plaintiffs' testator, and believe from the evidence that the defendant so exceeded its right of highway and excavated gravel on the land of the plaintiffs' testator, and removed and used the same beyond the limits of said land to repair or improve other public highways in the ———, without making just compensation to the owner of the soil or having any condemnation proceedings or exercising its lawful powers according to law, then the jury are instructed that the defendant would be liable as a trespasser for so doing, and that the jury must find for the plaintiff and assess such damages as the evidence shows would make them whole.³⁵

You are instructed that the burden of proof is upon the defendant to satisfy the jury that the gravel was obtained incident to the legal exercise of the power to grade. Such power, to be lawful,

³³ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

³⁴ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

³⁵ *Dist. of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440.

must have been exercised by the commissioners jointly. It could not be exercised by any one of the said commissioners, as the power could not in law be delegated. If the gravel obtained and used was not the incident to the exercise of the power to grade, but was obtained without the lawful exercise of the power to grade, then the use of the said gravel, as well as the said excavation, was unlawful, and the defendant has not maintained its plea of justification. If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers and by the employes of said defendant, it will be competent for the jury to presume from this fact that it was authorized and directed by the joint action of the commissioners of the defendant, unless there be evidence that satisfies them that the contrary is the fact.³⁶

§ 3907. Negligence with respect to conduct and control of public places other than streets—Reservoirs

You are instructed that, if the jury shall find, from the evidence, that the tank or reservoir spoken of by the witnesses was in an unsafe and insecure condition at the time of the alleged drowning, and that the same had been in such condition for —— months, or any considerable period prior to that time, this is evidence from which the jury may infer negligence on the part of the defendant. And if the jury shall also find, from the evidence, that the said tank was erected by the defendant for municipal purposes, then it was the duty of the defendant to keep the same in repair. And if the jury shall find that the defendant has been guilty of such negligence in keeping the same in repair, then the plaintiff is entitled to recover, although the jury shall find that no express notice was given to the city of the unsafe condition of the tank, if they shall also find that the child, ——, was drowned therein without any negligence on the part of his parents.³⁷

§ 3908. Duties with respect to jail and care thereof

You are instructed that, in order for the plaintiff to maintain her action in this case, it is necessary for her to show to the jury by a greater weight of the evidence that the proximate cause of the death of her husband was the fault of the town in failing and neglecting to properly construct and provide for the town a suitable and necessary calaboose, station house, or prison, and that, owing to such failure on the part of the town, the confinement of her husband in the said town prison was the direct and proximate

³⁶ *Dist. of Columbia v. Robinson*,
21 S. Ct. 283, 180 U. S. 92, 45 L. Ed.
440.

³⁷ *City of Chicago v. Major*, 18 Ill.
349, 68 Am. Dec. 553.

cause of his death; in other words, that the death of the said ——— would not have happened at the time it did but for the fact that he was put in the town prison, which from its condition and defective construction by the town, its want of ventilation, produced the death of plaintiff's intestate. If you find the condition of the prison did not cause or accelerate the death of ———, you will answer the first issue, "No."³⁸

You are instructed that, if you find that the defendant town had built a reasonably comfortable police prison for the purposes for which said prison is intended, and supplied and furnished to those who had immediate charge of it those things that were reasonably essential to prevent bodily suffering on the part of prisoners while confined therein, from excessive cold or heat, or hunger, and to reasonably protect their health, and you further find that plaintiff's husband was confined therein by the police of the town, for the reason that they honestly thought that he was drunk, the plaintiff's action in this case will not lie, and she cannot recover, and you will respond to the first issue, "No."³⁹

You are instructed that, if the aldermen of the town had provided a police prison as above described, that is, one whose structure and superintendence was such as to secure the health and comfort of the prisoners, and you find that ——— had been placed in the said prison by the policemen of the town, and that the police had failed, forgotten, or neglected to make use of the means and appliances furnished in the said prison for the reasonable comfort of the said ——— while confined therein, as, for instance, if they had failed to open all the doors and all the windows in such way as to give good ventilation, in such case the town would not be liable in damages to the plaintiff for this forgetfulness or carelessness of its policemen, unless this carelessness had been made known to the authorities of the town, and they had had notice to prevent the same; and, if you find the facts as above stated, the response to the first issue will be, "No." The doctrine is that while the town must provide a suitable police station in which to confine prisoners, and exercise reasonable prudence in selecting suitable men to look after the prison and prisoners confined in it, neither the board of aldermen nor the town is responsible further than this, and the default, if there were any, in the policemen of the town, would not make the town liable for the default of the said policemen.⁴⁰

³⁸ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

³⁹ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

⁴⁰ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

You are instructed that, if you find the facts to be, from the evidence, that the police of the defendant town arrested — in an apparent intoxicated condition on —, and placed him in the police prison between — and — o'clock in the evening; and that the police prison in which he was placed was a room — feet wide, — feet long, and — feet high, and that the door of the said prison room was a lattice door with — openings in it, and — inches wide, and — inches high, and that the said lattice door communicated with a hallway, which was — feet wide, — feet long, and — feet high, and that at the east end of this hallway there was another lattice door, — feet wide and — feet high, communicating with the outside air, and that there was another door at the west end of the said hall, which was left standing open, — inches wide and — feet high, opening into the mayor's office adjacent, — feet by — feet in size, and should further find that there was a window at the north and south side of this mayor's office left open at the time the prisoner was placed in the said cell, which communicate with the outside air, and that, about the hour of — o'clock of that same evening, said — was found dead in the said prison; and if these are all the facts, and the only facts, the jury find as to the construction and superintendence of the said prison, then these are not facts, if so found, which will fix the defendant with liability, and in this state of the case you are instructed to answer the first issue, "No."⁴¹

You are instructed that in this case, if the window glass had been broken, and the bedclothing furnished for the plaintiff had been destroyed, or the policeman had failed and neglected to provide for the plaintiff, but the governing officers of the defendant are not shown to have had actual notice thereof, or to have been negligent in providing such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure in discharging the duties of construction or superintendence of the prison as to subject the city to liability for injury sustained by the plaintiff by reason of the broken window or lack of bedclothes or failure on the part of the policeman to furnish them, and there is no evidence that the governing officers knew of the broken windows, if they were broken, or that there was not sufficient bedclothing, or that the policemen were careless and negligent of their duties, or that fire was not sufficient to keep the prisoner comfortable.⁴²

⁴¹ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

⁴² *Shields v. Town of Durham*, 21 S. E. 402, 116 N. C. 394.

§ 3909. Same—Liability for negligence of jailer or attendant

You are instructed that all the evidence tends to prove that the chief of police was authorized and empowered to supply and put in window panes and necessary beds and bedclothing, and necessary fuel for keeping prisoner comfortable. There is no evidence of negligence on the part of the governing authorities of the town of — in any particular, and the plaintiff is not entitled to recover. If the governing authorities furnished means or credit to supply everything necessary so as to secure the prisoners a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health, the city is not liable in damage for sickness and suffering endured by the prisoner, and caused by the neglect of the jailer, policeman, or attendant to properly minister to his wants and necessities. All the evidence tends to prove that the chief of police was authorized, directed, and empowered by the governing officers to purchase and supply all the means necessary for the comfort of prisoners confined in the prison of the town, and always paid for such supplies, and also furnished the means necessary for rendering said prison comfortable and healthy.⁴³

§ 3910. Same—Remote and proximate cause

The court instructs the jury that, if the jury find from the evidence that the said — had some disease of the heart, and indulged on the evening of the — too freely in the use of spirituous liquors, and thereby caused his own death, and that such disease and use of spirituous liquor was the proximate cause of his death, the plaintiff cannot recover, and the jury will respond to the first issue, "No."⁴⁴

The court instructs the jury that, if the jury believe from the evidence that — was diseased in his kidneys, and had some heart trouble, and that on the evening of the — he became intoxicated, and thereby brought on syncope or coma, as testified to by the physicians, and that this excessive drinking was the proximate cause of his death, the jury will answer the first issue, "No."⁴⁵

The court instructs the jury that, if the jury find that the death of the said — was caused by some fatal malady or disease, and that he would have died in one place as well as another, and that he did die from said disease as the proximate cause of death, the jury will answer all the issues in favor of the defendant; and if the jury find that his death was caused by a disease, and by his own

⁴³ *Shields v. Town of Durham*, 21 S. E. 402, 116 N. C. 304.

⁴⁴ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

⁴⁵ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

acts, to wit, excessive drinking, combined, and that such disease and excessive drinking were the proximate cause of his death, they will answer all the issues in favor of the defendant.⁴⁶

§ 3911. Negligence with respect to equipment and operation of municipal electric light plant

You are instructed that the general charge of negligence or carelessness made by the plaintiffs against the defendant includes negligence in the appliances and devices adopted and installed as a part of its system, and negligence in the maintenance and operation of its system as installed. With reference to the city's duty in the matter of its appliances, devices, etc., the law requires that the city shall, in selecting and installing its appliances and devices, use that degree of care which reasonably prudent men engaged in the same line of business would use under similar circumstances to have and to procure and install, such as the experience of men so engaged has shown to be reasonably safe for the purposes for which they are used, in view of all the conditions and circumstances connected with the business and of the dangers to be reasonably apprehended. Every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science for the prevention of accidents. In determining the question of the city's negligence in this respect, it is proper for you to consider whether as to any particular appliance, device, or manner of installment or arrangement complained of in the evidence in this case there exists a reasonable difference of opinion among electrical experts and men possessing knowledge, and qualified to speak thereon, concerning the efficiency of such appliances or system, and, in the light of all these facts, to determine whether the city is or is not properly chargeable with negligence in the adoption or arrangement of its devices or appliances.⁴⁷

§ 3912. Negligence of city with respect to water mains

The court instructs the jury that if they find from the evidence that the flooding of plaintiffs' premises and the damage to their building and personal property was caused by a leak in a public water main laid by the city of ——— in one of its public streets, and that such leak was directly caused by the negligent and unskillful laying of said pipe by the persons in charge of said work, or the failure on the part of the officers of defendant to exercise ordinary care or prudence in keeping the same in a safe condition, then their findings must be for the plaintiffs.⁴⁸

⁴⁶ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

⁴⁷ *Abrams v. City of Seattle*, 111 P.

168, 60 Wash. 356, 140 Am. St. Rep. 916.

⁴⁸ *Dammanh v. City of St. Louis*, 53 S. W. 932, 152 Mo. 188.

§ 3913. Same—Plaintiff's failure to maintain sufficient drain as proximate cause of flooding by broken main

I charge you that, if you find from a fair preponderance of the evidence that the quantity of water which escaped from the broken main and flooded the plaintiff's property was so great that the plaintiff would have sustained the same or as much damages, regardless of whether it had a sufficient and good drain or not, then the matter of maintenance of a drain was and is entirely immaterial, and you should disregard the same.⁴⁹

§ 3914. Same—Contributory negligence

I charge you that the plaintiff was not required to anticipate that the defendant would be negligent in selecting, inspecting, placing, or maintaining its water mains. It had a right to assume that the city would exercise reasonable care in selecting, inspecting, placing, and maintaining its water mains so that they would not break or flood property lawfully kept in the locality where such water mains are located, and, in the absence of knowledge that a defective water main had been installed or maintained, the plaintiff would not be guilty of contributory negligence by assuming that the city had fully performed all its duties relative to inspecting, placing, and maintaining its water mains.⁵⁰

§ 3915. Defective water plug

The court instructs the jury that if they find and believe from the evidence that since — the plaintiffs, as trustees, have been, and that they still are, the owners and in possession of the land and buildings at — and — streets, referred to in the evidence, and that about the fall of — the defendant, the city of —, through its officers, pursuant to ordinance, caused water distribution pipes to be laid in — street where it abuts the property of the plaintiff, and that such pipes were part of the city's general waterworks system, and that the city caused to be erected upon the sidewalk in — street, adjoining the premises above referred to, a water plug in connection with said distributing pipes, and that such water plug was intended for the purpose of permitting the city and contractors under the city to draw water from said pipes at said point, for sprinkling purposes as well as for fire protection purposes, and that the said water plug was covered by the city with an iron cover, that said water distributing pipes and said water plug were installed about the — day of —, that about —, and for a long time prior thereto, said water plug was defective, in this, that the shut-off cock failed to shut off the

⁴⁹ *Rainier Heat & Power Co. v. City of Seattle (Wash.)* 193 P. 233.

⁵⁰ *Rainier Heat & Power Co. v. City of Seattle (Wash.)* 193 P. 233.

water and permitted the water to flow therefrom and seep through the adjoining ground, and that the city, through its officers, servants, and agents, failed to remedy such defect, if any, and failed to put in a proper shut-off cock which would properly shut off the water at said plug, although the city, through its officers, servants, and agents, by the exercise of ordinary care, might have known that said shut-off cock was in such defective condition and that the water was pouring from said plug; and if the jury find and believe from the evidence, that such condition was permitted to exist by the city, through its officers, servants, and agents, for a long time after, by the exercise of ordinary care they could have discovered such condition, and that in the meantime and in consequence of such neglect on their part the city permitted the water from its waterworks system to flow through such plug and seep through the adjoining ground, and caused the water in large quantities to flow upon the property of plaintiff; and if the jury find and believe, from the evidence, that thereby the foundation of plaintiffs' building became undermined and was caused to sink and break, and that thereby the walls of the building in a number of places were caused to break and become cracked, and that plaintiffs suffered damage in consequence thereof—then the jury will return a verdict in favor of plaintiffs.⁵¹

§ 3916. Duty with respect to preventing fires—Liability on account of fire alleged to have spread from city dump to adjacent property

You are instructed that the plaintiff contends that this fire was of small size and known to the officials, as the supervisor was about there, and that, as one witness put it, it could have been put out with a man in a few hours' time. It is necessary for that knowledge to be brought home to the officers of the borough, unless it actually, through its agents, caused the fire. If the officials had knowledge of this fire, did they act as prudent, careful men would under the circumstances? That is the rule which guides all people, borough officials and men in private station. If you seek to hold a man guilty of negligence, you must show that he has not acted as a careful, prudent man would under the circumstances; that is, an ordinarily prudent and careful man. So you will have to take into consideration all the circumstances connected with the fire—the character of the material on the land, the distance from other properties, and the knowledge which an ordinary man would have of putting out a fire of that kind. This was not an ordinary fire, such as we have fire apparatus to combat—houses, buildings; but it

⁵¹ *Stifel v. City of St. Louis (Mo.)* 181 S. W. 577.

was a subterranean fire, running along under the surface of the ground. It will be for you to say whether or not this borough council acted as careful, prudent men would under the circumstances, in the extinguishment of the fire. If it did, then the borough is not responsible for the spread of the fire.⁵²

You are instructed that the evidence on the part of the defendant is that when this fire was discovered in ——— (it was discovered in ———, by the plaintiff's witnesses) operations were commenced with a view to extinguish it by water; that they opened fire plugs in the town, and conducted the water there by hose; that they dug trenches, and ran the water in those, and used means of this kind for months; that they were unsuccessful, and afterwards tried chemicals; that that also proved unsuccessful, and the fire still continued to work its way westward, and finally came upon the plaintiff's property. If the fire got into the plaintiff's property without any fault of the borough, we would say to you that it had a perfect right to go there and remove his property—dig it out, haul it away, or do any other thing that was necessary, and that would accomplish the object of putting out the fire and preventing its spread to neighboring properties. The evidence is that there were some ——— houses that were endangered by the spread of the fire, direct. Besides, the smells that arose from it constituted an annoyance to the whole neighborhood and a nuisance to the town. The borough would have the right, if free from fault, to go upon the property and do as it did to cut off the fire. You understand the reason for that. Suppose, in a row of houses connected together, the end house should start to burn. When the fire company would come there (that is, the borough acting through a fire company), it would have a perfect right to destroy the second house in order to save the balance of the row. The reason of that is plain. If it was not destroyed by tearing down, it would be destroyed by burning. There it is a matter of public necessity. The building is destroyed, and the owner must suffer the loss, without remedy as against the borough. So, here, plaintiff must stand this loss if this fire was in his lot without the negligence of the borough. The great question for you to determine is, did the borough set it on fire? Or, second, did it carelessly and negligently allow it to approach his lot? If it was through its negligence that it got into his lot, the digging of his lot away would not relieve it from responsibility for its acts. The defendant's contention, as we stated, is that the fire did not originate as the plaintiff says; that it had been there for years; that it originated on the ——— lots, and was communicated from there, through underneath the sur-

⁵² *Grow v. Borough of Pottsville*, 47 A. 195, 197 Pa. 337.

face, to the property of the plaintiff; and that the borough exercised all the care and diligence that a reasonably careful and prudent man would under the circumstances. Lastly, the borough claims that, even if the property was burned, the plaintiff has sustained no damage, because his lots are now worth as much, if not more, than they were before.⁵³

§ 3917. Liability for destruction of property by mob

The court further says to the jury that you will find for the defendant in this case, unless you should believe from the evidence that the city of ———, through its authorities, had the ability, either by their own force or by the aid of the citizens of said city, to have prevented the injury or destruction of plaintiff's property, and failed so to do, after said city, through its authorities, had notice or good reason to believe that said riot or tumultuous assemblage was about to take place; or that said city, through its authorities, had the ability, either by their own force or by the aid of the citizens of said city, to have prevented the injury or destruction of plaintiff's property after said riot or tumultuous assemblage had taken place in said city, and said city, through its authorities, had notice of the same in time to have prevented said injury or destruction, and failed so to do, and unless you so believe you will find for the defendant.⁵⁴

§ 3918. Burden of proof

You are instructed that the burden is upon the plaintiff in this case to sustain both of the issues by a preponderance of the proof, and if she fails to do so, or if the evidence is evenly balanced in your minds as to whether the defendant was guilty of any negligence or not, she cannot recover, and you will answer the issues for the defendant.⁵⁵

§ 3919. Damages from defective water main or water plug

The court instructs the jury that if they return a verdict in favor of plaintiffs under the other instructions herewith given, such verdict shall be for an amount sufficient to compensate the plaintiffs for the damage, if any, sustained by them by reason of the cracking of the walls and foundations, if you find that the same became cracked in consequence of the acts of the defendant referred to in other instructions; and the measure of plaintiffs' damage is the difference, if any, between the reasonable market value of the building just before the injury and the reasonable market

⁵³ *Grow v. Borough of Pottsville*, 47 A. 195, 197 Pa. 337.

169 S. W. 703, 160 Ky. 220, Ann. Cas. 1916A, 322.

⁵⁴ *Tandy v. City of Hopkinsville*,

⁵⁵ *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301.

value thereof after the same became cracked as aforesaid. But if such difference exceeds the amount which plaintiffs would have been required reasonably to expend at the time to put the building in as good condition as it was before the injury, then the verdict shall not exceed the amount of such reasonable expense of restoring the building to its former condition.⁵⁶

The jury are instructed that, if the jury find for the plaintiffs, then they will assess to them the difference in value of the building as it stood before the injury and its value as the jury shall find the same to have been after said injury, less the actual value of any improvements or repairs made thereon by the defendant city. And the court further instructs the jury that, if they find for the plaintiffs under other instructions given, they should include in their finding such damage, if any, as they find to have been directly caused by reason of the bursting of the water pipe in question to any articles of personal property belonging to both plaintiffs together, as well as the reasonable expense of removing the same to a place of safety; and such expense, by way of rental, as you may find the plaintiffs were compelled to pay for quarters elsewhere until the delivery of possession of the plaintiffs' building by the defendant city.⁵⁷

§ 3920. Damages for injury to land by fire

You are instructed that, if you find that the defendant is responsible for this fire and the destruction of the property, you come, then, to the last question in the case—what are his damages? There is evidence on the part of plaintiff that the property was worth \$——, and that now it is worth nothing. You will remember all that has been testified on that subject. One of the defendant's witnesses, ——, stated that the property had no value before, and now it has some value, because the inflammable material was off of the property, burned off, and it is now safe for a man to build a house there, which it was not before. —— thought the property was worth \$—— a foot, and now it is worth nothing. —— thought it was worth \$——, but was worth more afterwards than before the fire. He gave, we believe, as a reason, that a foundation could be secured to build upon the property. —— thought it was worth from \$—— to \$—— a foot. There is evidence on the part of the defendant that this property could be restored to its former condition without cost to the plaintiff. That is a question you will have to determine. The plaintiff claims it could not be restored at all, and that, even if it

⁵⁶ *Stifel v. City of St. Louis (Mo.)*
181 S. W. 577.

⁵⁷ *Dammann v. City of St. Louis,*
53 S. W. 932, 152 Mo. 186.

were filled up with earth from excavations of cellars, it would require years for it to settle so that a safe foundation could be erected upon it; also, that the fire is there surrounding the property on two sides; that therefore it is not at all desirable for building purposes, and that a man would not, under the circumstances, erect a building upon the property. The burden in all cases rests on the plaintiff to prove to a jury that the defendant is negligent, and also to prove the amount of his damages. In other words, when a man comes into court he should show by the weight of the testimony that his contention is worthy of belief. If you find the plaintiff has sustained damages, and that the defendant is liable for those damages, then you must assess them; and the measure of those damages would be the cost of the restoration of those lots by plaintiff, if they can be restored, unless that cost equals or exceeds the depreciation in the value of the property, in which event the depreciation would be the measure of damages. If the lots cannot be restored, then the depreciation or the value of the property destroyed would be the measure, and whether they can or not is a question for you to decide under all the testimony in the case.⁵⁸

D. LIABILITY ON ACCOUNT OF DEFECTIVE STREETS OR OBSTRUCTIONS THEREIN

1. *Liability in General*

§ 3921. Power to delegate duty to repair to property owners— Manholes

The court instructs the jury that a primary duty to keep the streets and sidewalks in a reasonably safe condition for public travel devolves upon the city, and the defendant city cannot escape its liability for the lack of ordinary care in regard thereto by granting permission to the property owners to place manholes therein for their private use, under an agreement that such property owners must keep such manholes in repair and in safe condition. The city has not power to grant such privileges, and if it did so, and then depended upon the property owners to keep said manholes in a safe condition, and failed to exercise ordinary care in regard thereto, the city cannot escape liability for the reason that they may have depended upon the property owners to keep such manholes in a safe condition.⁵⁹

§ 3922. Elements of cause of action

§ 3922(1). Iowa

You are instructed that, if the preponderance of the credible evidence in the case satisfies you that the plaintiff was free from

⁵⁸ *Grow v. Borough of Pottsville*, 47 A. 195, 197 Pa. 337.

⁵⁹ *Arkansas City v. Payne*, 162 P. 781, 80 Kan. 353, 18 Ann. Cas. 82.

any want of due care or attention that contributed to cause the injury, and further satisfies you that the city was guilty of negligence that was the proximate or near cause of the injury, and liable, through having notice through its proper officer or officers, and not repairing or removing the dangerous character of the walk after a reasonable time elapsed after such notice, then you will allow her such damages as will fully compensate her for her injury, including her suffering, mental and bodily pain, doctors' bills, nursing, and loss of time, as shown by the evidence in the case.⁶⁰

§ 3922(2). **Kansas**

You are instructed that, before the plaintiff can recover a judgment in this action, it must appear by a preponderance of the evidence (1) that the plaintiff ——— was injured as the result of a defect in the sidewalk on said ——— street, in the defendant city, as set out in her petition; (2) that said city or its officers were negligent in permitting said sidewalk to remain in said unsafe condition at the time said plaintiff was injured. To charge the defendant with negligence, it must appear that the proper officers of said city had notice of the unsafe condition of said sidewalk in time to have prevented the injury to said plaintiff by falling on said defective sidewalk (if you find she was so injured), or that, by the exercise of reasonable and ordinary care and diligence, they could have known of the unsafe condition of the sidewalk.⁶¹

§ 3922(3). **Nebraska**

You are instructed that before you can find for the plaintiff you must find that the plaintiff has suffered injury, that the injury was caused by a defect in the sidewalk, that said defect left the sidewalk in an unreasonably dangerous condition, that the plaintiff did not contribute to the said injury by any negligence on his part, that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same.⁶²

You are instructed that the plaintiff alleges in his petition that on or about ———, while walking along and upon the sidewalk of the defendant on ——— street, between ——— and ——— streets, in the city of ———, and while exercising ordinary care for his personal safety, he fell, and received injury to his person, and suffered damages; that, under its charter, the defendant was bound to keep

⁶⁰ *Munger v. City of Waterloo*, 49 N. W. 1028, 83 Iowa, 559.

25 P. 889, 45 Kan. 381, 23 Am. St. Rep. 731.

⁶¹ *City of Kansas City v. Bradbury*,

⁶² *City of Lexington v. Fleherty*, 104 N. W. 1036, 74 Neb. 626.

in reasonable repair the place of the accident; that said injury was received, and the damages so suffered were, on account of and by reason of the defective, unsafe, and dangerous condition of the sidewalk complained of; and that defendant had notice, prior to the accident, of such unsafe condition in time to have enabled it to repair such condition or give warning of it and failed to make such repairs or give any warning. The defendant, by his answer, puts all these allegations in issue, and the plaintiff must prove them all by a preponderance of the testimony before he will be entitled to a verdict at your hands. If he does so prove them, you shall allow him reasonable and just compensation for the damages so sustained by him resulting from the injury so received.⁶³

§ 3922(4). *Pennsylvania*

You are instructed that if the plaintiff fell by reason of loose planks or other defects in the walk which were apparent, and should have been seen and repaired, or if the defects had been there long enough so that the borough officers either actually knew of the condition, or should have known its condition by the exercise of ordinary care, and the plaintiff was free from any negligence on her part, she would be entitled to recover.⁶⁴

§ 3922(5). *Virginia*

The court instructs the jury that it is the duty of the city to make and keep its sidewalks reasonably safe for public travel, and that, if it fails in the discharge of this duty, it is liable to persons sustaining injuries because of such failure. And if the jury believe from the evidence that the sidewalk in question where the plaintiff fell, and sustained the injuries complained of in his declaration, was not in such reasonable repair, and that defendant city, prior to the accident, had notice of the defective condition of such walk and opportunity to repair it, then they must find for the plaintiff the damages they believe him to have sustained, unless they shall also believe from the evidence that the plaintiff, by his own negligence, or want of ordinary care and caution, so far contributed to the misfortune that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened.⁶⁵

§ 3922(6). *Washington*

You are instructed that, before the plaintiff can recover against the defendant, it is necessary for the plaintiff to prove the following things: (1) That he was injured by catching his foot in and

⁶³ *City of Lincoln v. Holmes*, 28 N. W. 851, 20 Neb. 39.

⁶⁵ *Gordon v. City of Richmond*, 2 S. E. 727, 83 Va. 436.

⁶⁴ *Fee v. Borough of Columbus*, 31 A. 1076, 168 Pa. 382.

falling upon a defective sidewalk, as alleged in the complaint; (2) that said sidewalk was in such a defective condition as to make it dangerous to travelers using such sidewalk; (3) that said defective sidewalk was not marked by any light or beacon so as to warn persons approaching or using the same of the probable danger; (4) that the city had either actual or constructive notice of the defective condition of said sidewalk; (5) that the defective condition of the walk as complained of was the proximate cause of the injuries the plaintiff suffered; (6) that within _____ days after the accident the plaintiff filed a claim with the city of _____; (7) the nature and extent of the injuries.⁶⁶

§ 3922(7). *West Virginia*

The court instructs the jury that if they believe from the evidence in this case that the defendant, at the time the accident occurred, was required by its charter to keep the sidewalk therein, at the place where the injury was sustained, in good and sufficient repair, that the sidewalk on which the injury occurred was at the time within the corporate limits of the defendant, that the place of the accident was controlled and treated by defendant as a public street, that the sidewalk at the place where the injury was sustained, was out of repair as alleged in the declaration, and by reason thereof the plaintiff was injured while exercising due care, and that defendant knew of such defective condition of the walk in time to have repaired it before the accident, then the plaintiff is entitled to recover.⁶⁷

The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets, bridges, and sidewalks in good and sufficient repair, to render them reasonably safe for all persons in the exercise of ordinary care while passing on or over the same; and if the jury believe from the evidence that the defendant, the city of _____, failed to use reasonable care and precaution to keep the sidewalk mentioned in the declaration in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damages thereby while exercising such a degree of care and caution as under the circumstances might reasonably be expected of one of his age and intelligence, then he is entitled to recover of the defendant in this suit.⁶⁸

The jury are instructed that if they believe from the evidence in this case that the sidewalk in the declaration mentioned was a

⁶⁶ *Wren v. City of Seattle*, 170 P. 342, 100 Wash. 67, 3 A. L. R. 1123.

⁶⁷ *Parrish v. City of Huntington*, 50 S. E. 416, 57 W. Va. 286.

⁶⁸ *Parrish v. City of Huntington*, 50 S. E. 416, 57 W. Va. 286.

public sidewalk within the corporate limits of the defendant, the city of ———, opened up, worked, treated, and controlled by the defendant as such sidewalk; that the said sidewalk was out of repair, in a bad condition, and unsafe for travel, at the time of the plaintiff's alleged injury; that plaintiff had notice of such bad condition of the walk, if it was in bad condition, in time to have repaired it before such alleged injury; and that by reason of the said sidewalk being so out of repair and in a bad and unsafe condition the plaintiff was injured, then the plaintiff is entitled to a verdict in this case, unless the jury are satisfied that the plaintiff was guilty of contributory negligence on his part, and that such negligence was the proximate cause, but not the remote cause, of his injury; and the jury is further instructed that the burden of proof of establishing such contributory negligence is upon the defendant, the city of ———.⁶⁹

§ 3923. Liability for pure accidents

§ 3923(1). Montana

You are instructed that an "accident" is an unusual and unexpected occurrence, to which human fault does not contribute, and that if the injuries sustained by plaintiff, if any, were purely the result of an accident as above defined, then she cannot recover in this action. In other words, if the sidewalk upon which plaintiff fell was at the time in a reasonably safe condition for public use and travel, and the plaintiff was at that time exercising reasonable care and caution for her own safety, then the occurrence must be deemed to be purely an accident or a misfortune, for which the city is not liable.⁷⁰

§ 3923(2). Washington

You are further instructed that a municipal corporation, such as the defendant city of ———, is only liable for such defects in its streets as are in themselves dangerous, or such that a person exercising reasonable care and caution for his own safety cannot avoid danger in passing over them, and if you believe in this case that the sidewalk over which the plaintiff traveled was not in itself dangerous to the safety of persons using the same with reasonable care, and that the alleged injury claimed to have been suffered by plaintiff was the result of a mere accident or from want of reasonable care for his own safety on the plaintiff's part, then your verdict should be for the defendant.⁷¹

⁶⁹ *Foley v. City of Huntington*, 41 S. E. 113, 51 W. Va. 396.

⁷⁰ *Kansler v. City of Billings*, 184 P. 630, 56 Mont. 250.

⁷¹ *Wren v. City of Seattle*, 170 P. 342, 100 Wash. 67, 3 A. L. R. 1123.

§ 3924. Proximate cause of accident

§ 3924(1). Texas

The jury are instructed that, if the injury occasioned did not result from the slipping into the ditch alone, but was produced by the accidental lighting upon a broken bottle or other piece of glass or sharp instrument, and thereby the injury was inflicted, the city would not be responsible for such accidental injury, resulting from such a cause, if unknown to the city, and such a cause the city should not be expected to know without special notice, or without it had existed so long that by ordinary care it would have been discovered and known.⁷²

§ 3924(2). Washington

I have instructed you that the plaintiff must show that some one or more of the acts of negligence complained of was the proximate cause of his injuries. By "proximate cause" we mean probable cause, direct cause, and a general test as to whether negligence is the proximate cause of an accident is whether or not it is such negligence as a person of ordinary intelligence, prudence, care, and caution should have foreseen that an accident was liable to be caused thereby. The proximate cause of an injury is that cause which in natural and continuous sequences unbroken by any efficient intervening cause, produces the injury and without which the injury would not occur.⁷³

You are instructed that if, tried by this definition, you find that the defendant, the city of ———, was not guilty of negligence as alleged in the complaint, whereby the plaintiff suffered the injury described in his complaint, then your verdict should be for the defendant. On the other hand, if, tried by the same definition, you find from a preponderance of the evidence that the defendant was guilty of negligence in the manner alleged in plaintiff's complaint, and that such negligence was the proximate cause of the accident whereby plaintiff sustained the injuries complained of, then your verdict should be for the plaintiff, unless you further find that the injuries to the plaintiff were caused by his own negligent acts to which he himself contributed.⁷⁴

2. To What Streets or Traveled Ways Liability of City Extends

§ 3925. In general

§ 3925(1). Alabama

You are instructed that a city, by bringing a highway within its corporate limits and leaving it open for public travel, becomes

⁷² *City of Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

⁷³ *Wren v. City of Seattle*, 170 P. 342, 100 Wash. 67, 3 A. L. R. 1123.

⁷⁴ *Wren v. City of Seattle*, 170 P. 342, 100 Wash. 67, 3 A. L. R. 1123.

bound to use ordinary care to maintain it in a reasonably safe condition for such travel.⁷⁵

§ 3925(2). *Minnesota*

You are instructed that it is the duty of the city of ——— to keep bridges upon its public streets and thoroughfares, which it keeps open for the general travel of the public, in a safe, passable condition, and reasonably secure against all dangers of accident.⁷⁶

You are instructed that public streets, highways, and bridges which belonged to the town of ——— within the limits of the present city of ——— became at the incorporation of the city the property of the city, and it became the duty of the city to keep such of them safe, passable, and in repair as it permitted to remain open to the travel of the general public.⁷⁷

§ 3925(3). *Wisconsin*

The court instructs the jury that, if the jury should be satisfied from the testimony that, before and at the time of the accident, the general line and route for travelers on foot was over the place and crossing where the accident happened, and the crossing, including the place where the accident happened was in continual use as a thoroughfare for travelers going back and forth, and the same was there several weeks or months before the accident, then, so far as this case is concerned, the question as to who made the crossing or any part of it, or placed it where it was, is immaterial, and that the plaintiff was under no obligation to ascertain or inquire who built the crossing or cross-walk, or how it came there.⁷⁸

The court instructs the jury that, if they are satisfied from the testimony that the apron or bridge where the plaintiff fell and broke his leg has been there, and had been there a long time, say a year or six months, before the accident occurred, without any objection on the part of the city, then the city is presumed to have acquiesced in the structure and to have adopted it, and must be held liable for damages by reason of defects, just the same as if the city authorities had actually ordered it to be placed there.⁸⁰

§ 3926. **Duty with respect to keeping every part of street in repair**
See, also, post, § 3932(5).

You are instructed that a town is not necessarily chargeable with damage arising from every defect existing within the located limits of a highway. Nor would it be liable for obstructions or defects in portions of the highway not a part of the traveled path, and

⁷⁵ *Ivey v. City of Birmingham*, 67 So. 506, 190 Ala. 196.

⁷⁶ *Shartle v. City of Minneapolis*, 17 Minn. 308 (Gil. 284).

⁷⁷ *Shartle v. City of Minneapolis*, 17 Minn. 308 (Gil. 284).

⁷⁸ *Johnson v. City of Milwaukee*, 1 N. W. 187, 46 Wis. 568.

⁸⁰ *Johnson v. City of Milwaukee*, 1 N. W. 187, 46 Wis. 568.

not so connected with it that they would affect the safety or convenience of those traveling on the highway and using the traveled path; nor would the town be legally liable when an injury was sustained by a party using the road for the purpose of passing from his own land, although it was caused by a defect within the limits of the highway, if it was outside the part of the road used for public travel.⁸¹

The jury are instructed that it is a question for the jury whether the footpath, on which the plaintiff alleges she met with the injury, was so connected with the wrought part of the road, or with the carriage way, and so used for travel, as to make the town liable for its condition.⁸²

The jury are instructed that the defect complained of, if outside the limits of the location, is not such a defect as requires a railing or barrier, either to protect the traveler or to warn him of the limits of the highway, and prevent him from straying; and the same rule applies if the alleged defect is outside that part of the highway worked and used for travel.⁸³

§ 3927. Duty as to unopened street

You are instructed that the opening and widening of streets is a matter of discretion in the city government. If you find that the city of ——— had not opened up ——— street south of ——— street as a public highway for travel in said city, then defendant would not be guilty of negligence in permitting a ditch or drain to form on said street by the natural flow of the surface water, or by other natural causes. The city would not become responsible for the condition of the street as a highway for travel until it had opened up and undertaken to put the same in condition for travel as a highway, and the fact that such street is named in the ordinances as a street of the city would not vary this rule.⁸⁴

§ 3928. Streets laid out, but not accepted as such, by city

The jury are instructed that, if the jury find from the evidence that ——— street (so called) was laid out by one ———, in or about the year ———, upon a piece of ground having a natural surface drain or water course, which crossed said so-called street, and which received and carried off the surface water from the adjoining property in rainy seasons, and that there had been no change in the condition of said so-called street and drain, and that the defendant had not before or at the time of the happening of the accident complained of in this case, either actually or impliedly accept-

⁸¹ *Whitford v. Inhabitants of Southbridge*, 119 Mass. 564.

⁸² *Whitford v. Inhabitants of Southbridge*, 119 Mass. 564.

⁸³ *Marshall v. Ipswich*, 110 Mass. 522.

⁸⁴ *City of Austin v. Ritz*, 9 S. W. 884, 72 Tex. 391.

ed or adopted said so-called street as one of the public streets or highways of the defendant, that is to say, by formal resolution, order, or ordinance, or by any acts of repair or recognition of said street as a street in the appropriation of money for or expenditure of money thereon, or by any work or labor thereon of it or its agents or servants, with its approval or acquiescence, then the plaintiffs cannot recover under the pleadings in this case, although the jury may further find that said street, so called, was used by persons passing on foot over it in going to or from their respective homes or places of business, and although the jury may further find that one ———, about ——— years ago, voluntarily, for his own convenience, but without authority from the defendant or its agents, placed a part of the deck of a canal boat across said drain, thereby making a temporary bridge across the same, and which was afterwards crossed by such persons as had occasion to use said street in crossing said drain, and that the plaintiff, while using due care and caution on her part in the act of crossing said temporary bridge, sustained the injuries complained of in this case.⁸⁵

The jury are instructed that it is necessary for the plaintiffs to prove to the satisfaction of the jury in this case, before they can find for them, that ——— street was not only laid out as a public street, but also that said street was either actually or impliedly accepted and adopted by the defendant before the alleged injuries occurred to ———; and although they may find that the order was presented to the city council of the defendant prior to the accident, as offered in evidence, and also the other order presented to the said city council after the accident and adopted by the defendant, and said street thereafter repaired, and that the property in ——— addition and lots in said addition were assessed by the defendant as offered in evidence, and that other streets in said addition were repaired both before and after said accident, and that the several deeds offered in evidence from ——— and ——— were executed, and the plat of ——— addition made as offered in evidence, and that said ——— street was used as a street, as offered in evidence, by the public from the time it was opened as such in the year ——— by the said ———, such facts do not amount to an acceptance or adoption of said street by the defendant.⁸⁶

§ 3929. Duty with respect to sidewalks

The jury are instructed that it is the duty of the corporation to keep the streets of the city in repair, and this includes the side-

⁸⁵ Kennedy v. Mayor and City Council of Cumberland, 65 Md. 514, 9 A. 234, 57 Am. Rep. 346.

⁸⁶ Kennedy v. Mayor and City Council of Cumberland, 65 Md. 514, 9 A. 234, 57 Am. Rep. 346.

walks for persons on foot, as well as the roadways; and it is no answer to a complaint for injury caused by a defect in the sidewalk that there was a sufficient space thereon by which a safe passage might have been made, unless the injury might have been avoided by proper prudence on the part of the person injured, or unless negligence can be imputed to him as contributing to cause the injury.⁸⁷

§ 3930. Approach to public bridge

The jury are instructed that it is admitted that the place where the accident happened, is within the limits of the city of ———, and is used by the public as an approach to the ——— county bridge, which is a public bridge owned by ——— county; but these facts do not of themselves make the city liable to maintain and repair said premises as a public street, or to pay damages for injuries which may happen by reason of the insufficiency or want of repair of said approach. It must appear, further, that the approach or walk thereon in question is a public street or walk within the limits of said city, which it is liable to maintain, which it had power and authority to adopt, and had adopted prior to the accident, and which had become a public highway or walk, in some way known to the law, and, further, that the walk was so poorly or defectively constructed, or in such a condition, as to be unsafe for persons who might be passing over it in the night-time; and of the sufficiency or insufficiency of the walk you are the judges.⁸⁸

§ 3931. Crossing not constructed by city

See, also, ante, § 3925(4).

The jury are instructed that even if they believe, from the evidence, that the crossing in question was laid or constructed by a private person in a public street of the town of ——— and was used by the public, yet the town must use reasonable care to keep it in a reasonably safe condition, and the law does not absolve the town from such obligation because the crossing or walk may not have been laid or constructed by the town itself.⁸⁹

3. *What Constitutes Negligence on Part of City and Degree of Care Required*

§ 3932. Degree of care required in general

§ 3932(1). California

I instruct you that it is not, and was not, at any time the duty of any of the defendants in this action to see to it that any side-

⁸⁷ City Council of Montgomery v. Wright, 72 Ala. 411, 47 Am. Rep. 422.

⁸⁸ Bishop v. City of Centralla, 49 Wis. 609, 6 N. W. 353.

⁸⁹ Town of Normal v. Bright, 79 N. E. 90, 223 Ill. 99.

walks should be so constructed and maintained as to be absolutely safe for the passage of all persons under all conditions, and that if the sidewalk at the point where plaintiff testified he was hurt was in a reasonably safe condition, you must find for defendants.⁹⁰

§ 3932(2). *Colorado*

The court instructs the jury that it was the duty of the city and county of ——— to use ordinary care and diligence to keep the sidewalk on which plaintiff fell in a reasonably safe condition for travel by pedestrians.⁹¹

§ 3932(3). *Delaware*

You are instructed that the streets of a town or city are for the use of the public and for the public convenience. It is the duty of those having control of them to exercise due care and diligence in keeping them in a reasonably safe condition, free from holes, pits, excavations, or obstructions, so that they may be safe for the traveler, on foot or otherwise, who may use them in a lawful and careful manner.⁹²

You are instructed that the town or city is not an insurer against all injuries which may result from holes or obstructions in the public streets.⁹³

§ 3932(4). *Illinois*

The jury are instructed that the law imposes upon cities the duty to exercise reasonable care to keep their streets and sidewalks in reasonably safe condition for use by persons traveling thereon. The city is not an insurer against injuries received by reason of defects in its streets or sidewalks. If it maintains them in reasonably safe condition, it is not liable; and in this case, if you believe, from all the facts and circumstances shown by the evidence, that the place where the plaintiff claims to have been injured was in such condition for travel thereon or thereover that a person, while in the exercise of ordinary care for his own safety, would have passed safely over, then the defendant is not liable in this case.⁹⁴

The jury are instructed that, if you believe from the evidence that the place where the plaintiff met with the injury complained of was reasonably safe for a person exercising reasonable care and prudence in passing over it, you will find for defendant.⁹⁵

§ 3932(5). *Kansas*

You are instructed that the city is liable not only for injuries occasioned by negligently constructing defective sidewalks on its

⁹⁰ Taylor v. Manson, 99 P. 410, 9 Cal. App. 382.

⁹¹ Griffith v. City and County of Denver, 132 P. 57, 55 Colo. 37.

⁹² Stidham v. Delaware City, 67 A. 175, 6 Pennewill, 359.

⁹³ Stidham v. Delaware City, 67 A. 175, 6 Pennewill, 359.

⁹⁴ City of Gibson v. Murray, 75 N. E. 319, 216 Ill. 589.

⁹⁵ Smith v. City of Gilman, 38 Ill. App. 393.

streets, or by causing such defects in them after they are constructed, but also for negligently permitting them to remain in a dangerous or unsafe condition, no matter how such condition was caused. Any person traveling upon a street has a right to use any portion of the street or sidewalk for that purpose, not already otherwise in use, and a person traveling upon a street or sidewalk of a city has a right to assume that such street or sidewalk is in a safe condition, and to act upon that assumption, relying upon the belief that the city has performed its duty and placed and maintained such street or sidewalk in a safe condition.⁹⁶

§ 3932(6). *Kentucky*

You are instructed that negligence is the failure to exercise such care as is ordinarily exercised by ordinarily careful and prudent persons under the same or similar circumstances.⁹⁷

You are instructed that ordinary care is such care as ordinarily careful and prudent persons ordinarily exercise under the same or similar circumstances, on the same or similar business.⁹⁸

You are instructed that, if you believe that the curb and gutter at the time and place complained of was in a reasonably safe condition for the use of persons exercising ordinary care and prudence, you should find for the defendant city.⁹⁹

§ 3932(7). *Missouri*

You are instructed that all that the city is bound to do is to exercise the care for maintaining its sidewalks and streets in the reasonably safe condition that an ordinarily prudent person would exercise, and if the city used such care in the construction and maintenance that an ordinarily prudent person would exercise, then your verdict must be for the defendant.¹

I charge you, as a matter of law, that defendant city is not an insurer against accidents to pedestrians passing along and over its sidewalks, and that all that is required of defendant city is to have its sidewalks in a reasonably safe condition for public travel.²

You are instructed that, if you find and believe from the evidence that ——— street and ——— street were, on and prior to ———, public streets and highways of the defendant, ———, and within the corporate limits of said city, and that said streets intersect each other at right angles, and that at the southwest corner of said streets there was a wooden board sidewalk and wooden steps; and that said sidewalk and steps were used by the traveling

⁹⁶ *Kansas City v. Bradbury*, 25 P. 889, 45 Kan. 381, 23 Am. St. Rep. 731.

⁹⁷ *City of Covington v. Whitney*, 99 S. W. 337, 30 Ky. Law Rep. 659.

⁹⁸ *City of Covington v. Whitney*, 99 S. W. 337, 30 Ky. Law Rep. 659.

⁹⁹ *City of Covington v. Whitney*, 99 S. W. 337, 30 Ky. Law Rep. 659.

¹ *Berry v. City of Sedalia*, 212 S. W. 34, 201 Mo. App. 436.

² *Morgan v. City of Kirksville*, 168 S. W. 835, 181 Mo. App. 348.

public as a way, then the court instructs you that it was the duty of the defendant to keep said sidewalk and steps at said point in a condition reasonably safe for the use of the public at night as well as by day, and the plaintiff, if she did not know to the contrary, had a right to presume that this duty had been performed. And if you further find and believe from the evidence that said sidewalk was, on ———, in an unsafe and dangerous condition for travel thereon by the public, and that a sufficient time had elapsed between the time the same became unsafe and dangerous (in case you find it was unsafe and dangerous) and the time of the injury (if any) to the plaintiff, for the city, by the exercise of reasonable diligence, that is, such care as an ordinarily prudent person would exercise, under the circumstances, to have discovered and repaired the same prior to the time of the injury (if any) to the plaintiff, then the city was negligent in not discovering and repairing the same. And if you further find and believe from the evidence that the plaintiff was traveling along said sidewalk, and in the exercise of ordinary care, under the circumstances, and was, by reason of the unsafe and dangerous condition of said sidewalk (if you find it was unsafe and dangerous), caused to be thrown to said sidewalk and steps and injured, then you will find for the plaintiff, and assess her damages (if any) at such sum as the evidence shows is a full, fair, and just compensation for the injuries (if any) sustained by her, considering their nature and character as shown by the evidence, and not exceeding the sum of \$——, which is the amount claimed by plaintiff in her petition.³

§ 3932(8). **Montana**

You are instructed that if you believe from the evidence in this case that the particular sidewalk described in the complaint herein, and which it is alleged was improperly constructed, was at the date of the accident in question, and prior thereto, reasonably safe for public use and travel, then the plaintiff cannot recover in this action, and you should find for the defendant.⁴

You are instructed as a matter of law that a city is not required to have its sidewalks so constructed as to secure to persons using them absolute and complete immunity from injury, nor is it bound to use the utmost care and exertion to that end. It is not an insurer against injuries, and its legal duty in this connection is fully discharged if it constructs and maintains its sidewalks in such manner as to be reasonably safe for use by persons exercising ordinary care and caution.⁵

³ *Kelley v. Kansas City*, 133 S. W. 670, 153 Mo. App. 484.

⁵ *Kansler v. City of Billings*, 184 P. 630, 56 Mont. 250.

⁴ *Kansler v. City of Billings*, 184 P. 630, 56 Mont. 250.

§ 3932(9). Nebraska

The court instructs the jury that under its charter and under the law, it is and was the duty of the city of ——— to keep and maintain the sidewalk complained of, and at the point in question, in a reasonably safe condition for travel by the ordinary and usual modes; and if the plaintiff, while passing over in the usual mode, using ordinary care for his personal safety, received personal injury, and suffered damage on account of defendant's neglect of that duty, you should find for the plaintiff.⁶

§ 3932(10). Oklahoma

You are instructed that a municipal corporation is required to exercise ordinary care and diligence to keep its sidewalks in a reasonably safe condition for public use in the ordinary and usual modes of travel, and if it fails to do so it is liable for injuries sustained by reason of such negligence, provided, however, that the party injured was in the exercise of ordinary care and caution at the time the injury occurred.⁷

§ 3932(11). Tennessee

You are instructed that the defendant is not an insurer against accidents upon its streets and sidewalks, but is bound to keep them in a reasonably safe condition, but not absolutely so. Its duty is only to see that sidewalks and streets are reasonably safe for persons traveling on them, while exercising ordinary care and caution. It is only bound to use ordinary care and attention to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the ordinary modes, by night as well as by day, while exercising reasonable care and caution.⁸

§ 3932(12). Texas

The jury are instructed that the opening and repairing of streets is a matter of discretion in the city government; but, when she undertakes to open or construct streets and travel ways, she must so construct them as to render their use reasonably safe to such persons as are naturally expected to use said ways, using such care as such persons ordinarily exercise.⁹

§ 3932(13). Virginia

The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets, bridges, and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same; and

⁶ *City of Lincoln v. Holmes*, 28 N. W. 851, 20 Neb. 39.

⁷ *City of Stillwater v. Swisher*, 85 P. 1110, 16 Okl. 585.

⁸ *Pool v. City of Jackson*, 23 S. W. 57, 93 Tenn. 62.

⁹ *City of Galveston v. Pomsalsky*, 62 Tex. 118, 50 Am. Rep. 517.

if the jury believe from the evidence that the defendant, the city of ———, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby while exercising such a degree of care and caution as, under the circumstances, might reasonably be expected from one of her age and intelligence, then she is entitled to recover of the defendant in this suit.¹⁰

The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same, and if the jury believe from the evidence that the defendant failed to use all reasonable care and precaution to keep its sidewalk in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby, without negligence on his part, then he is entitled to recover in this suit.¹¹

The court instructs the jury that it is the duty of defendant city to keep its sidewalks in safe condition, and free from defects and obstructions dangerous to persons passing along the same with ordinary care; and the defendant is liable to a person who sustains injury, without fault on his part, by reason of its neglect so to do.¹²

The court instructs the jury that, if the jury believe from the evidence that the sidewalk where the plaintiff was injured was uneven, out of repair, or fit condition for any reason, and dangerous to persons passing along the same with ordinary care and that the defendant, or its officers or agents, knew, or ought to have known, of its condition, and that the plaintiff, in passing along the said sidewalk, with such care as an ordinarily prudent man would have observed, fell thereon by reason of its defective condition, and was injured, then they must find for the plaintiff.¹³

§ 3932(14). Washington

You are instructed that it is the duty of the city at all times to keep its sidewalks on its public streets in a reasonably safe condition for public use, and not to permit anything that will make the use of the sidewalk in the ordinary manner unsafe. To this end it is the duty of the city to inspect its sidewalks in a reason-

¹⁰ *City of Roanoke v. Shull*, 34 S. E. 34, 97 Va. 419, 75 Am. St. Rep. 791.

¹¹ *Moore v. City of Richmond*, 8 S. E. 387, 85 Va. 538.

¹² *Gordon v. City of Richmond*, 2 S. E. 727, 83 Va. 436.

¹³ *Gordon v. City of Richmond*, 2 S. E. 727, 83 Va. 436.

ably careful and reasonably frequent manner for the purpose of ascertaining whether or not they are safe for public use.¹⁴

§ 3932(15). *West Virginia*

The court instructs the jury that the city of ——— is not an insurer against accidents upon the streets and sidewalks; nor is every defect or inequality therein, even though it may cause the injury sued for, actionable; nor is the city required to construct and maintain its streets and sidewalks in such a perfect manner and condition as to secure pedestrians absolute immunity from danger while passing thereover; it is sufficient if the streets and sidewalks are in a reasonably safe condition for ordinary travel, by day and by night, by persons exercising ordinary care; and, in determining in a given case whether or not a street or sidewalk is in reasonable repair, reference must be had to physical structure of the country, its climate, the condition of the weather, the time of the year when the accident complained of occurred, and other things naturally pertinent, and in considering the defect alleged in the declaration, the jury shall take into consideration what might reasonably be expected of the city under all the facts and circumstances of the case, and whether or not it would have been reasonably practical for the city to keep its streets free from all such defects as that alleged in the declaration; and, if the jury find from the evidence that the sidewalk, at the time and place of the injury sued for in this case, was, under all the circumstances, in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day and by night, then they shall find for the defendant.¹⁵

§ 3933. *Liability for conditions resulting from carrying out plan adopted by city*

You are instructed that, if you find that the placing of the stone in question at or near to the end of the box drain by the defendant was a part of the plan for improving the street by putting in the drain, and protecting the end of the drain and the traveling public from injury or accident by placing the stone in the position where it was at the time of the accident, the plaintiff cannot recover.¹⁶

You are instructed that, when a street has been improved by the construction therein of a box drain or culvert, one end of which is protected by a stone placed there at the time of its construction, and as a part thereof, and the pay roll prepared by the officers in charge of the work for the labor and material has been subsequent-

¹⁴ *Wren v. City of Seattle*, 170 P. 342, 100 Wash. 67, 8 A. L. R. 1123.

¹⁵ *Boyland v. City of Parkersburg*, 90 S. E. 347, 78 W. Va. 749.

¹⁶ *Davis v. City of Jackson*, 28 N. W. 526, 61 Mich. 530.

ly audited by the board of public works, allowed by the common council of the city, and approved by the mayor, this corporate action must be considered equivalent to the adoption of the plan by which the improvement was made.¹⁷

You are instructed that the wrong which must exist, to render the city liable, is neglect, and there can be no neglect when the work was completed as intended. Negligence cannot be predicated on a work done in accordance with its design or plan, even though it does not sufficiently protect the public.¹⁸

§ 3934. Duty to put street in condition to withstand elements

You are instructed that, if the city of —— left the street at 6 o'clock in the evening in a condition that was proper and fit to be traveled over by horses, bicycles, wagons, and such, at that time, it does not necessarily follow that it was left in a reasonably safe condition. Something more, in my opinion, is required of the city. The city is required to leave that street in such condition that it will remain in the condition in which it was put; that is, if it was put in a condition at 6 o'clock reasonably safe and fit for public travel at that time, then the further duty falls upon the city to consider what the elements are, and to consider what is likely to occur during the night; and they are required by law, in my opinion, to put it in such a condition that it will stand or withstand the elements or conditions that might reasonably and ordinarily be expected at that season of the year. So, gentlemen of the jury, the principal fact in this case left for you to determine is, did the city leave that street in a condition in which it would be expected it would remain in a condition that was reasonably safe? Did they do all that prudence and foresight would demand of them? In other words, if the rain and storms that might be expected, if you believe that they might be expected at that time of the year, would put that street out of repair and render it dangerous, then, gentlemen of the jury, in my opinion, negligence would be chargeable against the city; but if you find that a storm of unusual severity, or a storm that might not be expected under ordinary circumstances and conditions at that time of the year, came up, then it is something human foresight cannot see or prevent, and that would be an extraordinary visitation of the elements, and the city of —— would not be, in such a case, chargeable with negligence.¹⁹

¹⁷ Davis v. City of Jackson, 28 N. W. 526, 61 Mich. 530.

¹⁸ Davis v. City of Jackson, 28 N. W. 526, 61 Mich. 530.

¹⁹ Beattie v. City of Detroit, 100 N. W. 574, 137 Mich. 319.

§ 3935. Sufficiency of inspection of sidewalks

You are instructed that, if you find from the evidence that a short time before the alleged accident to plaintiff the defendant's street commissioner examined the crossing in question, and found it in reasonably safe and sound condition, and that the alleged accident occurred before, in the exercise of reasonable care, another inspection should have been made, then the city cannot be held liable for damages in this case. If, however, you find that at the time the commissioner inspected the crossing (if he did inspect it) the alleged break or hole then existed in the plank, and that, with the exercise of reasonable care on his part, he ought to have discovered and repaired it, but failed so to do, the city will be held negligent in respect thereto; and if the plaintiff thereafter, and without fault on her own part, was injured by reason of such defective walk, she will be entitled to your verdict.²⁰

§ 3936. Liability as dependent upon character of defects**§ 3936(1). California**

~~do~~I charge you that the duty imposed on the defendants commissioners of public works was to repair only such sidewalks as were so out of repair as to endanger persons passing thereon, and that defendants are not liable for every defective sidewalk, but only for such as are so out of repair as to endanger persons passing thereon.²¹

I instruct you that, if you find from the evidence that the sidewalk where the plaintiff has testified that he was injured was not so out of repair as to endanger persons in ordinary health and of ordinary strength, and with the ordinary control of their muscles and faculties while passing thereon, you must find for the defendants.²²

§ 3936(2). Illinois

The jury are instructed that the defendant, the city of ———, is not liable for latent or unseen defects in its sidewalks, not discoverable by the exercise of ordinary care; and if you believe from the evidence that the sidewalk in question was, at the time and place of the alleged accident, in a reasonably safe condition for ordinary travel, so far as was discoverable by the defendant by the use of ordinary care, by persons using such a degree of care and caution as reasonably prudent persons would use for their own safety under all the circumstances shown by the evidence, then you shall find the defendant city of ——— not guilty.²³

²⁰ Padelford v. City of Eagle Grove, 91 N. W. 899, 117 Iowa, 616.

²¹ Taylor v. Manson, 99 P. 410, 9 Cal. App. 382.

²² Taylor v. Manson, 99 P. 410, 9 Cal. App. 382.

²³ Karczenska v. City of Chicago, 144 Ill. App. 516.

§ 3937. Care required as dependent on amount of travel

The court instructs the jury that greater diligence on the part of the defendant is required in looking after the condition of a street or crossing where such street or crossing is much traveled than where it is little used.²⁴

§ 3938. Same—Sidewalks in suburbs**§ 3938(1). Alabama**

The jury are instructed that it is as much the duty of the city to keep the sidewalks in the suburbs of the city in a safe condition for the use of passengers as those in the heart of the city; that, while the authorities may have a discretion in the matter of elegance of pavements, or in the matter of pavements or no pavements, yet they have no discretion in the matter of safety; and it is an absolute duty to keep all the sidewalks in the city in a reasonably safe condition for the use of passengers, whether in the body of the city or near its limits.²⁵

§ 3938(2). Illinois

The jury are instructed that it is the duty of a town or city to use reasonable care to keep all sidewalks and crossings in its public streets in reasonably safe condition, even if the crossing or sidewalk is in the suburbs of the town or city, where less used than in the more frequented streets.²⁶

§ 3939. Duty to blind persons

The jury are instructed that the city is not required by law to construct its sidewalks so as to render them absolutely safe for people who may be temporarily blinded from any cause, and who, while in such condition, see fit to use them without guide or assistance; it is sufficient if they are made reasonably safe for people traveling over them under ordinary circumstances.²⁷

§ 3940. Right of city to claim benefit of precautions taken by contractor

The jury are instructed that, if the contractor of the building being erected, provided and maintained reasonably safe guards or signals to protect persons traveling along the sidewalk, in front of the building, from injury, this would relieve the city from liability for failure to place barriers or warning lights at the excavation mentioned in the evidence, the same as though such guards and signals had been placed and maintained there by order of the city.²⁸

²⁴ *Berry v. City of Sedalia*, 212 S. W. 34, 201 Mo. App. 436.

²⁵ *City Council of Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

²⁶ *Town of Normal v. Bright*, 79 N. E. 90, 223 Ill. 99.

²⁷ *Smith v. City of Gilman*, 38 Ill. App. 393.

²⁸ *City of Kansas City v. Birmingham*, 25 P. 569, 45 Kan. 212.

4. Particular Defects or Obstructions

§ 3941. Permitting obstructions or dangerous structures in street

§ 3941(1). Kentucky

The court instructs the jury that the law made it the duty of the defendant the city of ———, and of its agents and servants charged by it with the care of its highways, to exercise ordinary care, and to have and maintain the same in a condition reasonably safe for the use of the public; and if the jury shall believe from the evidence that the pole, in the evidence referred to, by which plaintiff was injured was, at and prior to the happening of plaintiff's injury, in such a decayed, rotten, and dangerous condition as to render its fall by reason of such condition probable, and if the jury shall further believe from the evidence that the decayed, rotten, and dangerous condition of said pole, if it was in such condition, was known to the city of ———, or to its said agents, or any of them, long enough prior to the happening of plaintiff's injury to have enabled the said defendant or its agents, by the exercise of ordinary care, to have removed the said pole from the highway, and if the jury shall further believe from the evidence that the said pole, by reason and because of its rotten, decayed, and dangerous condition, fell upon plaintiff, and that he was thereby injured, then the law is for the plaintiff as against the city of ———; and the jury should so find, unless the jury shall find as set out in instruction No. ———.²⁹

§ 3941(2). Texas

The jury are instructed that the defendant has entire control of streets within the corporate limits, and has power to provide for and enforce the manner in which said streets are to be kept, and is liable to travelers on said streets for any damage received, without the fault of the one injured, from placing in the street such obstructions as render the travel upon said street hazardous to the persons or the property being conveyed, or passing said streets.³⁰

§ 3942. Same—Acts of public contractor and abutting owner

You are instructed that it was the duty of the defendant city of ——— to keep its streets and highways, including ——— avenue, at the place indicated in the evidence, in a reasonably safe condition for use by persons lawfully using the same, and to exercise ordinary care to cause the precautions referred to in the first instruction to be taken by the defendants ——— and ——— while

²⁹ American Dist. Telegraph Co. v. Oldham, 146 S. W. 764, 148 Ky. 320, Ann. Cas. 1918E, 376.

³⁰ City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

the lime bed referred to in the evidence remained in the street for the construction of said building under said permit; and if the jury shall believe from the evidence that ——— street, at the time and place mentioned, was not reasonably safe for use by the public by reason of the lime bed referred to in the evidence, and if the jury shall further believe from the evidence that the defendant the city of ——— failed to exercise ordinary care to cause the precautions referred to in the first instruction to be taken by ——— and ———, and that by reason of its negligence in that regard, if it was negligent, the plaintiff received the injuries of which he complains, then the law is for the plaintiff as against the city of ———, as well as ——— and ———, and the jury should so find. But, unless you shall so believe from the evidence, the law is for the defendant the city of ———, and the jury should so find.³¹

§ 3943. Permitting rotten meter box in street

You are instructed that, if you believe from a preponderance of the evidence that the meter box referred to in the testimony was rotten and out of repair, and that it was, by reason of such unsafe condition, an unsafe and dangerous place in said street, and rendered it dangerous to use said street and walk immediately adjacent thereto, and if you further find that plaintiff, without fault on her part, fell into said meter box, then you will return a verdict for her, provided you further find that the defendant city knew, or by the exercise of ordinary care ought to have known, of said condition of said box long enough before said accident to have put it in good repair.³²

§ 3944. Loose boards in sidewalk

The court instructs the jury that it was the duty of the defendant city to see that the sidewalk in question was constructed of such materials and in such a manner as to make it reasonably safe for travel, and to see that it was kept and maintained in a reasonably safe condition for use and travel thereon in the ordinary modes; and if the jury believe, from the evidence, that the defendant negligently or knowingly permitted said sidewalk to be constructed in an improper, insecure, and defective manner, by using insufficient stringers, and placing the boards across the stringers so that the ends of the boards lapped over the stringers at either side, and that the boards were insecurely nailed, whereby and by reason thereof said sidewalk became and was unsafe and dangerous, and was not reasonably safe for travel thereon, or if the jury believe, from the evidence, that the sidewalk, at the time and place when

³¹ *Gnau v. Ackerman*, 179 S. W. 217, 166 Ky. 258.

³² *City of South Omaha v. Meyers*, 92 N. W. 743, 3 Neb. (Unof.) 699.

and where plaintiff claims to have been injured, was out of repair, and unsafe for travel thereon by the ordinary modes, by reason of the stringers being unsound, and the boards being loose or insecurely nailed to said stringers, and that defendant's officers, whose duty it was to keep said sidewalk in repair, knew, or might by the exercise of ordinary care and diligence have known, of its defective and unsafe condition in time to have repaired the same before said alleged injury to plaintiff, and that, while plaintiff was walking along said walk, where it was so defective and out of repair, by the side of Mrs. ———, in the exercise of ordinary care herself, she was violently thrown down upon the sidewalk and ground, and injured, by a loose or insecurely nailed board in said walk flying up and out of its place when stepped on by Mrs. ———, who was walking in company with plaintiff, then and in such case the jury should find for plaintiff, although the jury may believe, from the evidence, that plaintiff knew the condition of said sidewalk, and that it was out of repair and unsafe.³³

§ 3945. Obstruction of sidewalk and curbing by lumber pile

Lumber pile on street viaduct, see post, § 3950(3).

The court instructs the jury that, if the jury believe from all the evidence that at the time and place in the proof described, a number of boards or timbers were upon the sidewalk, curbing or gutter, on the west side of ——— street south of ——— street, opposite the bowling alley building of ———, and that the city of ——— knew of their presence, or could, by the use of ordinary care and caution have known of the presence, of said boards or timbers a sufficient length of time before the accident to the plaintiff for the city of ——— to have removed same, and failed to do so, and that the defendant and its agents in failing to do so, if they did so fail, were guilty of negligence, and, if they further find that said curbing or gutter, or either, at the time and place described in the proof, was not in a reasonably safe condition for persons to cross over and walk upon and along, and that the plaintiff was using due care and caution at said time and place, and that the plaintiff did not know of the presence of said lumber pile, and could not, by ordinary care, have known of same, and that while the plaintiff was attempting to cross the curbing and gutter for the purpose of taking a street car, as in the proof described, and solely by reason of the unsafe condition of said curb and gutter, if any, the plaintiff fell over said boards or timbers, causing

³³ Chilton v. City of St. Joseph, 44 S. W. 766, 143 Mo. 192.

the injuries in the proof described, they will find a verdict for the plaintiff; otherwise, for the defendant.³⁴

§ 3946. Permitting excessively smooth surface of walk or excessive slant

§ 3946(1). Colorado

You are instructed that, if you find from the evidence that the said sidewalk had an excessively smooth surface, or an excessive inclination or slant, and that because of said conditions, or either of them, it was not in a reasonably safe condition, and that the plaintiff, while using ordinary care in walking on said sidewalk, fell, and was injured as the result of said condition of the walk, then your verdict should be for the plaintiff.³⁵

§ 3946(2). Missouri

You are instructed that, if you find and believe from the evidence that, at the time plaintiff alleges she was injured the bricks in said crossing at the point where she was injured were, as originally put in, or by reason of wear thereafter, so smooth and slippery that, taken in connection with their slope, said crossing was unsafe or dangerous for pedestrians, and if you find that such condition existed when said crossing was originally constructed or had existed for such a length of time before plaintiff's injury that the officers of the city in charge of its streets could, by the exercise of reasonable diligence, have discovered the condition of such crossing so as to have a reasonable time to correct such condition before plaintiff fell thereon, if she did fall, and if you further find and believe from the evidence that on or about the ——— day of ———, the plaintiff slipped and fell upon said crossing on account of such smooth and slippery condition, if any, of said bricks, taken in connection with the slope thereof, you will return a verdict for plaintiff for any damages sustained by such fall.³⁶

§ 3946(3). Wisconsin

The court instructs the jury that, if you find that the walk was in an extraordinary condition of slipperiness in view of the season of the year, and you find that it was not so constructed as to be reasonably safe after severe storms and freezing weather, such as are liable to occur at the season of the year when the accident happened, you will be warranted in finding a defect; but I shall say something more upon this question further on. Now, gentlemen, I come again to the question, was the highway or sidewalk de-

³⁴ *City of Covington v. Whitney* (Ky.) 99 S. W. 337, 90 Ky. Law Rep. 659.

³⁵ *Griffith v. City and County of Denver*, 132 P. 57, 55 Colo. 37.

³⁶ *Berry v. City of Sedalia*, 212 S. W. 34, 201 Mo. App. 436.

fective? Upon that question I say, by way of instruction that the rule of the statute or reasonable safety required that it shall have been reasonably safe for those walking upon it with ordinary care in an ordinary condition of the weather, or during such ordinary changes of the weather as are liable to occur at any season of the year, and at the season of the year when the accident occurred. To return once more to the main question, was the sidewalk defective? It is purely a question of fact for you to determine. It is a question somewhat simple in its nature and character. It involves the question and only the question of whether the sidewalk at the point complained of was reasonably safe or otherwise, located where it was, and in view of the approach to it from the direction in which the plaintiff was traveling, or whether it was so constructed as in any ordinary condition of the weather liable to exist at any season of the year that it might become dangerous to those walking upon it with proper or ordinary care.³⁷

§ 3947. Permitting accumulation of ice and snow

§ 3947(1). Illinois

You are instructed that, if the sidewalk in question was constructed in a proper manner, sufficiently level and smooth for ordinary travel, without obstructions, and so built that it would not, by reason of any peculiarities of its construction, cause snow or ice to accumulate thereon, and if there was no accumulation of snow or ice thereon, and the accident was attributable solely to the slippery condition of that part of the sidewalk, occasioned by a recent fall of snow, and that the sole cause of the accident was the temporary slipperiness of that part of the sidewalk caused by the recent fall of snow thereon, and that, in the absence of snow or ice, that part of the sidewalk, in its ordinary condition, was not unreasonably unsafe, such condition of the sidewalk would not be a defect for which the city would be liable.³⁸

§ 3947(2). Iowa

The court instructs the jury that cities and towns are not insurers of the safety of travelers upon their streets and sidewalks. It is their duty, however, to keep their walks in a reasonably safe condition for persons desiring to pass over them, to pass in safety, by the use of due care and prudence on the part of said pedestrians in passing over said walks, and if the plaintiff has shown by a preponderance of evidence, as herein defined to you, that while she was exercising ordinary care and prudence, and without any negligence on her part contributing to the injuries complained of, by

³⁷ *Hill v. City of Fond du Lac*, 14 N. W. 25, 56 Wis. 242.

³⁸ *City of Chicago v. McGiven*, 78 Ill. 347.

reason of the negligence of the defendant, as charged in her petition, and as submitted to you herein by the court, she was injured by reason of the defendant permitting snow and ice to be and remain on the walk referred to in the plaintiff's petition in such a rough, rounded, and uneven condition as to render such walk dangerous to persons passing over the same in the exercise of ordinary care and prudence, then in such a case the defendant would be liable to the plaintiff for whatever injury the evidence has shown she has sustained by reason thereof, providing that you further find that at the time and prior to the time of the said injury the defendant had knowledge of such defect complained of or by the exercise of ordinary care and prudence it should have known of such defect in time to have remedied the same and thereby prevented the injury.³⁹

The court instructs the jury that the fact, if it be a fact, that ice and snow has been permitted to accumulate on the walk of a city from natural causes and may have been permitted by the city to remain thereon for a considerable length of time, and though slippery, because of the smoothness of the surface, does not constitute such a defect alone for which a city may be held responsible for an injury resulting to a pedestrian thereon. It is only where such snow and ice are allowed to remain upon the walk until by its being trampled upon by pedestrians, freezing and thawing, or from other causes the surface of such snow and ice becomes rough, ridged, rounded in such a manner that a person in the exercise of ordinary care could not pass over it without danger of falling, that the defects are such as to render the city liable. There is no duty resting on the city to remove snow and ice from the sidewalk so long as the snow and ice remain unchanged by the interference of man, or from other artificial causes by which the snow or ice become ridged, uneven, or is made to assume some other form or present some other danger than it would have presented solely from natural causes. And if you believe from the evidence produced upon the trial hereof that, at the time plaintiff fell upon the sidewalk in question, the sidewalk was covered with snow and ice, and that the same was unbroken and smooth and even as it had fallen upon said sidewalk, then the plaintiff would not be entitled to recover in this action, and you should find for the defendant.⁴⁰

You are instructed that it may be stated as a general rule that the mere fact that snow or sleet has fallen upon the sidewalk from the clouds, and thereby rendered the sidewalk slippery and difficult to pass over, would not make the city liable therefor, even

³⁹ *Finnane v. City of Perry*, 145 N. W. 494, 164 Iowa, 171.

⁴⁰ *Finnane v. City of Perry*, 145 N. W. 494, 164 Iowa, 171.

though such ice and snow should remain upon the walk for an unreasonable length of time after the officers of the city, whose duties require them to look after such matters, had notice of its existence, or after they, in the exercise of reasonable care in performing their duties, ought to have known of its existence; but this rule relates only to the natural conditions resulting from rain or sleet falling and freezing upon the walk, or snow accumulating upon the walk from natural causes. Where, after such ice or snow has thus accumulated, if by reason of persons traveling over same, or if, from other causes, as from ice or snow thawing and flowing down upon the walk from other lands, the surface of the snow or ice upon the walk becomes rough, or ridged, or rounded in form, or lies at an angle, or slanting, to the plane surface of the walk, so that it becomes difficult and dangerous for persons traveling on foot to pass over same when exercising ordinary care, or if the walk is constructed in such manner as not to permit the natural flow of the water and thawing snow from lands adjoining, but dams same upon the walk, and holds same there until it freezes, and the walk becomes dangerous, by reason thereof, to persons using ordinary care in attempting to pass over same, or, by reason of snow or ice having accumulated on the walk from natural causes, the flowing water and snow from adjoining lands are dammed up and held upon the walk, and frozen there, and by reason thereof make the walk dangerous for persons using ordinary care in passing over the same on foot, then the city becomes liable for injuries caused by such obstruction, provided the person injured did not contribute to his injury by negligence on his part, and the obstruction has existed for an unreasonable length of time after the same became known to the city authorities, or ought to have been known to them in the exercise of reasonable care.⁴¹

§ 3947(3). Virginia

The court instructs the jury that it is the duty of the defendant city to keep its sidewalk in a reasonably safe condition, and free from defect and obstructions dangerous to persons passing along the same with ordinary care; but said defendant is not liable for accumulation of ice or snow on the sidewalks which produce mere slipperiness, and have not been allowed to become uneven or rounded as to amount to an obstruction; and if the jury believe, from the evidence, that the plaintiff was injured by reason of slipping and falling on ice or snow which had not accumulated so as to form an obstruction, they must find for the defendant.⁴²

⁴¹ *Huston v. City of Council Bluffs*, 69 N. W. 1130, 101 Iowa, 33, 36 L. R. A. 211.

⁴² *City of Lynchburg v. Wallace*, 29 S. E. 675, 95 Va. 640.

The court instructs the jury that, if they believe, from the evidence, that the injury complained of was caused from the defendant negligently allowing ice and snow so to accumulate on its sidewalk as to become uneven and rounded, thus to become an obstruction, and after notice of that condition permitted the same to remain, without using due care to remove or remedy the said obstruction, they must find for the plaintiff, provided they believe, from the evidence, that the plaintiff exercised ordinary care, under all the circumstances, to avoid the consequences of such negligence on the part of the defendant.⁴³

§ 3948. Permitting nuisance in street attractive to children

You are instructed that, if for several weeks or more immediately before the date of the injury different fires had been burning in the dump, and because of the existence of such fires the dump was a dangerous place for plaintiff and other children of tender years to play or venture upon, and the defendant with knowledge of these facts and with knowledge that the plaintiff and other children of tender years had for a period of several weeks or more been in the habit of playing or venturing thereon or thereabout, and took no reasonable precaution to keep the plaintiff away from the dump or fire in question or to prevent injury to him or to prevent him from falling into the fire while engaged in play or adventure thereon or thereabout, then defendant would be liable for injuries by reason of such negligence without any contributory negligence on the part of the plaintiff.⁴⁴

§ 3949. Obstructions near to traveled way

You are instructed that, if the town officers knew, or by the exercise of ordinary diligence might have known, that the stump existed so near the traveled track as to render the highway dangerously defective for the use of travelers in the exercise of ordinary care, and plaintiff in the exercise of ordinary care drove against it and was injured, the town is liable.⁴⁵

§ 3950. Duty to place barriers or warning signals

Duty of private person to place barriers or lights around excavation or obstruction, see post, § 4929.

Duty of town or county, see post, § 4914.

§ 3950(1). Illinois

The jury are instructed that, if you believe from the evidence the sidewalk in question was, at the place where the accident occurred, _____ inches high from the ground and without railing, this is not

⁴³ *City of Lynchburg v. Wallace*, 29 S. E. 675, 95 Va. 640.

⁴⁴ *Roman v. City of Leavenworth*, 133 P. 551, 90 Kan. 379.

⁴⁵ *Boltz v. Town of Sullivan*, 77 N. W. 870, 101 Wis. 608.

of itself, as matter of law, conclusive evidence of negligence on the part of the city to make it liable. And if you further believe from the evidence that the sidewalk was of such width and in such condition and was so lighted at the time of the accident that persons in the exercise of reasonable care and prudence could safely pass over the same, you will find for the defendant.⁴⁶

§ 3950(2). Maryland

You are instructed that it was the duty of the defendant to take proper precaution, by proper guards, signals, lights, or other warnings, to warn persons of the impassable condition of the street, so as to prevent injuries to persons passing along said street; and if the jury further find that the defendant, and those employed by it in repairing and recurbing said street, did not use ordinary care in providing such precautions, and that the plaintiff, in consequence of such neglect to provide such precautions, was thrown from his hack, while driving with ordinary care along said street, then the plaintiff is entitled to recover.⁴⁷

§ 3950(3). Missouri

The jury are instructed that, if you believe and find from the evidence that on or before ———, between the hours of ——— and ——— o'clock in the morning, and when it was quite dark and foggy (if you so find), plaintiff was riding in an automobile, east-bound across what is commonly known as the ——— avenue bridge, crossing the ——— river from ——— to ———, and that just after said automobile had crossed said bridge and had passed onto a temporary wooden structure forming the eastern approach to said bridge, and commonly known as the ——— street viaduct, and when said automobile was a few feet northeast of the point where said temporary wooden structure joins onto the permanent structure composing said ——— avenue bridge, and on the right-hand side of said ——— street viaduct, and within a few feet of the right-hand railing of said viaduct (if you so find), said automobile collided with a certain pile of lumber upon said viaduct at said point (if you so find), and that as a direct result of said collision, if any, plaintiff was injured; and if you further find that said ——— street viaduct was built and maintained by said defendant at the times herein mentioned as a public thoroughfare, and as an approach to said ——— avenue bridge across the ——— river; and that at the times herein mentioned and for a long time prior thereto said viaduct was much used by all kinds of foot and

⁴⁶ *Smith v. City of Gilman*, 38 Ill. App. 393.

⁴⁷ *Mayor and City Council of Baltimore v. O'Donnell*, 58 Md. 110, 36 Am. Rep. 395.

vehicle traffic at all hours of the day and night, if you so find; and if you find that all said facts, if you find them to be facts, were known to the defendant, or by the exercise of ordinary care upon its part could have been known to it long prior to ———; and if you further find that said defendant carelessly and negligently, if you so find, piled the aforesaid lumber on said viaduct at said place, and that said lumber, if any, constituted a dangerous and unsafe obstruction on said structure, if you so find; and if you further find that said defendant carelessly and negligently, if you so find, failed to place a light on said pile of lumber, if any, when it knew, or by the exercise of ordinary care could have known, that in the absence of light on said pile of lumber members of the public using said structure would be liable to collide with said pile of lumber and be hurt and injured thereby, if you so find; and if you further find that the collision of said automobile with said pile of lumber, if you so find said automobile did so collide, and the injury, if any, to plaintiff was directly caused by the carelessness and negligence of defendant in the foregoing respects, if you find said defendant was careless and negligent in said respects, and that plaintiff was at all times in the exercise of ordinary care for her own safety—then under the law your verdict must be for the plaintiff and against the defendant, and you will assess plaintiff's damages at such sum as you find from the evidence will reasonably compensate her for her said injuries, if any, received as a direct result of said collision, if any.⁴⁸

The court instructs the jury that even if you find and believe from the evidence that no warning lights had been placed upon the pile of macadam in the street, nevertheless, if you further find and believe from the evidence that the place at which the macadam was placed was so well lighted that the pile of macadam could have been easily seen by one exercising ordinary care while such distance away as to enable him easily to avoid it, and that ordinary prudence did not require a warning light to be placed thereon, then your verdict shall be in favor of both defendants.⁴⁹

§ 3950(4). Utah

You are instructed that it was the duty of the defendant city to keep ——— street at the place where plaintiff alleges that she was injured in a reasonably safe condition for travel by all kinds of vehicles, including bicycles, and in case of a defective condition in or dangerous obstruction on said street, it was its duty to exercise ordinary care and diligence, as in these instructions is more fully explained, to apprise the plaintiff and the public of such defect or

⁴⁸ Roy v. Kansas City, 224 S. W. 132, 204 Mo. App. 332.

⁴⁹ Hunt v. City of St. Louis, 211 S. W. 673, 278 Mo. 213.

dangerous condition by placing barriers or signals, or by some other efficient means to point out the danger.⁵⁰

§ 3951. Same—Duty to guard against falling off embankment or precipice

You are instructed that if the city, in opening or repairing one of its streets or sidewalks for travel, has opened a part of said street for travel and is at work on the remainder—if you so find—then it must use reasonable care to guard passers-by along said street or sidewalk from injury by conditions existing on that part of said street or sidewalk not open for travel, by placing sufficient barriers to protect persons from injury in going over such street, provided the city has manifested its purpose to open such way and dedicate the same to the use of the public; and, if it fails to use reasonable care in this respect, that is, the care of a prudent man under all of the circumstances, and a pedestrian is injured whilst traveling along such street, and such injury was proximately caused by the negligence of the city, the city would be liable for such damages as might ensue.⁵¹

You are instructed that it was the duty of the defendant to keep its streets, including its sidewalks, in proper repair, that is, in such condition as that children and others in passing and repassing over them might at all times, when said streets have been opened for travel, do so with reasonable safety, and proper repair means that all bridges or culverts, dangerous pits, embankments, and like perilous places, very near and adjoining the streets, shall be guarded against by proper railings or barriers.⁵²

You are instructed that, if you find by the greater weight of the evidence that the defendant employed ——— to construct the culvert along ——— street, and that it caused ——— and others to raise ——— street, at and near the said culvert, above the level of the surrounding ground, to a height of ——— feet or more at the culvert, and you find that said street was opened by the city for travel, and you find that it failed to place guard rails or barriers along the said sidewalk, but left said street or sidewalk at said point unprotected, and you find that such failure on the part of the city was the proximate cause of the injury to the plaintiff, then the defendant would be guilty of negligence, and under such findings, if so made by you from the evidence, you would answer the first issue, "Yes."⁵³

⁵⁰ *Emelle v. Salt Lake City*, 181 P. 268, 54 Utah, 360.

⁵¹ *Alexander v. City of Statesville*, 81 S. E. 763, 165 N. C. 527.

⁵² *Alexander v. City of Statesville*, 81 S. E. 763, 165 N. C. 527.

⁵³ *Alexander v. City of Statesville*, 81 S. E. 763, 165 N. C. 527.

5. *Depressions and Holes in Street or Sidewalk*

§ 3952. Duty of municipality in general

§ 3952(1). *Kentucky*

The jury are instructed that, if they believe from all the evidence that on ———, and at the time of injury to plaintiff mentioned in the proof, there was a hole in the sidewalk on the north side of ——— street, east of ——— street, and opposite the palings or gate extending between the warehouse standing on the northeast corner of ——— and ——— streets and the warehouse next to the east, and that, because of the presence of said hole, if any, the said sidewalk at said point was not in a reasonably safe condition for the use of those walking over and upon the same in the exercise of ordinary care, and that said hole, if any, existed at said point before the injury to plaintiff mentioned in proof for a time long enough to have enabled the defendant city to have repaired said hole, if any, and it failed so to do, and if the defendant city, by the exercise of ordinary care, could have known of said hole, if any, long enough before the injury to the plaintiff to have enabled the city to repair said sidewalk at said point, if such hole was there, and did not do so, and if the jury believe that the plaintiff, at the time mentioned in the proof, in walking along and over said sidewalk at said point, stepped into said hole, without slipping upon any ice or snow, or both, and by so stepping was thrown to the ground and injured, and that the presence of said hole, if any, was the proximate and sole cause of his fall and injury, and that the city was, in permitting said hole, if any, to remain in said sidewalk at said point, if the city did so permit, guilty of negligence, and that the plaintiff at the time of his injury, in walking along and upon said sidewalk, was himself in the exercise of ordinary care, then the jury should find a verdict for the plaintiff.⁵⁴

§ 3952(2). *Missouri*

You are instructed that, if you believe and find from the evidence that on ——— there was, at or near the usual stopping place (if any) for north-bound ——— cars at ——— and ———, a depression in the street about ——— inches deep, and that said depression (if any) was so situated that there was danger of persons who might alight from street cars stopping at said place stepping into the same and being injured thereby, and if you further find that defendants by the exercise of ordinary care should have known that said depression was at said place and that there was danger of persons being injured by stepping into same, and if

⁵⁴ *City of Covington v. Billiter*, 99 S. W. 318, 30 Ky. Law Rep. 650.

you further find that the defendant city by the exercise of ordinary care should have known said facts and conditions (if you so find them) in time by the exercise of ordinary care to have removed the depression before the time of plaintiff's injury (if any), but that said defendant city negligently (if you so find) permitted said depression to be and remain in the condition aforesaid at said place, and if you further find that thereafter, on ———, the plaintiff was a passenger on a north-bound ——— street car of the defendant ——— Railways Company, and desired to transfer at ——— and ———, and that the defendant ——— Railways Company negligently (if you so find) stopped said car at the aforesaid depression for the plaintiff to alight, and that said place was not a reasonably safe place for plaintiff to alight, and that as plaintiff alighted from said car she stepped into the aforesaid depression and received injuries; and if you further find that plaintiff herself was at all times in the exercise of ordinary care for her own safety, then you are instructed by the court that your verdict must be in favor of the plaintiff and against both of the defendants.⁵⁵

The court instructs the jury that, if they believe and find from the evidence that the sidewalk on the north side of ——— street extending back from ——— street to the alley between ——— street and ——— street, in the city of ———, was on or about the ——— day of ———, a public street and sidewalk, and was in an unsafe and dangerous condition for travel thereon by the public, by reason of a hole or depression in said walk (if the jury believe there was a hole or depression in said walk), and that a sufficient length of time had elapsed between the time said sidewalk became unsafe and dangerous (if the jury believe it was unsafe and dangerous) and the time of the alleged injury to plaintiff for the defendant city, by the exercise of ordinary diligence and care, to have discovered and repaired said sidewalk before the time of the alleged accident, and if the jury further believe from the evidence that the plaintiff on or about said date was traveling along and over said sidewalk, and was exercising reasonable care for her own safety, and that, while passing along over said sidewalk at said point, she was thrown or fell upon said walk and injured by reason of the unsafe and dangerous condition of said walk, if it was unsafe at that point, then the jury are bound to find for the plaintiff.⁵⁶

The court instructs the jury that, if they find from the evidence that on the ——— day of ———, ——— street was a public street of ———; that on the said day there was a hole in the sidewalk on

⁵⁵ Costello v. Kansas City, 219 S. W. 386, 280 Mo. 576.

⁵⁶ Clancy v. City of Joplin (App.) 181 S. W. 120.

the east side of said street, between ——— and ——— streets, at a point about ——— feet north of ——— street, which made said sidewalk not in a reasonably safe condition for persons traveling over it; that said hole was known to the officers of ——— having supervision of its sidewalks, or could have been known to them if they had used ordinary care and diligence in the discharge of their duties, in time to have repaired the same before said day; that on said day plaintiff, while in the exercise of ordinary care, as defined in other instructions, was traveling over said sidewalk, and stepped into said hole, and was thereby thrown down and injured, then your verdict should be for the plaintiff.⁵⁷

§ 3953. Liability as dependent on extent of depression

The court instructs the jury that it is the settled law in this state that a depression in a walk which does not exceed two inches in depth will not render the city liable for damages incident to an accident caused by such depression. Thus you will see that, unless the plaintiff in this case has proved by a preponderance of the evidence that the depression or obstruction in question exceeded two inches in depth or in height, she cannot recover. But if you shall find as a fact from the evidence in this case that one piece of the walk had been depressed and the other had been so raised as to cause a depression of from two to four inches in depth, or if one of the sections of the walk was elevated at one side or end of the section and depressed at the other to such an extent that there was a difference in height of the adjacent portions of the walk of from two to four inches, then it would be a question of fact for you to determine whether the walk was in a reasonably safe and fit condition for public travel.⁵⁸

§ 3954. Defect in crossing—Opening between stepping stones

The jury are instructed that, if the jury find from the evidence that said crossing was not so reasonably safe for ordinary travel as aforesaid, at the time of the alleged injury, to wit, on the night of the ——— day of ———, by reason of an opening between the stones in said crossing erected for and used as stepping-stones therein; and further find that the defendant had notice of such defect in such crossing, or that the same had existed for a time prior to the time of said alleged injury, reasonably sufficient to have enabled the defendant to have ascertained the fact, and remedied said defect, and further find that on the night of said day last aforesaid the said plaintiff's wife, ———, while walking over

⁵⁷ Elliott v. Kansas City, 96 S. W. 1023, 198 Mo. 593, 6 L. R. A. (N. S.) 1082, 8 Ann. Cas. 653.

⁵⁸ Wadkins v. City of Albion, 100 N. W. 982, 201 Mich. 130.

said crossing, and while in the exercise of ordinary care and attention, fell into said opening, and was thereby injured, and that her said fall and injury was caused by said alleged defect in said crossing, then they must find for said plaintiff.⁶⁰

§ 3955. Failure to cover catch or sink basin

§ 3955(1). Missouri

You are instructed that, under the law, the city of ———, the defendant herein, is charged with the duty of maintaining its streets and alleys in reasonably safe condition, so that those having occasion to use them may do so in safety. It was the duty of the defendant to keep ——— street in a reasonably safe condition at the point covered by the hole in question, by providing a reasonably safe and sufficient covering for said hole, and by keeping the said hole covered. If the defendant failed to provide a covering for said hole reasonably safe and sufficient, in consequence of which the covering fell into the hole, leaving the same uncovered and unprotected, then such an act on the part of the city was negligence, or, if the defendant suffered the said hole to remain without cover after knowing the same was open, or when, by the exercise of ordinary care, the defendant might have known that said hole was open, then such act of the defendant was negligence. And if you shall believe from all the evidence in this case that the plaintiff, while in the exercise of ordinary care, fell into the hole on ——— street while attempting to cross said street, by reason of the negligence of the defendant, as in this instruction defined, and that by reason of such fall plaintiff sustained the injuries complained of, then your finding must be for the plaintiff.⁶⁰

§ 3955(2). Oklahoma

The court instructs the jury that it was the duty of the city of ——— to use reasonable care to keep its streets and sidewalks in a safe condition for persons using the same, and for failure to perform this duty the defendant will be liable in damages to the plaintiff, if injured by falling into the manhole, catch or sink basin which has been permitted to remain in the street uncovered for such a length of time as, by the use of ordinary care, the defendant could have discovered and known the condition, and failed to properly cover the same, provided, the negligence of the plaintiff, if any, did not contribute to such injury, if any; and as applied to this case you are instructed that if you believe by a preponderance of evidence that the city of ——— failed to use reasonable care to cover the sink or catch basin mentioned in evidence, after notice of

⁵⁹ *Davenport v. City of Hannibal*,
18 S. W. 1122, 108 Mo. 471.

⁶⁰ *Barr v. Kansas City*, 16 S. W.
483, 105 Mo. 550.

its condition, or if you believe from a preponderance of the evidence that the same remained opened and in a defective condition for such a period of time that the defendant, by the exercise of ordinary care and diligence, could have known of its condition and repaired the same and placed it in a reasonably safe condition, and that it failed to do so, and you further believe from a preponderance of the evidence that said plaintiff, while traveling upon the street mentioned in evidence, stepped into said sink or catch basin, and was at the time exercising ordinary care on his part for his own safety, and was injured thereby, and that the negligence of the defendant aforesaid was the direct and proximate cause of said injury, then you are instructed to find for the plaintiff, otherwise you would find for the defendant.⁶¹

§ 3956. Duty to cover or guard drain or gutter

§ 3956(1). Pennsylvania

You are instructed that a city is not bound to keep its highways in the condition of absolute safety; nor is it obliged to cover its crossings at all places, if it does not see fit to do so. This, like all other city improvements, may be done or not, as the municipal authorities see proper; and the absence, therefore, of a crossing at the place of the accident, was not of itself negligence in the corporation.⁶²

§ 3956(2). Texas

The jury are instructed that, if the drain was a reasonably proper one in its manner of construction, and leaving it uncovered and unfenced between the crossings of the streets and alleys was not reasonably liable to result in injury to persons passing and using ordinary care, to be expected from those who usually travel streets in the city, the defendant would not be liable, and you should return your verdict for the defendant.⁶³

The jury are instructed that it is a question for them to determine from the proof whether the drain on ——— street, covered at the crossings of the streets and alleys, but left uncovered in the intervening spaces and without any barrier to prevent travelers falling in the same, was such a construction as that the persons using said street could with ordinary care avoid receiving injury therefrom.⁶⁴

The jury are instructed that, if you find the drain was a dangerous obstruction in the street, and was not properly guarded, and

⁶¹ City of Ada v. Smith, 175 P. 924.

⁶² Heiss v. City of Lancaster, 52 A. 201, 203 Pa. 260.

⁶³ City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

⁶⁴ City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

that the plaintiff, using due and ordinary care in passing, slipped and fell into said drain, and that the injury she received resulted solely from said fall, and not in part from the presence of some accidental cause unknown to the defendant, you will find for the plaintiff, and assess the damage at such sum as in your judgment of the proof will compensate her for the pecuniary loss the plaintiff has sustained in the damage done to her person by said fall and injury.⁶⁵

§ 3957. Defective covering of coal hole

The court instructs the jury that if you find and believe from the evidence that on ———, and for a long time prior thereto, ——— street was a public street within the defendant city, and that the sidewalk on the west side of said ——— street, and directly in front of No. ———, ——— street, was at all said times a public sidewalk upon said street, and that at all times a coal hole, with the covering and lid thereon, was in said sidewalk, then it became the duty of said defendant city to exercise ordinary care in keeping said sidewalk in front of No. ———, ——— street, in a reasonably safe condition for persons lawfully walking thereon; and if you further find from the evidence that defendant city, neglected said duty by allowing the covering and lid on said coal hole to be, on said ———, and to remain for a long time prior thereto, in an unsafe and dangerous condition for travel on account of the covering and lid of said coal hole extending above the level of said sidewalk, and if you further find and believe from the evidence that defendant city, either knew of said condition of said coal hole, or by the exercise of ordinary care or caution could have known thereof in time to have had reasonable opportunity to have repaired said defect, if any, or had a reasonable opportunity to have caused the same, if any, to have been repaired in time to have prevented the accident to plaintiff hereinafter referred to, but failed and neglected so to do; and if you further find and believe from the evidence that on said ——— day of ———, while plaintiff was walking south of said sidewalk in front of No. ———, ——— street, she struck her right foot against or under the said covering of said coal hole, and was thrown to the sidewalk and injured without any negligence on her part contributing thereto—then you are to find for the plaintiff.⁶⁶

⁶⁵ *City of Galveston v. Posnainsky*,
62 Tex. 118, 50 Am. Rep. 517.

⁶⁶ *Smart v. Kansas City*, 105 S. W.

709, 208 Mo. 162, 14 L. R. A. (N. S.)
565, 123 Am. St. Rep. 415, 13 Ann.

Cas. 932.

6. *Notice to Municipality of Defects*

§ 3958. *Necessity of notice to municipality of defects*

§ 3958(1). *Illinois*

You are instructed that if the jury believe, from the evidence, that the sidewalk in which the defect is alleged to have been, and where the plaintiff is alleged to have been injured, was properly and safely constructed and laid down, and that prior and up to, or about, the time of the alleged injury, it appeared to be in a proper and safe condition, then, if there be no evidence that the defendant had actual knowledge of such defect, or that the defect existed for such length of time before the injury, that the defendant, if exercising proper care and diligence, would have known of it, the jury should find the defendant not guilty.⁶⁷

The jury are instructed that, notwithstanding the jury may believe, from the evidence, that the said sidewalk, at the time of the alleged injury, was defective, yet this fact alone would not be sufficient evidence of negligence on the part of the defendant. In order to charge the defendant with negligence, it must appear, from the evidence, not only that the said sidewalk was defective at the time of the alleged injury, but also, either that such defect was actually known to the defendant, through some of its officers, agents, or servants, or that the defect existed for such a length of time, prior to the alleged injury, that the city, if exercising ordinary diligence, would or should have known of the defect.⁶⁸

§ 3958(2). *Iowa*

The court instructs the jury that, in order to recover in this action, it must be proved, by weight or preponderance of the evidence introduced upon the trial, that a traveled path used commonly by pedestrians had existed across the parking at the place in question substantially as claimed by plaintiff; that the defendant's officers actually knew of same, or that it had existed for such a length of time that such officers, in the exercise of reasonable and ordinary care and diligence, should have known of the existence thereof; that a wire had been negligently stretched across such path; that the defendant, by its officers, actually knew of the erection of such wire, or, by the exercise of reasonable and ordinary care and diligence, should have known of its erection a sufficient length of time before the injury to plaintiff so that, in the exercise of rea-

⁶⁷ *City of Chicago v. McCarthy*, 75 Ill. 602.

⁶⁸ *City of Chicago v. McCarthy*, 75 Ill. 602.

sonable care and diligence, such wire might have been removed or safeguarded before plaintiff was injured.⁶⁹

§ 3958(3). **Kansas**

The jury are instructed that, before the plaintiff can recover a judgment in this action, it must appear by a preponderance of the evidence (1) that plaintiff's intestate, ———, was killed as the result of a defect or excavation in the sidewalk on ——— street in the defendant city, and that such excavation was left in an unsafe condition; and (2) that said city or its officers were negligent in permitting said sidewalk to remain in said unsafe condition at the time said ——— is alleged to have been killed. To charge the defendant with negligence, it must appear that the proper officers of the city had notice of the unsafe condition of the sidewalk, in time to have prevented the killing of ——— by falling into said excavation, or that by the exercise of reasonable and ordinary care and diligence, they could have known of the unsafe condition of said sidewalk, in time to have prevented such killing. By reasonable and ordinary care and diligence, is meant that degree of care and prudence which an ordinarily careful and prudent man would reasonably be expected to use, under similar circumstances.⁷⁰

§ 3958(4). **Missouri**

You are instructed that you must find for the defendant unless you believe from the evidence that the defendant had actual knowledge of the displacement of the covering of the drop, and the condition of said drop, and a reasonable time thereafter to repair the same, or put guards thereabout for protection, before the alleged injury to the plaintiff; or that the displacement of said cover must have been of such an obvious and notorious character, and must have existed for such length of time, that the defendant would, by the exercise of ordinary care and diligence, have known the same.⁷¹

§ 3958(5). **Nebraska**

You are instructed that negligence is the gist of this action, and the burden of proving the negligence on the part of the defendant city, as alleged in plaintiff's petition, is upon the plaintiff, and before he would be entitled to recover in this action he must prove the negligence so alleged in his petition on the part of said defendant by a fair preponderance of the evidence, and in this case, if you find from the evidence that the said scuttle hole in controversy was constructed in such manner as was considered, in the exercise

⁶⁹ *Youngblood v. Mason City*, 146 N. W. 20, 165 Iowa, 488.

⁷⁰ *City of Kansas City v. Birmingham*, 25 P. 569, 45 Kan. 212.

⁷¹ *Barr v. Kansas City*, 16 S. W. 483, 105 Mo. 550.

of ordinary reason and prudence, ordinarily safe to persons passing along and over the same using ordinary care and diligence, or that said scuttle hole became out of repair and unsafe and defective and that said defendant city through its authorities had no knowledge of the same, and that such defective condition had not existed a sufficient length of time or that said defective condition existed in such manner that by the exercise of ordinary care and diligence the said defendant city could not have known it, then and in that event said defendant city would not be liable, and your verdict should be accordingly.⁷²

You are instructed that the defendant city is liable only for such unsafe condition of its streets as it had actual notice of, or ought to have known of by exercising what would be, under all the circumstances, ordinary and reasonable caution and diligence. If, therefore, the preponderance of the evidence fails to show that the defendant knew or ought to have known of the unsafe condition of said box, if you find it was unsafe, then your verdict should be for the defendant.⁷³

§ 3958(6). Oklahoma

You are instructed that before the plaintiff can recover it must appear from the testimony, by a fair preponderance thereof, that the city of ———, through its mayor or city engineer, or both, at least ——— hours prior to the time when the injury complained of or alleged to have been received by the plaintiff was received, knew or by the exercise of reasonable diligence could have known of the unsafe condition of the street at the point where the plaintiff is alleged to have been injured, if you find from the evidence that it was unsafe.⁷⁴

§ 3958(7). Texas

You are instructed that if you find that plaintiff's wife was injured by reason of the fact, if you find such to be a fact, that a plank over a hole in defendant's sidewalk was loose or warped, and would not have occurred but for the fact that such plank was loose or warped, then, before plaintiff could recover damages against defendant, you must find from the evidence before you that defendant's officers, agents, or servants, or some of them, had actual notice that the same was so loose or warped, or that the same had been in such condition for such length of time before the said accident, that by the use of reasonable diligence and care they could have known of such fact before the said accident. By "rea-

⁷² City of Omaha v. Kochem, 105 N. W. 182, 74 Neb. 718.

⁷³ City of South Omaha v. Meyers, 92 N. W. 743, 3 Neb. (Unof.) 699.

⁷⁴ City of Tulsa v. Wells, 191 P. 186, 79 Okl. 39.

sonable diligence and care," as used in this charge, is meant such diligence and care as a person of ordinary prudence would have used in such a matter under similar circumstances.⁷⁵

§ 3959. Same—Obstruction of street by third person

You are instructed that if, at the time of the injuries complained of, the defendant had a contract with any person to furnish it with lumber by the year or otherwise, and to deliver the same to the city, and such person did in fact, under such contract, deliver said lumber, and pile the same in the street, then the act of such person or persons in delivering and piling the same was not the act of the city, and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied.⁷⁶

You are instructed that, if the lumber mentioned in the complaint was not placed in the street by the city, but was placed there by some one else, to be used in the construction or repair of a building, or for any other purpose, then the city is not liable for any accident resulting therefrom, unless it had notice, either express or implied, that the same was in the street, and that the same was in an unsafe and dangerous condition.⁷⁷

§ 3960. Same—Liability for latent defects

You are instructed that, to render a village liable for defects in a sidewalk the defect must be of such character that the village authorities, by using ordinary care and diligence, could discover it. If you should find from the evidence in the case that the defect was of such a nature that the officials of the village could not have discovered it by using ordinary care and diligence, the defendant is not liable in damages, and your verdict should be for the defendant village.⁷⁸

§ 3961. Necessity of actual notice to city

You are instructed that actual notice would, of course, be sufficient, but it is not necessary in all cases. It may be inferred from the notoriety of the defect or damage, from its continuation for such length of time as to lead to the presumption that the proper officers did, in fact, know, or with proper diligence and care, might have known the same.⁷⁹

⁷⁵ *City of Dallas v. Jones*, 53 S. W. 377, 93 Tex. 38.

⁷⁶ *City of Evansville v. Senhenn*, 47 N. E. 634, 151 Ind. 42, 41 L. R. A. 728, 68 Am. St. Rep. 218.

⁷⁷ *City of Evansville v. Senhenn*,

47 N. E. 634, 151 Ind. 42, 41 L. R. A. 728, 68 Am. St. Rep. 218.

⁷⁸ *Shaw v. President, etc., of the Village of Sun Prairie*, 42 N. W. 271, 74 Wis. 105.

⁷⁹ *Rosenberg v. City of Des Moines*, 41 Iowa, 415.

You are instructed that, if the sidewalk was properly constructed and afterward became out of repair, then defendant would not be liable, unless you find it had notice of such defect. But actual notice need not be proved in all cases. It may be inferred from the notoriety of the defect or danger, from its continuance for such a length of time as to lead to the presumption that the proper officers did in fact know, or with proper diligence might have known, the same.⁸⁰

§ 3962. Necessity of notice as to defects in original construction

§ 3962(1). Iowa

You are instructed that, if the jury find from the evidence that the plaintiff was injured by the defective sidewalk in the street of the defendant, without negligence on his part, it is not necessary, in order to entitle the plaintiff to recover, that he should prove actual notice of the defect to the city, if the same was the result of the construction by the defendant, or if the defect was notorious and had remained so for a sufficient length of time to enable defendant, by reasonable diligence, to know of its existence and repair the same.⁸¹

§ 3962(2). Tennessee

You are instructed that, if the proof should show that the sidewalk where the plaintiff was hurt was originally put down in a defective condition, and so remained in that condition from the time it was first put down until the plaintiff was injured, then no notice, either actual or constructive, was necessary to defendant, for, if thus defectively constructed, the defendant would be charged with notice from the time of its original defective construction.⁸²

§ 3963. What constitutes actual notice

§ 3963(1). Pennsylvania

You are instructed that any defect which existed in the walk at the time when ——— examined it, and which was apparent to a person examining it with ordinary care, of course the borough had actual notice of. Notice to him would be notice to the borough, under those circumstances. This would be an important question for you to determine: What was the condition of the walk at that time? He testifies that there were no such defects as are described by the plaintiff's witnesses at that time; substantially, that there were no broken planks and no loose planks that he discovered.⁸³

There is evidence, too, that the burgess, ———, was accustomed

⁸⁰ Rice v. City of Des Moines, 40 Iowa, 638.

⁸¹ Rice v. City of Des Moines, 40 Iowa, 638.

⁸² Pool v. City of Jackson, 23 S. W. 57, 93 Tenn. 62.

⁸³ Fee v. Borough of Columbus, 31 A. 1076, 168 Pa. 382.

to walk over the walk about every day. That you may consider in respect to the question of actual notice of the defects in the walk. He testifies that he did not discover any such defects as described by the plaintiff, and he thinks he would have discovered them if there had been any there. All this is for you. You must determine from this conflicting testimony what the true facts are. What was the actual condition of this sidewalk at the time when the accident occurred, and how long had it existed prior to that time? If it was actually known, as I have said to you, by the officers, that the sidewalk was dangerous, and for an unreasonable time they neglected to repair it, or if it had been dangerous so long that, considering its situation, the amount of travel over the walk, the public place the walk occupied, and all the circumstances in the case, the officers, by exercising reasonable and ordinary care should have known of it, and failed to repair it, then they were negligent.⁸⁴

§ 3963(2). Tennessee

You are instructed that by "actual notice" is meant that if there was a defect in the sidewalk, and some member of the board of mayor and aldermen, or some agent or employé of the defendant, whose duty it was to keep, or see the streets were kept, in repair, saw it, or that some one notified or informed them, or some of them, of its existence.⁸⁵

§ 3964. Notice to what employees or officers binding on municipality

§ 3964(1). Iowa

You are instructed that the defendant is a municipal corporation, and, as such, obtains notice and knowledge through its officers and representatives, and you are instructed that by negligence of said defendant, as used in these instructions, is meant the negligence of such officers or representatives of the defendant as were charged with the duty of constructing and maintaining the sidewalk at the time and place of the accident, or inspecting the same and keeping it in proper condition; that notice on the part of the defendant of improper construction or defective condition as alleged by the plaintiff means notice to the officers or representatives of the defendant charged with the duty of constructing and maintaining said sidewalk or inspecting the same and keeping it in proper condition; and that knowledge on the part of the defendant of said sidewalk or manhole being out of repair, as alleged by the plaintiff, means knowledge of the officers or representatives of the de-

⁸⁴ *Fee v. Borough of Columbus*, 31 A. 1076, 168 Pa. 382.

⁸⁵ *Pool v. City of Jackson*, 23 S. W. 57, 93 Tenn. 62.

fendant charged with the duty of maintaining or inspecting the same and keeping it in proper condition.⁸⁶

§ 3964(2). *Washington*

You are instructed that the city is not charged with notice of a defect merely by reason of the fact that some subordinate employé of one of the city departments, having no supervision of the streets, may have known of it.⁸⁷

§ 3965. **Constructive notice of defects as equivalent to actual notice**

Constructive notice of defects in bridge, see ante, § 1224.

Liability of private persons on account of defects in streets, see post, § 4932.

§ 3965(1). *Iowa*

You are instructed that actual notice need not be shown in all cases. It may be inferred from the notoriety of the defect, or from its being so visible and apparent, and having continued for such length of time, as that, in the exercise of reasonable observation and care, the proper officers of the city ought to have known of and remedied or removed the defect or obstruction. The evidence in this case fails to show actual notice of the defect or obstruction complained of, if same existed, to the defendant or its officers; but if the evidence shows that such defect or obstruction had existed for such length of time, and was so visible and apparent, as that the officers and servants of the defendant ought, in the exercise of ordinary care and observation, to have known of and remedied or removed same before the time of the accident in question, this would be sufficient to show that the defendant was negligent in permitting such defects or obstructions to remain at the time of the accident; but unless the evidence does show that said defects or obstructions were caused by the negligence of the defendant in constructing the culvert at the place in question, as before explained, or that same were of such notoriety, or had existed for such length of time, and were visible and apparent before the accident, as that the officers and servants of the defendant, in the exercise of ordinary care and observation, ought to have known of and remedied or removed said defects or obstructions, the defendant cannot be charged with negligence on account thereof, and the plaintiff cannot recover in this case. In this connection you are charged that notice, in order to bind the city, must be to some representative charged with some duty with reference to maintaining the streets in proper condition for travel.⁸⁸

⁸⁶ *Roney v. City of Des Moines*, 130 N. W. 396, 150 Iowa, 447.

⁸⁷ *Owen v. City of Seattle*, 116 P. 261, 64 Wash. 10.

⁸⁸ *Hazzard v. City of Council Bluffs*, 53 N. W. 1083, 87 Iowa, 51.

§ 3965(2). Kansas

You are instructed that, if you believe from the evidence that the sign in question was in a dangerous and unsafe condition at the time of and previous to the injury complained of, and had been in such condition for several months prior thereto, and that such dangerous condition was such as would be apparent upon an ordinary examination and inspection thereof, then it was the duty of the city to have known of such condition, and it is chargeable with negligence in permitting it to remain where it was in such unsafe condition, the same as if the city or its officers had actual knowledge of such condition.⁸⁹

§ 3965(3). Nebraska

The court instructs the jury that actual knowledge in all cases need not be proved, but may be inferred. If the defective and unsafe condition of the sidewalk is open and notorious, and continued for a length of time in which and within which the city authorities, in the exercise of reasonable diligence and care, in their reasonable supervision over the streets, would acquire notice of such unsafe condition, the city would be liable just as in cases of actual notice.⁹⁰

§ 3965(4). Virginia

The court instructs the jury that the defendant city has notice of a defect by actual notice to officers having supervision over its streets, and is conclusively presumed to have notice of the defect when the same has remained such a length of time that, by the exercise of ordinary diligence, it could have discovered said defect.⁹¹

§ 3966. What constitutes constructive notice of defects**§ 3966(1). Illinois**

The court instructs you that it is the duty of a city in this state to use reasonable care to keep its walks and streets in a reasonably safe condition for public travel by those who are in the exercise of ordinary care for their own safety; that where a walk or a public street remains in an unsafe condition for a considerable time, and such a length of time that the city authorities, in the exercise of ordinary care and diligence, should have discovered such condition and remedied it, then notice to the city of such defective or unsafe condition of such walk or street is presumed.⁹²

⁸⁹ Gray v. City of Emporia, 23 P. 944, 43 Kan. 704.

⁹⁰ City of Lincoln v. Holmes, 28 N. W. 851, 20 Neb. 39.

⁹¹ City of Lynchburg v. Wallace, 29 S. E. 675, 95 Va. 640.

⁹² Graham v. City of Rockford, 87 N. E. 361, 238 Ill. 214.

§ 3966(2). **Kansas**

You are instructed that it is not necessary that the defendant city should have had actual notice of the unsafe and dangerous condition of the sidewalk, if you find that the sidewalk was unsafe. If you find that said condition of said sidewalk existed a sufficient length of time before the injury to plaintiff to have enabled the defendant city or its officers and agents, by the exercise of ordinary care and diligence, to have known of the existence thereof, and remedied the same, then the law implies a notice to the defendant city of the existence of the condition.⁹³

You are instructed that by reasonable and ordinary care and diligence is meant that degree of care and prudence which an ordinarily careful and prudent man would be expected to use under similar circumstances.⁹⁴

§ 3966(3). **Michigan**

You are instructed that, if the sidewalk generally was in bad shape, otherwise than the particular plank, or plank and a half, if the ends of the boards were loose, and if it was in such shape that planks were liable to get out, because not nailed, and because the stringers were rotten, and that such a defect as the removal of a plank might be expected, then I charge you that if the removal of such a plank would cause a dangerous place, and would render the sidewalk unfit for travel, the general condition was a thing that the village should have had notice of, and should have repaired; and if they did not know, that this particular plank and a half were gone, if they knew that the sidewalk was so defective, and had been in the same general bad condition, and that an accident was expected and likely to happen, that would be notice that required them to go on, and fix and take care of it.⁹⁵

§ 3966(4). **Tennessee**

You are instructed that by "constructive notice" is meant that if there was a defect in the sidewalk, and that the defect was so patent and obvious as to be generally noticed by persons passing over it, and thus continued to exist for such a length of time prior to the time of the alleged accident as that it might be reasonably inferred that some members of the board of mayor and aldermen, or employé of defendant, whose duty it was to keep the streets in repair, had notice of such defects.⁹⁶

⁹³ *City of Kansas City v. Bradbury*, 25 P. 889, 45 Kan. 381, 23 Am. St. Rep. 731.

⁹⁴ *City of Kansas City v. Bradbury*, 25 P. 889, 45 Kan. 381, 23 Am. St. Rep. 731.

⁹⁵ *Grattan v. Village of Williams-ton*, 74 N. W. 668, 116 Mich. 462.

⁹⁶ *Pool v. City of Jackson*, 23 S. W. 57, 93 Tenn. 62.

§ 3966(5). Wisconsin

You are instructed that, if the village had laid a new walk over the place of injury, it would thereby have discovered the defect in question, and it would be chargeable with constructive notice of such defect.⁹⁷

The court instructs the jury that, if the jury find, from the testimony, that the cross-walk or crossing, including the place where the accident is alleged to have happened, or any part of it, was defective, out of repair, or in a condition dangerous for travelers over the same, and that the same was in such defective or dangerous condition for several weeks or months before the accident, and continued so to be up to the time the accident happened, then the city and its officers are presumed to have had knowledge or notice of such defects and dangerous condition of the crossing or cross-walk, and no actual notice was necessary to make the city liable; that is to say, in such case the city is presumed to have had notice.⁹⁸

§ 3967. Constructive notice of obstruction of street

You are instructed that the law assumes that after a certain time they shall take notice of obstructions of such a character. That depends upon the circumstances of the case, to be sure, and how long the obstruction may remain upon the street, in order to charge the officers of the borough with notice. We refer you to the rule hereinbefore laid down with regard to the degree of diligence which the officers are to exercise according to the extent of the use of the street, and other facts which might bring knowledge home to them, and of which they should take notice.⁹⁹

You are instructed that, though you should conclude the particular pile of rubbish on which the plaintiff was injured had not been on the street over a day or two, yet if you find that others of a similar character had previously, from time to time, occupied substantially the same place, so that the one complained of was but a later one of a series of such obstructions, the municipality may be affected with notice if, considering the extent of travel upon — street, the demands of the public thereon, and the period of time over which such obstruction extended, and in view of the law already stated as to the duties of borough officers in this behalf, you think they should, in the exercise of reasonable diligence, have known of the obstruction.¹

⁹⁷ Shaw v. President, etc., of Village of Sun Prairie, 42 N. W. 271, 74 Wis. 105.

⁹⁸ Johnson v. City of Milwaukee, 1 N. W. 187, 46 Wis. 568.

⁹⁹ Frazier v. Borough of Butler, 33 A. 691, 172 Pa. 407, 51 Am. St. Rep. 739.

¹ Frazier v. Borough of Butler, 33 A. 691, 172 Pa. 407, 51 Am. St. Rep. 739.

§ 3968. Duty to make repairs on receiving notice of defects

The court instructs the jury that, if you find from the evidence that the sidewalk in question was in a defective or unsafe condition at or before the time of the occurrence, and the city authorities had knowledge or were notified of that fact, it was their duty to repair it without unnecessary delay; and if they failed or neglected to do so, and the injury, if any, resulted on that account—was the consequence of such neglect—and no fault of plaintiff contributed to the injury, you should find for plaintiff.²

§ 3969. Right of city to reasonable time after notice to remedy defects

Right to opportunity to repair bridge, see ante, § 1225.

§ 3969(1). New Hampshire

The jury are instructed that, if the injury complained of resulted from the condition of the sidewalk produced by the recent sudden action of the elements, the defendant is not chargeable unless, under the circumstances, it ought to have repaired the defect before the accident happened, and had reasonable opportunity to do so, and that, if it could have had no such notice and reasonable opportunity as would have enabled it to repair the defect, such defect was not embraced within the legal construction of the statute. So produced and existing without such lapse of time as to give the authorities of the city a reasonable opportunity to know of the defect and remove it before the accident, it had not become the kind of obstruction, insufficiency, or want of repairs contemplated by the statute.³

§ 3969(2). Virginia

The court further instructs the jury that the defendant was entitled to a reasonable time after the discovery of the defect to remove and remedy the same; and if the jury shall believe, from the evidence, that the sidewalk was in a defective condition as above set forth, and that by reason of its recentness and the condition of the weather it had not had reasonable time to remove the same, they must find for the defendant.⁴

7. Liability of Public Contractor**§ 3970. Right of public contractor to temporarily obstruct street**
Liability of sidewalk contractor, see post, § 4926.

You are further instructed that if you find and believe from the evidence that the defendant ——— was engaged in the reconstruc-

² City of Lincoln v. Holmes, 28 N. W. 851, 20 Neb. 39.

³ Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520.

⁴ City of Lynchburg v. Wallace, 29 S. E. 675, 95 Va. 640.

tion of ——— street, and that in connection with such work he piled macadam upon ——— street and immediately adjoining ——— street, but that in so doing he used only such part of said street as was reasonably necessary for that purpose, leaving a clear space for passage of vehicles, and that said macadam was not permitted to remain there for a longer period than was, under all the facts and circumstances, reasonably necessary, then said pile of macadam was in itself neither wrongful nor an unlawful obstruction of said ——— street.⁵

The court instructs the jury that contractors engaged in the construction and repair of public highways have the right temporarily to obstruct and use such part of such highways for the storage of material to be used in such work of construction or repair as may be reasonably necessary under all the circumstances.⁶

§ 3971. Maintenance of nuisance attractive to children

You are instructed that it was the duty of the abutting owner, ———, and the contractor, ———, to so place and guard said lime bed as to render the street reasonably safe for persons lawfully using same; and if you believe from the evidence that said lime bed was attractive or inviting to children, and it was dangerous for them to go upon it, and that the said ——— and ——— knew or by the exercise of ordinary care could have known, that the said lime bed was attractive or inviting to children, and that it was dangerous for them to go upon it, if it was so attractive or inviting and dangerous for them to go upon it, then it was their duty to exercise ordinary care to prevent injury to children using the street by adopting and enforcing such precautions as were reasonably sufficient for that purpose; and if you shall believe from the evidence that ——— street at the time and place mentioned was not reasonably safe for use by the public by reason of the lime bed referred to in the evidence, and if you shall further believe from the evidence that ——— and ——— negligently failed to adopt and use such precautions in guarding said lime bed as were reasonably necessary to protect children using said street from injury, and that by reason of such failure upon their part, or of either of them, or any of their employes, if they or any of them did so fail, the plaintiff received the injuries of which he complains, the law is for the plaintiff as against the defendants ——— and ———, and the jury should so find. But, unless you shall so believe from the evidence, the law is for the defendants ——— and ———, and the jury should so find.⁷

⁵ Hunt v. City of St. Louis, 211 S. W. 673, 278 Mo. 213.

⁶ Hunt v. City of St. Louis, 211 S. W. 673, 278 Mo. 213.

⁷ Gnau v. Ackerman, 179 S. W. 217, 186 Ky. 258.

§ 3972. Effect of stipulation to keep street in repair for stated time

The court instructs the jury that if they believe from the evidence that the defendant ——— constructed the sewer on ——— street in accordance with the specifications of the city engineering department, and that said sewer had been completed by him and accepted by the city before the time of the injury complained of, then they are instructed that there was no duty or obligation on the part of the said defendant ——— to watch for or to be on the lookout for sinkages or holes which should develop on said sewer, and that there was no duty on the said defendant ——— to guard such sinkages and holes by barricades or lights, and they must find for the defendant, unless you shall believe from the evidence that the city gave reasonable notice prior to the accident to defendant, or his agent, of the defect in said street, so that he could repair or safeguard it.⁸

8. Contributory Negligence of Traveler**§ 3973. Duty of traveler to use ordinary care****§ 3973(1). Georgia**

Negligence of traveler as defense in action against town or county, see post, § 4916.

The jury are instructed that, if the plaintiff, in driving his car along the street in question, by the exercise of ordinary care on his part could have discovered the existence of the obstruction in the street, and, failing to do so, ran his car into the obstruction and was injured, his injuries would be attributable to want of care, and he would not be authorized to recover; or if, in the exercise of ordinary care, he discovered the obstruction in the street, and, after making such discovery, he could have prevented the accident and injury to himself by the exercise of ordinary care for his own protection, and failed to do so, and was thereby injured, he could not recover for such injuries, and you should so find.⁹

§ 3973(2). Idaho

You are instructed that a person using the public highways and streets of a city is bound to the exercise of ordinary care—that is, such care as an ordinarily prudent man would exercise under like conditions—and if he fails to use such care he cannot recover for any damage or injury he may suffer, even though the city failed to keep its streets in a reasonably safe condition for travel. If, therefore, you find from the evidence that the plaintiff did not exercise

⁸ *City of Richmond v. Jackson*, 88 S. E. 49, 118 Va. 674.

⁹ *Holliday v. City of Athens*, 74 S. E. 67, 10 Ga. App. 709.

ordinary care in making the turn from ——— street into ——— street across the plank bridge or culvert referred to in the evidence, and his failure to exercise such care, proximately contributed to the injury complained of, then you are instructed to find for the defendant.¹⁰

§ 3973(3). *Illinois*

You are instructed that the only care and caution required by ———, the plaintiff, in using the crossing in controversy, was such conduct and care and caution for her own personal safety as a reasonably prudent and cautious person would have exercised under the same condition and circumstances.¹¹

§ 3973(4). *Iowa*

You are instructed that if, under all the circumstances surrounding him (plaintiff) he could readily have seen, and as an ordinarily prudent and careful man ought to have seen, the wire over which he claims to have fallen, then he was guilty of contributory negligence, and he can recover nothing in this case.¹²

§ 3973(5). *Michigan*

In case you conclude that the defendant is guilty of negligence as just set forth, the next question for you to consider is whether or not the plaintiff was himself in the exercise of due and proper care at the time he alleges he was injured. Plaintiff must also establish this proposition in his favor by a preponderance of evidence before he can recover. If he was not, he is guilty of contributory negligence, and cannot recover in this action. Contributory negligence is defined to be some act of omission by a person injured which an ordinarily prudent man would not have done, or would not have left undone, under the same circumstances, and which directly aided in causing or contributing to the injury received. Hence, under the law of this state in reference to this suit, if plaintiff has done any act which an ordinarily prudent man would not have done, or omitted to do any act which an ordinarily prudent man would have done, he is guilty of contributory negligence and cannot recover.¹³

§ 3973(6). *Missouri*

The court instructs the jury that, although you may find from the evidence that plaintiff was injured at the time and place claimed by her, yet if you find from the evidence that plaintiff, by standing near the embankment which fell upon her while the bank was sub-

¹⁰ *Smith v. City of Rexburg*, 132 P. 1153, 24 Idaho, 176, Ann. Cas. 1915B, 276.

¹¹ *Town of Normal v. Bright*, 79 N. E. 90, 223 Ill. 99.

¹² *Buchholtz v. Incorporated Town of Radcliffe*, 105 N. W. 336, 129 Iowa, 27.

¹³ *Belyea v. City of Port Huron*, 99 N. W. 740, 136 Mich. 504.

jected to the heat of a fire built near it, and which said fire caused said bank to fall, did not exercise ordinary care under the circumstances, and that such lack of care directly contributed to her injury, then plaintiff cannot recover, and your verdict must be for defendant.¹⁴

§ 3973(7). Pennsylvania

You are instructed that there is evidence that the plaintiff had passed over the walk frequently. She did not testify, as I remember, that she had observed or noticed the dangerous condition of the walk, these loose planks, and so on, before this time; but whether she had noticed it—whether she ought to have noticed it—is for you. As I have said, she was not bound to the exercise of extraordinary care, but she was bound to use such care as a person of ordinary prudence, situated as she was, under like circumstances, would use; and, if she neglected that, it would be negligence.¹⁵

§ 3973(8). Virginia

The court instructs the jury that a person using a public street is required to use ordinary care and to exercise his faculties in a reasonable manner to avoid injury to himself, and the care thus required must be commensurate with the conditions by which he is surrounded. And if the jury believe from the evidence that the injury to the plaintiff occurred or was contributed to by reason of his failure to use ordinary care or to make reasonable use of his faculties, then he was guilty of contributory negligence, and the jury must find for the defendant, the city of —, even though they may believe from the evidence that the city was guilty of negligence, and that the sidewalk was not in a reasonably safe condition.¹⁶

§ 3974. Effect of slight negligence

The court instructs the jury that a traveler on the public street is held to the exercise of only ordinary care. Slight negligence, which is a want of extraordinary care, will not defeat a recovery for an injury received in consequence of a defect in a public street or highway, provided the evidence shows that the city authorities were guilty of negligence in permitting the defect to exist, and that the traveler was injured thereby, and was using ordinary care to avoid the injury.¹⁷

§ 3975. Duty to exercise ordinary care to discover defects

You are instructed that it is the duty of pedestrians walking on the sidewalk of the city of — to use ordinary care and discern

¹⁴ *Henson v. Kansas City*, 210 S. W. 13, 277 Mo. 443.

¹⁵ *Fee v. Borough of Columbus*, 31 A. 1076, 168 Pa. 382.

¹⁶ *City of Richmond v. McCormack*, 91 S. E. 767, 120 Va. 552.

¹⁷ *Moore v. City of Richmond*, 8 S. E. 387, 85 Va. 538.

defects in a sidewalk over which they are walking. They are not required to keep their eyes constantly on the sidewalk; neither are they permitted to go along the sidewalk regardless of where they are walking. Therefore the court instructs you that, although you may find from the evidence that the hole into which plaintiff stepped and fell was a dangerous and defective hole, still, if you believe from the evidence that plaintiff knew of said place and danger of using same, or by the exercise of ordinary care on her part could have known of it, and that plaintiff attempted to pass over said point (without using reasonable care), and such failure contributed to cause her injury, then the plaintiff is guilty of contributory negligence in not discerning it, and your verdict should be for the defendant.¹⁸

You are instructed that, although the jury may believe from the evidence that plaintiff could have, by the exercise of ordinary care and diligence, discovered the hole in the sidewalk in question, and that it was unsafe and dangerous (if the jury believe from the evidence that it was unsafe and dangerous), in time to have prevented stepping therein (if the jury believe she did step therein), yet that will not be sufficient to defeat a recovery, unless the jury believe from the evidence that she failed to exercise ordinary care and prudence in passing over said walk, and the failure to exercise such care and prudence directly contributed to her injuries, if any.¹⁹

§ 3976. Circumstances increasing degree of care required

The jury is further instructed that by "ordinary care," as used in the foregoing instructions, is meant such care as a prudent person would take for his safety under all the circumstances of the case, taking into consideration her age, physical condition, the streets and sidewalks generally, the condition of the weather, the time of day or night, and other things naturally pertinent; and, if the jury find from the evidence that the accident occurred at night, and that the streets and sidewalks of the said city, at and near the point of the alleged accident, were generally covered with ice and snow, and dangerous because of their slipperiness, then "ordinary care" on the part of the plaintiff means a greater degree of care and caution would be required of her than is ordinarily required of a pedestrian traveling over a sidewalk. And if the jury further find from the evidence that in passing over the slippery sidewalk at the place of the accident the plaintiff did not use such greater care

¹⁸ *Clancy v. City of Joplin* (Mo. App.) 181 S. W. 120.

¹⁹ *Clancy v. City of Joplin* (Mo. App.) 181 S. W. 120.

and caution, and such care and caution as a prudent person would use under the circumstances, they must find for the defendant.²⁰

§ 3977. Assumptions permissible to traveler with respect to safety of street

See, also, ante, § 3975.

§ 3977(1). Delaware

You are instructed that, in the absence of any knowledge to the contrary, the traveler has a right to assume that the streets of a city are in a reasonably safe condition, and in such case he is not bound to look or search for holes or obstructions.²¹

§ 3977(2). Virginia

The court instructs the jury that the plaintiff had the right to assume that the defendant would perform its duty in keeping the sidewalk in the declaration mentioned in safe and proper condition, and he was required to exercise only ordinary care in passing over the place where the accident occurred, unless he knew of its dangerous condition, or might have seen it by the exercise of the care ordinarily observed by the citizens in walking along the sidewalks of the city. He was not required to anticipate danger, nor to be on the lookout for its existence.²²

§ 3977(3). Washington

You are instructed that one traveling upon the sidewalk or street of a city without notice of any defect therein has the right, when using due diligence and care, to presume and act upon the presumption that it is reasonably safe throughout its entire width.²³

§ 3977(4). West Virginia

You are instructed that, if the street and sidewalk were within the corporation, and opened up as a street and public highway for the use of travelers, and under the control of the defendant, the law imposed upon the defendant the duty to keep said street and sidewalk in a reasonably safe condition for persons using ordinary care; and plaintiff had a right to assume and believe that defendant had performed its duty, and that the street and sidewalk at the place mentioned in the declaration was, at the time of the injury, in a reasonably safe condition for his use as a traveler in the exercise of ordinary care.²⁴

²⁰ Boyland v. City of Parkersburg, 90 S. E. 347, 78 W. Va. 749.

²¹ Stidham v. Delaware City, 67 A. 175, 6 Pennewill, 359.

²² Gordon v. City of Richmond, 2 S. E. 727, 83 Va. 436.

²³ Gallamore v. City of Olympia, 76 P. 978, 34 Wash. 379.

²⁴ Foley v. City of Huntington, 41 S. E. 113, 51 W. Va. 396

§ 3978. Unnecessarily choosing dangerous way or duty to take safest route

§ 3978(1). Illinois

The jury are instructed that, if they believe, from the evidence, that the most direct route for the plaintiff in going to and from his home to his place of business was over ——— street in said city of ———, then the fact (if shown by the evidence) that the sidewalk on said street, over which plaintiff passed, was defective, and had been in a defective condition for some years previous to the alleged injury, would not oblige him to take another less convenient sidewalk.²⁵

§ 3978(2). Iowa

The court instructs the jury that, if it appears from the evidence that it was fairly apparent to a pedestrian, while using his senses as an ordinarily prudent man, that the parking had been seeded, and the existence of the stakes, or stakes and wire, along the parking fairly apprised or warned him not to go upon the parking, then, if the plaintiff did go upon said parking under these circumstances, he was guilty of negligence, as the sidewalk afforded him a reasonably safe and convenient way.²⁶

You are instructed that, if you find, from the evidence, that the defendant was negligent in permitting the sidewalk to remain in the condition in which you find it was at the time the plaintiff fell, and that said walk was at said time in a dangerous and unsafe condition for travel, and you further find, from the evidence, that the plaintiff, at the time he attempted to pass over the walk, well knew this fact, and that it was imprudent for him to attempt to pass over it at the time he did attempt to pass over it for any reason, and with this knowledge he still persisted in passing over it, although there was another walk which he might have taken in going in the direction which he desired to go, then his own negligence contributed to his injury, and he cannot recover. That is, if you find, from the evidence, that the plaintiff knew, at the time he attempted to pass over the walk, of the negligence of the defendant, and that the walk was in a dangerous and unsafe condition, and that it was imprudent for him to attempt to pass over it in company with ———, as the evidence shows he did attempt to pass over it, and yet, notwithstanding this fact, and the knowledge he had concerning the danger, he did attempt to pass over it, and was injured in so doing, and you find that there was another walk which he might have taken in going in the direction he desired to

²⁵ *City of Aurora v. Hillman*, 90 Ill. 61.

²⁶ *Youngblood v. Mason City*, 146 N. W. 20, 165 Iowa, 488.

go, which was perfectly safe for travel, then he was negligent in so attempting to pass over such walk and cannot recover.²⁷

You are instructed that, in determining whether the plaintiff was guilty of a want of care in going upon the sidewalk, you will take into consideration the defective condition of the walk at and prior to the time of the injury, as alleged by her in her petition, and which allegation binds her on this branch of the case, her condition, including her pregnancy, and her agility or feebleness, owing to said condition or other cause, and her knowledge or want of knowledge of the walk, and all the circumstances of the case, as established by the evidence; and, if you believe, considering the knowledge that the plaintiff had of the walk, if any, her ability to walk upon this kind of a walk at the time, and the necessities of the case, that is, the need of her going upon the walk, and whether she could, without unreasonable precaution, have taken another way, and thus avoided exposing herself to the danger of walking upon this walk in the condition it is alleged to have been in at the time, that a reasonably prudent person, in the exercise of ordinary care and caution, would not, in her condition, have attempted, with her knowledge of the walk, if any, to have gone upon the walk, then she is not entitled to recover.²⁸

You are instructed that, if you find from the evidence that the plaintiff, at the time he passed over the walk, well knew that the walk was unsafe, and that it was imprudent to do so at that time in consequence of the darkness, or for any other cause, and with this knowledge he still persisted in passing over it, though there was another walk which he might have taken in going in the direction he desired to go, then his own negligence contributed to the injury, and he cannot recover. But if you find, that, although he had knowledge of said defect, he believed that it might be passed by the exercise of ordinary care, and that he did not believe it was imprudent to go upon said walk, and pass along the same, and had the right as a reasonably prudent man to so believe, then he was under no obligation to take another walk, and his not doing so, or his going upon the walk where the said defect existed, would not be negligence. The plaintiff, in the selection of the walk to be used by him, if he had knowledge of the alleged defect, was under legal obligation to act as an ordinarily careful and prudent man would. So, in passing along said walk, he must walk as an ordinarily prudent man would walk. He must use his eyes, and act carefully and prudently, considering all of the circumstances surrounding him. If he did do so, and met with an

²⁷ *Barnes v. Town of Marcus*, 65 N. W. 984, 96 Iowa, 675.

²⁸ *Munger v. City of Waterloo*, 49 N. W. 1028, 83 Iowa, 559.

accident, which is caused by the negligence of the city, then he can in law recover for the damages sustained. If he did not use such care and prudence, and meets with an accident, he cannot recover, although the city may also be negligent.²⁹

You are instructed that, if you find from the evidence that the plaintiff, at the time that she passed over the walk, knew that the walk was unsafe, and that it was imprudent to do so at that time in consequence of the darkness or for any other cause, and with this knowledge she still persisted in passing over it, though there was another walk which she might have taken in going the direction which she desired to go, then her own negligence contributed to the injury, and she cannot recover.³⁰

§ 3978(3). Texas

You are instructed that, if you find from the evidence that the plaintiff drove up to the ditch on ——— street, and that he saw, or could by the exercise of ordinary care and prudence have seen, the same, and that he could then have turned back and proceeded upon another route, or that he could have driven safely directly across the ditch, and, instead of turning back or driving directly across, he turned to the right, and attempted to cross in a diagonal course, and his vehicle was turned over by the ditch, and he disabled, then, before you can find for plaintiff, you must find from the evidence that he acted with ordinary prudence and care, and that he was guilty of no contributory negligence.³¹

§ 3979. Right of pedestrian to cross street at points other than regular crossings

The jury is instructed that the plaintiff had the legal right to cross ——— street at any point, either at crossings or between crossings, if she believed there was no obstructions or dangerous places on said highway.³²

§ 3980. Care required in descending hill with series of curves

The court instructs the jury that, if you find from a fair preponderance of the evidence that ——— place and ——— street consisted of a series of curves upon a grade reaching from the top of the hill to ——— avenue, and if you further find from the evidence that the plaintiff knew, or should have known, of this condition and attempted to descend the hill on those streets with a truck loaded with feed, then I charge you that it was the duty of the

²⁹ Kendall v. City of Albia, 34 N. W. 833, 73 Iowa, 241.

³⁰ Parkhill v. Town of Brighton, 15 N. W. 853, 61 Iowa, 103.

³¹ City of Austin v. Ritz, 9 S. W. 884, 72 Tex. 391.

³² City of Covington v. Whitney (Ky.) 99 S. W. 337, 90 Ky. Law Rep. 659.

plaintiff to exercise a degree of care commensurate with the conditions that he knew existed by reason of the curves and grades, and if you find from a fair preponderance of the evidence that the plaintiff failed to use such care and caution as the curves and grades on said street required him to exercise, and that would be such care and caution as a reasonably prudent person would have exercised under like or similar circumstances, and, by the failure to use such care as I have before defined to you, caused or contributed to the injury suffered by the plaintiff, and was the proximate cause thereof, then he cannot recover in this action, and your verdict should be for the defendant.³³

§ 3981. Effect of prior knowledge by injured person of dangerous or defective condition of street

See, also, post, § 4917.

Duty of private person to travelers on street, see post, § 4937.

Use of bridge with knowledge of unsafe condition as contributory negligence, see ante, § 1227.

§ 3981(1). Alabama

You are instructed that if the jury believe from the evidence that the plaintiff before the time when she was injured knew of the "step-off" in the sidewalk, but on the evening she was injured through her own forgetfulness failed to use due care to avoid it, and that this forgetfulness on her part proximately contributed in the least degree to her injuries, she cannot recover, and if the plaintiff prior to the night on which she was injured knew of the condition of the sidewalk, and had before that time consciously avoided passing over it for fear of being injured, but on the night of her injuries forgot to avoid the place, and such forgetfulness contributed to her injuries, she cannot recover.³⁴

The court charges the jury that, although they may believe the plaintiff knew of the defects in the sidewalk, that constitutes no legal reason why she should not use the sidewalk, and as a citizen she had the legal right to use said sidewalk, notwithstanding the defects, and such use of the sidewalk, in case of injury, would not, unless she was negligent in the manner of traveling thereon, affect her right to recover full damages.³⁵

The jury are instructed that the attempt of a visitor to a friend in the city to walk home at night, on a sidewalk which has been left in bad repair by the city, and which is in the same condition in which it has been kept for months, and which is the only

³³ *Walters v. City of Seattle*, 167 P. 124, 97 Wash. 657.

³⁴ *City of Birmingham v. Edwards*, 77 So. 841, 201 Ala. 251.

³⁵ *City of Mobile v. Shaw*, 43 So. 94, 149 Ala. 509.

one in the city used by all persons having occasion to go in that direction, is not negligence in him; and if a person so walking is injured, by reason of a defect in the sidewalk, he is entitled to recover damages, unless he is otherwise guilty of negligence contributing to his injury.³⁶

§ 3981(2). Delaware

You are instructed that it is nevertheless the duty of a person using such streets to employ his senses and exercise all reasonable care to avoid accident; and if, at and immediately before the time of the accident, he has due and timely warning of danger, the defendant would not be liable for an injury sustained by reason of a disregard of such warning.³⁷

§ 3981(3). Iowa

You are instructed that the plaintiff, in the absence of any knowledge or information as to the defective condition of the walk, if it was defective, had the right to assume that defendant had exercised ordinary care to keep the same in a reasonably safe condition. If, however, you find he did know or had notice of the defective condition of the walk then it will be for you to say, under all the facts and circumstances, whether he was negligent in going upon it.³⁸

You are instructed that, if the plaintiff had previous knowledge of the alleged defect in the walk, it was his duty to keep it in mind and look for it, unless there was something sufficient to divert his attention; and if he failed to keep it in mind and look for it, he is guilty of negligence and cannot recover, unless you find that he would have met with the accident had he kept the said defect in mind. And if you find that, before he reached said defect, his foot slipped on a plank in the crossing, and he went into said defect by reason of the slip, and you find that, up to the time he slipped, he was using due care and caution in passing along said walk, and you find that he would not have met with the accident but for said slipping, then he was not guilty of contributory negligence.³⁹

The court further instructs the jury that, if you find from the evidence that plaintiff knew of the condition of the sidewalk at the place of injury, or could by the use of ordinary diligence have discovered it at the time and before the injury complained of, and that going on the sidewalk at the place of the injury with such knowledge was negligence, then you will find for the defendant, if you find his negligence contributed to the injury.⁴⁰

³⁶ City Council of Montgomery v. Wright, 72 Ala. 411, 47 Am. Rep. 422.

³⁷ Stidham v. Mayor, etc., of Delaware City, 67 A. 175, 6 Pennewill, 359.

³⁸ Hill v. City of Glenwood, 100 N. W. 522, 124 Iowa, 479.

³⁹ Kendall v. City of Albia, 34 N. W. 833, 73 Iowa, 241.

⁴⁰ Rice v. City of Des Moines, 40 Iowa, 638.

§ 3981(4). Michigan

In relation to this question of contributory negligence, you should consider the rapidity which the testimony shows the plaintiff to have been walking, whether the night was dark or moonlight, and these things you will have to determine from the testimony. If you determine that there was sufficient light for the plaintiff to have seen the alleged defect by using his sense of sight, you have a right to say that his failure to do so is contributory negligence. You may consider whether or not the plaintiff is guilty of contributory negligence because he did not pass around the alleged defective sidewalk instead of approaching near to it or attempting to pass over it. The knowledge of the alleged defects which the testimony shows he possessed placed upon him the duty to exercise such ordinary care, to act himself carefully and prudently in view of the recognized danger, and to use such reasonable care and caution as a prudent man would ordinarily exercise in view of such fact, and in view of all the circumstances that surround the plaintiff at the time and place of the alleged injury, taking his knowledge of the condition of the place in question into consideration.⁴¹

You are instructed that, if the jury find that on the —— day of ——, the walk in question was in a condition not reasonably safe and fit for public travel, and that it had been and remained for several weeks in that condition, and the defendant either knew or ought to have known the existing condition, and the plaintiff at or about —— o'clock came out of a lighted room and was proceeding carefully along the walk, and endeavored to locate the dangerous place, he not having distinctly in mind such location by reason of the darkness of the night, and by reason of the fact, if the jury find it to be a fact, that his observation was dimmed upon coming out of the lighted room into the darkness, he momentarily failed to locate the dangerous place, and to detect the landmarks which he was endeavoring to distinguish to use as a guide past the dangerous place, and while using reasonable care to avoid the dangers he momentarily lost his bearing and was precipitated into the excavation, then he may be entitled to recover.⁴²

§ 3981(5). Missouri

The court instructs the jury that it is the duty of pedestrians walking on the sidewalk of the city of —— to use ordinary care and discern defects in a sidewalk over which they are walking. They are not required to keep their eyes constantly on the sidewalk; neither are they permitted to go along the sidewalk regard-

⁴¹ Belyea v. City of Port Huron, 99 N. W. 740, 136 Mich. 504.

⁴² Belyea v. City of Port Huron, 99 N. W. 740, 136 Mich. 504.

less of where they are walking. Therefore the court instructs you that, although you may find from the evidence that the hole into which plaintiff stepped and fell was a dangerous and defective hole, still, if you believe from the evidence that plaintiff knew of said place and danger of using same, or by the exercise of ordinary care on her part could have known of it, and that plaintiff attempted to pass over said point (without using reasonable care), and such failure contributed to cause her injury, then the plaintiff is guilty of contributory negligence in not discerning it, and your verdict should be for the defendant.⁴³

The court instructs the jury that, although the jury may believe from the evidence that plaintiff could have, by the exercise of ordinary care and diligence, discovered the hole in the sidewalk in question, and that it was unsafe and dangerous (if the jury believe from the evidence that it was unsafe and dangerous), in time to have prevented stepping therein (if the jury believe she did step therein), yet that will not be sufficient to defeat a recovery, unless the jury believe from the evidence that she failed to exercise ordinary care and prudence in passing over said walk, and the failure to exercise such care and prudence directly contributed to her injuries, if any.⁴⁴

The court instructs the jury that where a person knows of a confronting danger, and fails to use reasonable care to avoid being injured thereby, the law calls his conduct careless, because it is out of harmony with ordinary prudence and loads it with the entire responsibility for the consequences, notwithstanding the negligence of another may have aided in producing them. Therefore if you find and believe from the evidence that plaintiff knew of the defective condition of the sidewalk and failed to use reasonable care to avoid falling on it, your verdict should be for defendant.⁴⁵

The court instructs the jury that the plaintiff had the right to assume that she could use the sidewalk, on which she alleges she was walking when she fell, with safety, using such care as an ordinarily prudent person would exercise under like circumstances, and, though she may have known the sidewalk was defective, yet this fact alone would not prevent her from recovering in this action, but should be taken into consideration by the jury with other facts and circumstances in evidence as to whether she was exercising ordinary care as above defined.⁴⁶

The court instructs the jury that it was the duty of the defend-

⁴³ *Clancy v. City of Joplin* (App.) 181 S. W. 120.

⁴⁴ *Clancy v. City of Joplin* (App.) 181 S. W. 120.

⁴⁵ *Stephens v. City of El Dorado*

Springs, 171 S. W. 657, 185 Mo. App. 464.

⁴⁶ *Elliott v. Kansas City*, 96 S. W. 1023, 198 Mo. 593, 8 L. R. A. (N. S.) 1082, 8 Ann. Cas. 653.

ant city to see that the sidewalk in question was constructed of such materials and in such a manner as to make it reasonably safe for travel, and to see that it was kept and maintained in a reasonably safe condition for use and travel thereon in the ordinary modes; and if the jury believe, from the evidence, that the defendant negligently or knowingly permitted said sidewalk to be constructed in an improper, insecure, and defective manner, by using insufficient stringers, and placing the boards across the stringers so that the ends of the boards lapped over the stringers at either side, and that the boards were insecurely nailed, whereby and by reason thereof said sidewalk became and was unsafe and dangerous, and was not reasonably safe for travel thereon, or if the jury believe, from the evidence, that the sidewalk, at the time and place when and where plaintiff claims to have been injured, was out of repair, and unsafe for travel thereon by the ordinary modes, by reason of the stringers being unsound, and the boards being loose or insecurely nailed to said stringers, and that defendant's officers, whose duty it was to keep said sidewalk in repair, knew, or might by the exercise of ordinary care and diligence have known, of its defective and unsafe condition in time to have repaired the same before said alleged injury to plaintiff, and that, while plaintiff was walking along said walk, where it was so defective and out of repair, by the side of Mrs. ———, in the exercise of ordinary care herself, she was violently thrown down upon the sidewalk and ground, and injured, by a loose or insecurely nailed board in said walk flying up and out of its place when stepped on by Mrs. ———, who was walking in company with plaintiff, then and in such case the jury should find for plaintiff, although the jury may believe, from the evidence, that plaintiff knew the condition of said sidewalk, and that it was out of repair and unsafe.⁴⁷

§ 3981(6). *Montana*

You are instructed that the ordinary and reasonable care required of plaintiff is that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding her at the time. If you find from the evidence that at the time in question, the sidewalk was improperly constructed, and by reason of such improper construction was unusually slippery or otherwise dangerous, and you further find that such facts were then known to plaintiff, then the law required her to use more care than if she had not such knowledge, and if she neglected to do so, and such neglect contributed to the injury she sustained,

⁴⁷ *Chilton v. City of St. Joseph*, 44 S. W. 706, 143 Mo. 192.

if any, she cannot recover in this action, and your verdict should be for the defendant.⁴⁸

§ 3981(7). *Nebraska*

You are instructed that ordinary and reasonable care required of plaintiff is that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding him at the time. If you should find from the evidence that at the time and prior thereto plaintiff knew of the defective and dangerous sidewalk and where it was located, he was required to use more care than if he had not such knowledge, and if he neglected to do so and such neglect contributed to the injury he cannot recover; but if he did use more than he would be required to do in case he had no such knowledge and was injured by reason of defendant's neglect, and no fault of plaintiff contributed to the injury, you should find for the plaintiff.⁴⁹

§ 3981(8). *North Dakota*

I charge you, gentlemen of the jury, that prior knowledge of a defect in a sidewalk by one who is injured is not necessarily proof of contributory negligence; and if you believe from the evidence in this case that the plaintiff had knowledge that the sidewalk was out of repair, and even dangerous, yet because of that fact alone he would not, therefore, be bound to forego travel on such sidewalk.⁵¹

§ 3981(9). *Virginia*

The court further instructs the jury that if, previous to the accident, the plaintiff knew that there was ice ahead of her, and then took the risk of passing over it safely, she cannot recover, unless she used care and caution which a person of ordinary prudence would exercise with a knowledge that there was some ice there; that, if she had knowledge there was an obstruction and interference with the passage, so as to render it perilous, dangerous, and insecure for a person of ordinary care and prudence to pass, she took her chance, and would not be entitled to recover, notwithstanding they may believe the city negligent.⁵²

⁴⁸ *Kansler v. City of Billings*, 184 P. 630, 56 Mont. 250.

⁴⁹ *City of Lexington v. Fleharty*, 104 N. W. 1056, 74 Neb. 626; *City of Lincoln v. Holmes*, 28 N. W. 851, 20 Neb. 39.

⁵¹ *Gagnier v. City of Fargo*, 96 N. W. 841, 12 N. D. 219. Proper in connection with other instructions that jury may consider the knowledge of plaintiff on the question of contrib-

utory negligence and that plaintiff must have exercised such care as an ordinarily careful and prudent person would have exercised under like circumstances, which circumstances include plaintiff's knowledge of the condition of the walk at the time of the accident.

⁵² *City of Lynchburg v. Wallace*, 29 S. E. 675, 95 Va. 640.

§ 3981(10). *Washington*

I instruct you that if the plaintiff knew of the alleged dangerous condition of the sidewalk prior to the time of the accident, then the law would require more care on her part to avoid injury than if she knew nothing about it. The degree of care in each case required to be used by the plaintiff would still be ordinary care, and she would not be under obligation to use a greater degree of care than ordinary care, but would be required to use that degree of care, to wit, ordinary care, which reasonable prudence and caution would dictate to the ordinary traveler as being proper to be used. When a person knows of a dangerous sidewalk, the law requires of him to exercise such reasonable care as an ordinarily prudent and cautious person would use under like circumstances. If this is done, and injury results, the person is without fault, and if you find this to be the case, the plaintiff was not guilty of contributory negligence. If this was not done, and the failure so to do proximately contributed to the injury, then she was guilty of contributory negligence, and cannot recover. The question of whether, upon all the facts in the case as disclosed from all the evidence, the plaintiff was or was not guilty of contributory negligence is one for your determination, and while previous knowledge, if you find she had such knowledge, of the condition of the sidewalk, on the part of the plaintiff, and the fact that she was, if you find that she was, wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence, yet you have a right to, and may, if you find that such acts or omissions on her part were acts of negligence contributing proximately to her injury, find for the defendant.⁵³

§ 3982. *Violation of city ordinance*

I instruct you that the violation of a city ordinance is not such negligence as will bar recovery, unless such violation is the proximate cause of an accident. And in this regard I instruct you that, even though you may find that the plaintiff drove his motor truck around the corner of ——— street and ——— avenue at a rate of speed in excess of ——— miles per hour, and in violation of the ordinance of the city of ———, yet, if you further find that the speed at which the auto truck was traveling was a remote cause or a mere condition of the accident, as alleged in plaintiff's complaint, if you find an accident did occur, and if you further find that the defendant was negligent in the way and manner in which it kept and maintained ——— street and ——— avenue at the intersecting point thereof, and the way and manner in which the city kept the

⁵³ Taylor v. City of Spokane, 171 P. 249, 100 Wash. 409, 2 A. L. R. 1046.

lower crosswalk, as alleged in plaintiff's complaint, all of which negligent act or acts, if any, were the direct and proximate cause of the injury that the plaintiff sustained, if any, then your verdict shall be for the plaintiff and against the defendant.⁵⁴

§ 3983. Acts in emergencies

I am asked by the plaintiff to charge you that some testimony has been offered by the defendant by which it is attempted to show that the plaintiff might have stopped his automobile, or might have turned it to the right or left, before it went into the excavation. The plaintiff has told you what he did as soon as he discovered the excavation in front of him, and has told you the kind of automobile he was on at the time, and the year when it was made, and the distance in which it can be turned, the speed, going at the rate of ——— or ——— miles per hour. Upon this point I charge you that our Supreme Court has said that one suddenly put in danger is not required imperatively to do that which, after the peril is ended, it is seen might have been done, and escaped. The law makes allowance for the fright and lack of carefulness or judgment incident to the peril, and it would be absurd to require the plaintiff in this case, when he saw the excavation ahead of him, and was suddenly called upon to decide how he should escape, to exercise the same coolness and nerve that an uninterested bystander might manifest. There can be no question about that, gentlemen of the jury, but still he is bound to use that degree of diligence which the average prudent man would use on such an occasion as that, and, if he had a right to anticipate that there was any peril at that particular point, of course, gentlemen of the jury, he was bound to approach at a rate of speed which was consistent with a rate which would have been adopted by a reasonably prudent person.⁵⁵

§ 3984. Care required from children

§ 3984(1). Virginia

The court further instructs the jury that the conduct of an infant is not of necessity to be judged by the same rules which govern that of an adult; that while it is the general rule, in regard to an adult or grown person, that, to entitle him or her to recover damages for an injury resulting from the fault or negligence of another, he or she must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to its maturity and capacity wholly, and this is to be determined by the circumstances of the case

⁵⁴ *Walters v. City of Seattle*, 107 P. 124, 97 Wash. 657.

⁵⁵ *Karrer v. City of Detroit*, 106 N. W. 64, 142 Mich. 331.

and the evidence before the jury, and the law presumes that a child between the ages of 7 and 14 years cannot be guilty of contributory negligence, and, in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing her maturity and capacity.⁵⁶

§ 3984(2). *Washington*

You are further instructed that, in determining the question whether or not the plaintiff was guilty of contributory negligence to such an extent as to directly and proximately and materially contribute to the injury which he suffered, it is the duty of the jury to take into consideration the boy's age and all of the circumstances surrounding him, his experience or lack of experience, his knowledge or lack of knowledge, the amount of prudence, care, and judgment which would ordinarily and reasonably be expected of a boy of that age under the circumstances and conditions shown by the evidence in this case. That is the rule by which the question of whether or not he is guilty of contributory negligence is to be measured by the jury. You should not apply to the plaintiff in the case the same rules you would apply to a grown man. You should make allowances for his youth, and, in attempting to determine the question of his contributory negligence or the lack of it, inquire whether or not he exercised such care as would reasonably and ordinarily be expected of a boy of his age, intelligence, and experience under like circumstances and conditions.⁵⁷

§ 3985. *Intoxication of person injured at time of accident*

You are instructed that since a person, when intoxicated, is less likely to use ordinary care in a given instance than when he is sober, it is always proper to inquire into his condition in this respect. If he has been called upon to use such care, and if it is found that at the time he was intoxicated, this circumstance may be considered upon the question whether he did in fact use ordinary care at the time in question.⁵⁸

§ 3986. *Effect of contributory negligence*

§ 3986(1). *Georgia*

I charge you, whatever the law required positively the defendant to do, a failure to do so is negligence, and in this case the law required the city to keep the streets in safe condition for travel in the ordinary modes, and, if you are satisfied from the evidence

⁵⁶ *City of Roanoke v. Shull*, 34 S. E. 34, 97 Va. 419, 75 Am. St. Rep. 791.

⁵⁷ *Davis v. City of Wenatchee*, 149 P. 337, 86 Wash. 13.

⁵⁸ *Guertin v. Town of Hudson*, 53 A. 736, 71 N. H. 505.

that it failed to do so, then I charge you that the defendant was guilty of negligence. The law also required the plaintiff to exercise ordinary care in using the street, and if you are satisfied from the evidence that he failed to do so, then I charge you that the plaintiff was also guilty of negligence. Therefore, if you are satisfied, from the evidence, that the defendant was negligent, and such negligence resulted in injury to the plaintiff, and you are also satisfied, from the evidence, that the plaintiff was also negligent at the same time, and his negligence concurred with the negligence of the defendant, and, concurring with the negligence of the defendant, contributed to this injury of the plaintiff, so that plaintiff's negligence would become a proximate cause of the injuries, and that the plaintiff would not have been injured if he had not been negligent, even though the defendant was also negligent, the plaintiff, under such circumstances, could not recover for his injuries.⁵⁹

§ 3986(2). Kentucky

I further instruct you, gentlemen, that it was the duty of the plaintiff to exercise ordinary care for her own safety in using the sidewalk, and, if you believe from the evidence in this case that she failed to exercise such care, and such failure, if any, so contributed to bring about her fall and injury, if she did fall and was injured, that but for her failure to exercise such care she would not have been injured, the law of the case is for the defendant, and you should so find, although you may believe from the evidence that the sidewalk was negligently permitted to be in an unsafe condition, as submitted to you in the first instruction.⁶⁰

You are instructed that, if you believe that the plaintiff was injured by reason of the negligence of the defendant, and also believe that the plaintiff was also guilty of negligence contributing to said injury, and that, but for the concurrent negligence of the said plaintiff and defendant, the injuries would not have been sustained, then the jury should find for the defendant city.⁶¹

§ 3986(3). Michigan

You are instructed that the plaintiff will not yet be entitled to recover unless he has shown to you by a preponderance of the evidence that his own negligence did not contribute to his injury. If the plaintiff herein might have avoided the consequences of defendant's negligence, but did not, he cannot recover.⁶²

⁵⁹ *Holliday v. Mayor, etc., of City of Athens*, 74 S. E. 67, 10 Ga. App. 709.

⁶⁰ *City of Louisville v. Dahl*, 185 S. W. 1127, 170 Ky. 281.

⁶¹ *City of Covington v. Whitney*, 99 S. W. 337, 90 Ky. Law Rep. 659.

⁶² *Hunter v. Village of Durand*, 100 N. W. 191, 137 Mich. 53.

§ 3986(4). Texas

You are instructed that, if you find that the ditch was dangerous, and that defendant had been guilty of negligence in permitting it to become and remain in such condition, still, if you find that plaintiff was guilty of negligence in the manner in which he attempted to cross, and that his negligence contributed to the accident, and that the accident would not have occurred if plaintiff had exercised reasonable care, the plaintiff cannot recover.⁶³

§ 3986(5). Washington

You are instructed that the affirmative defense contained in the answer of the defendant to the complaint is the defense of contributory negligence on the part of the plaintiffs, and that contributory negligence on the part of the plaintiffs, if established by the evidence, under the instructions of the court given you in that regard, is a complete defense to the action of such plaintiffs, and precludes any recovery on the part of the plaintiffs, and it is immaterial to such defense, when contributory negligence is established, to what extent the defendant may have been negligent also in the matter. You are further instructed in this regard that the term "contributory negligence" as used in these instructions and in the case is defined and explained to you as follows: Such an act or omission on the part of the plaintiff, amounting to want of reasonable and ordinary care, as contributing to, or ~~occurring~~ co-operating with, the negligent act of the defendant, is the proximate cause of the injury and damage complained of, that is, such negligence on the part of such plaintiff as helped to produce the injury and damage complained of.⁶⁴

§ 3987. Negligence of plaintiff not proximate cause of accident

You are instructed that if you find that the defendant, the city of ———, was guilty of negligence, as alleged in plaintiff's complaint, which negligence was the direct and proximate cause of the injury that the plaintiff ——— sustained, if any, the plaintiff will be entitled to recover, even though the plaintiff ——— at the time he was operating his auto truck down ——— street may have been guilty of negligence in operating his automobile truck at a rate of speed in excess of the state law, if you further find that the negligence of the plaintiff in this regard was only a remote cause or a mere condition of the accident.⁶⁵

⁶³ City of Austin v. Ritz, 9 S. W. 884, 72 Tex. 391.

⁶⁴ Walters v. City of Seattle, 167 P. 124, 97 Wash. 657.

⁶⁵ Walters v. City of Seattle, 167 P. 124, 97 Wash. 657.

9. *Pleading and Evidence*

§ 3988. *Confining plaintiff to negligence alleged in declaration*

You are instructed that in order that the plaintiff may recover in this case it is necessary that you should be satisfied, not only that the injuries complained of were caused by the negligence of the defendant, and that the plaintiff was free from any negligence that contributed thereto, but also that the said injuries were caused or received in the manner alleged in the plaintiff's declaration. He must, therefore, have satisfied you that his horse was hurt by stepping or falling into a hole or excavation in the street as he has averred; for that is the injury upon which he bases his action, and he must recover for that, or not at all.⁶⁶

§ 3989. *Presumptions and burden of proof*

The jury are instructed that contributory negligence is an affirmative defense, and that the burden of proof is upon the defendant, alleging it, to establish such negligence on the part of the plaintiff by a preponderance of the evidence.⁶⁷

§ 3990. *Res ipsa loquitur*

I instruct you that if you find that the accident complained of was one which, in the ordinary course of business, would not have occurred except for failure or neglect on the part of the defendant, its agents or employes, to use that degree of care which the law requires, and which I will hereafter explain to you, and you further find that the negligent operation of the defendant's electrical apparatus is naturally accompanied with danger, and that knowledge of its condition is practically limited to the defendant or its servants, and evidence as to the same is unavailable except through it or them, and that the deceased was under no obligation to know, and did not know, or have reason or opportunity to know of the danger that threatened him, then the mere happening of the accident under such circumstances creates the inference that the defendant was negligent, and in that case the burden would be shifted to the defendant to show that it was not guilty of such negligence.⁶⁸

§ 3991. *Burden of proof as to contributory negligence*

See, also, ante, § 3989.

The jury are instructed that the burden of proving contributory negligence is upon the defendant, if that defense is relied upon, and it may be proved by affirmative testimony, or may be deduced from

⁶⁶ *Stidham v. Delaware City* (Del.)
87 A. 175, 6 Pennewill, 359.

⁶⁸ *Abrams v. City of Seattle*, 111 P.
168, 60 Wash. 356, 140 Am. St. Rep.
916.

⁶⁷ *Walters v. City of Seattle*, 167
P. 124, 97 Wash. 657.

all the evidence in the case, but the defense must be established by a preponderance of the evidence in favor of the defendant.⁶⁹

§ 3992. Matters considered in determining whether locus in quo defective

§ 3992(1). Colorado

You are instructed that the testimony shows that the walk in question had an inclination toward the street slightly in excess of that fixed by ordinance. Counsel for plaintiff urge that this conclusively establishes negligence against the city. The court instructs the jury that such fact does not in and of itself alone necessarily establish negligence, but that it is a fact which the jury should take into consideration, with all of the other testimony, in reaching a conclusion as to whether the walk was of a defective or dangerous construction.⁷⁰

§ 3992(2). West Virginia

The court further instructs the jury that the question as to whether or not the street and sidewalk at the place mentioned and described in the declaration in this case were in a reasonably safe condition for the purpose of persons lawfully passing and repassing over and along the same, both by day and night, must be determined from the condition said sidewalk was in at the time the alleged injury complained of by the plaintiff was received by him, and not from its condition before or after that time.⁷¹

§ 3993. Conditions prior to accident

You are instructed that the condition of the set-off prior to the injury cannot be considered by you in determining whether or not the city has been negligent, if you should find that the set-off complained of as dangerous was, on the evening of the alleged injury, barricaded or protected so as to be reasonably safe to persons walking on the sidewalk there, in the exercise of due care, or such care as an ordinary prudent man would exercise, taking into consideration the kind of night it was.⁷²

§ 3994. Matters considered in determining question of contributory negligence

§ 3994(1). Iowa

You are instructed that if the plaintiff, by his own negligence, proximately contributed to his own injury, then the defendant is not liable in this suit. In determining the question of negligence on the part of the plaintiff, it will be proper for the jury to take into consideration the hour of the night the injury was received, and the business call-

⁶⁹ Gordon v. City of Richmond, 2 S. E. 727, 83 Va. 436.

⁷⁰ Griffith v. City and County of Denver, 132 P. 57, 55 Colo. 37.

⁷¹ Foley v. City of Huntington, 41 S. E. 113, 51 W. Va. 396.

⁷² Cramer v. City of Burlington, 42 Iowa, 315.

ing plaintiff to ——'s saloon, the darkness of the night, and all the facts and circumstances connected with his visiting said saloon, and whether or not the plaintiff was under the influence of intoxicating liquors.⁷³

§ 3994(2). *Missouri*

The court instructs the jury that, in determining the question of negligence or carelessness on the part of plaintiff, the jury will take into consideration all the facts and circumstances proved, including the condition of the streets and the street crossing at the place where the injury is alleged to have occurred, the condition of the brakes on the wagon in which the plaintiff was riding, the manner in which he had his wagon loaded, his position on the wagon with reference to the lever which controlled the brake, his manner of handling his team, the time of day when he was injured, and all other facts and circumstances proven, and if, after the consideration of all the evidence and circumstances proven in the case, the jury believe and find from the evidence that the plaintiff failed to exercise that care which a prudent person ordinarily would have used under like circumstances, and that his failure to exercise such care contributed to his injury, he is not entitled to recover.⁷⁴

§ 3995. **Limiting effect of evidence—Defects at other places than that of accident**

You are instructed that the court has permitted evidence to go to you tending to show that the walk within a short distance from the place where it is claimed the accident happened was out of repair; that is, that boards were loose at other places in the same block. You are especially instructed that this testimony should be considered by you, as against the city, only for the purpose of tending to show, if it does (and that is for you to say), whether or not the city authorities should have had knowledge or notice of the condition of the walk or plank where the accident is claimed to have happened, by the exercise of reasonable care.⁷⁵

§ 3996. **Sufficiency of evidence of cause of injury**

You are instructed that if you find that the injury sustained by the plaintiff was produced by two causes, namely, the slant of the step in question, and a coating of ice thereon, the result of the storm of the night before, the latter being a cause for which no one was responsible, the plaintiff cannot recover, unless she has shown by a preponderance of the credible testimony that the slant of the step was

⁷³ *Cramer v. City of Burlington*, 39 Iowa, 512.

⁷⁴ *Derrington v. City of Poplar Bluff*, 186 S. W. 561.

⁷⁵ *Bailey v. City of Centerville*, 78 N. W. 831, 108 Iowa, 20.

the real cause of the injury, and but for which it would not have happened; neither can a recovery be had if it is equally as probable that the injury came from the one cause as from the other.⁷⁶

E. NEGLIGENCE WITH RESPECT TO DRAINS AND SEWERS

§ 3997. In general

§ 3997(1). Georgia

The court instructs the jury that the issue between the parties to this case, as set out at length in the pleadings, which you are at liberty to read for yourselves, succinctly stated, makes up this case: The plaintiff alleges that there was to the cellar of the store occupied by him a sewer built for the purpose of draining the same, and that with that sewer his cellar was a fit place to store goods, and that he had certain goods stored in that cellar; that the city negligently, and without proper exercise of its duty, cut the drainage sewer, and caused it to be fixed in such a way as to render it less fit for the purposes for which it was built, and made it unfit to drain the same, and caused it to be, by those repairs, stopped up by the matters and things that drained through it; and that the stop in the sewer at the intersection of ——— and ——— streets, preventing the water from flowing out of the sewer, caused the water to back into the cellar, and run in the cellar, covering in whole or in part merchandise, and damaging it by contact with the water. The defendant denies that—all of it—and says that, if there was any sewer at all, it was a private drain, with which the defendant had nothing to do; that, if it cut that private drain, it fixed it in a workmanlike manner; and, whether it was fixed in a workmanlike manner or not, the water in the cellar did not get there by reason of the stoppage of the sewer at ——— and ———, but the water got in the cellar of plaintiff's store in some other manner, either flowing there from a source higher than plaintiff's store, or from the rains on the surface of the earth falling into the area openings; and that in any event it is not liable for any damages, and that, if liable at all, not for the sum claimed by the plaintiff. And so you are to decide the issues of fact which will fix the rights of the parties, and, in the event you should find that the plaintiff is entitled to recover, then you would decide the extent of his damage.⁷⁷

The court instructs the jury that your first inquiry will be touching those issues of fact upon which the plaintiff's right of action depends, without regard to the question of damages, for, if the plaintiff has no right of action, of course he can have no recovery for any damages he may have suffered. It would be what, under the law, is termed

⁷⁶ Langhammer v. City of Manchester, 63 N. W. 688, 99 Iowa, 295.

⁷⁷ Mayor, etc., of City of Macon v. Small, 34 S. E. 152, 108 Ga. 309.

"damage without injury." The defendant had the right to build up ——— and ——— streets and the public alleys at any time in such way as its judgment dictated to be for the interest of the general public, and therefore the plaintiff can have no right of action because the streets and alleys were changed in their grades. The plaintiff's right of action will depend upon the rights which he and the defendant had touching the sewer which is alleged to have drained his cellar. In order to recover, the plaintiff must show you that the water came in his cellar by reason of the negligent act of the defendant, and damaged his goods. So your first inquiry will be directed, perhaps, logically to the inquiry as to how the water came to be in the cellar, if you should determine that there was water in the cellar. The burden is on the plaintiff to show, by a preponderance of the testimony, that the presence of the water in the cellar was caused by the clogging of the drain sewer at the intersection of ——— and ——— streets, that stoppage causing the water which flowed into the sewer to fill the sewer and back up into his cellar. If the water came into the cellar in any other way than that, your verdict will necessarily be for the defendant in the case. If the water came into the cellar in that manner, and for that reason, your next inquiry would be whether the stoppage of the sewer was caused by the negligence of the city in failing to discharge its duty towards the plaintiff with reference to that sewer. On that proposition, which the court has suggested as your next inquiry, you will be governed by your opinion of the evidence, looking to see the construction of the cellar with reference to the streets of the city and the sewer and whether or not there was an opening from the cellar into the sewer, or if no such opening, whether or not the floor of the cellar, and sewer under it, were burst by the pressure of water, so as to let it in in that manner, or whether it came in there through the area openings; it being entirely for the jury's decision as to how the water came to be in the cellar. If you should find that the water came to be in the cellar by reason of the stoppage in the sewer which was to drain the same, or other property contiguous to it, then you will see whether the stoppage in the sewer was caused by the negligence of the defendant. If it was not caused by the negligence of the defendant, the plaintiff would not be entitled to recover. If it was caused by a failure of duty on the part of the defendant, which would, in law, be negligence, the plaintiff would be entitled to recover.⁷⁸

§ 3997(2). Illinois

You are instructed that, if the jury believe, from the evidence, that the city of ———, in ——— street in said city, fixed the grade and constructed the street and caused to be constructed sewers and drains

⁷⁸ Mayor, etc., of City of Macon v. Small, 34 S. E. 152, 108 Ga. 309.

on said street to carry off the surplus water which necessarily, in case of rains, would run down said street, by reason of said grading, and that, in ———, there came a rain, and said sewers or drains were stopped up, or were otherwise defective, so that they would not carry off the surplus water, and thereby the water from said rain was forced into the basement of the plaintiffs' building, and the plaintiffs thereby damaged, then the jury should find for the plaintiffs to the amount which the proof shows such damage to be.⁷⁹

§ 3998. Liability as dependent on whether sewer or drain private or public

You are instructed that, to determine the question of the duty of the defendant in reference to the sewer in question, it is necessary for you to determine whether the sewer was a public or a private sewer, and, if it was a private sewer, whether or not it was laid in the streets by permission of the city. Look to the evidence to see if it disclosed who laid the sewer, and when, and for what purpose, and how long it has been used. If you should find that the sewer was laid a great number of years ago, under such circumstances as would negative the idea that it was laid without knowledge of the city, the length of time through which it has existed and the public manner in which it was laid would authorize the jury to conclude that it was by permission of the corporate authorities. The jury would be authorized, if the sewer had been there from the time indicated by the testimony, ——— years or more, to conclude that there was an original permission granted to lay it. If it was used only by the person who originally laid it, for the benefit of his private property and his successors in estate, and by such other private persons as he, the original owner of it, might have permitted to connect with it for the use of their property and their successors in estate, it would be a private sewer. If the defendant, the city of ———, at any time began to use the sewer itself for the drainage of the streets or alleys of the city of ———, any one or more of them, and the city connected, or tapped a connection made by another, for the purpose of carrying away the surface water from a street or alley through this original sewer, the jury would be authorized to conclude that the sewer had been adopted by the city; and, if so adopted, it would be to all intents and purposes, so far as the defendant is concerned in regard to its duty towards it—so long as the defendant should use it for the purposes of draining the streets and alleys—a public sewer. If the city used it, and thereby made it a public sewer while it used it, it would be a public sewer in a limited sense, because the city at any time, by ceasing to use it,

⁷⁹ City of Aurora v. Gillett, 56 Ill. 132.

could take away the rights which attached to it as a public sewer; but so long as the city did use it, and, by its adoption, took charge of it for the purpose of using it, it would necessarily, coincident with that use, become liable for its adoption of the sewer, as it would for any other public sewer. If a private sewer is built and occupied under a license from the corporate authorities, and, if it is expensive to build, the license cannot be revoked needlessly nor capriciously until a sufficient time had elapsed to allow, by its use and enjoyment, a recompense for the amount expended in its erection. The city would not be allowed, after permitting a citizen to build a private sewer at an outlay of great expense, to capriciously take away that right, until the enjoyment of the sewer had fairly compensated the owner for the outlay. But whether such fair compensation had arisen from the long use of a sewer or not, the defendant would have the right to abolish any private sewer, at any time it saw fit to do so, when its abolition became reasonably necessary for the public good, in the construction of any public sewers and drainage, whether for sanitary purposes or a system of surface drainage. Whenever the necessity for surface or sanitary sewerage renders the construction of a system of sewerage necessary, and, in order to meet it, the city, in its construction, has to abolish any private sewer, the city would have the right to abolish any such private sewers, and cause the property owners to connect, if necessary, with the public system.⁸⁰

§ 3999. Liability with respect to private sewer

The court instructs the jury that a private sewer, so long as it is not necessary to abolish it, may continue to be used, and the city would have no right capriciously and needlessly to destroy it, if it had been put down by the license of the city, and enjoyed for any great time. In the case of a private sewer, if, while the license is unrevoked, the defendant makes changes in the sewer which are calculated to cause the sewer to overflow plaintiff's cellar, and such changes do cause such overflow and damage to the owner of the cellar, the defendant would be liable, provided the changes made were made in a negligent, unskillful, unworkmanlike manner, and not otherwise. If it was a private sewer, and if the surface water from one of its alleys was drained into said sewer through one of the defendant's catch basins or intake basins placed there for that purpose, then it was the duty of the defendant to exercise ordinary diligence to keep said sewer in proper repair. If while it was so used by the plaintiff and defendant, if the same was cut by the city or its agents, then the city was bound to repair it in a proper manner; and if it was repaired in an improper and negligent manner, and damage was caused thereby to the plaintiff, then the defendant is liable. You will see first, if the sewer was

⁸⁰ Mayor, etc., of City of Macon v. Small, 34 S. E. 152, 108 Ga. 309.

ever cut by the defendant, under what circumstances it was cut. If it was cut in the construction of a system of sanitary sewers, the defendant would have the right to cut it, if it was necessary to be done; and in the construction of the sewers, in order to preserve this sewer from being cut, the defendant, and whoever was constructing the sanitary sewers, would only have to exercise ordinary care to keep from cutting it. And if, in the exercise of ordinary care, it was proper and right to cut it, and fix the sanitary sewers, and afterwards repair the cut sewer, if that were done in an ordinarily prudent, careful way, it would entail no liability. You see if the grade of the sanitary sewer was lower than that of the drain sewer, and find if the sewer could have been supported, so as to avoid being cut. If in the exercise of ordinary diligence pursuing a work of that kind the sewer was cut, and afterwards repaired with due diligence, the fact that it was cut, and not kept intact as it originally was, would not entail liability. If it was necessary to cut it, and therefore necessary to repair it, it would be the duty of the defendant itself, or to cause whoever it was permitting to work in the streets, to repair it in a workmanlike manner; that is to say, to exercise ordinary diligence to so repair the sewer as to enable it to perform the functions it had been performing. The inquiry necessarily leads, then, to what is ordinary care, and it is defined to be that care and diligence which every prudent man exercises in and about his own affairs of a like kind, for the preservation of his own property. Therefore you look to the testimony to see what knowledge the city had of the purposes for which this sewer was used, and how great a volume of water it had to take off, whether it had any streets drained in it, or such drainage as would likely have a small quantity or large quantity of *débris*, and see what ordinary diligence would have discovered to the city touching the uses to which the sewer was put, and whether in the light of all that the city knew about it, and of all that by the exercise of ordinary diligence the city would have known about it, the city repaired the damage to the sewer, if it was bound to repair it, as a prudent man for the preservation of his own property would have repaired it; and anything short of so repairing it, if they failed, would have been negligence. It follows, necessarily, that if the city exercised that degree of care, and repaired it in the same manner that a prudent man would have repaired it—in the way that prudence and diligence would have suggested would keep the sewer amply large enough and free enough to carry off the matter that it was to receive and take away—the city would have discharged its full duty, and would not be liable, even though it might have erred in its judgment as to the space which it ought to have preserved, or the manner in which it ought to have repaired it. On the

other hand, if it did not exercise that care and diligence which a prudent man would have exercised, but negligently or improperly repaired the sewer, and such negligent and improper repair of it caused it to form a place that would catch the contents of the sewer so as to cause it to stop up and overflow, the defendant would be liable for such negligent conduct, and the damage resulting therefrom. If you believe from the testimony that the manner in which the sewer was repaired would have caused it to be sufficient for the purpose for which it was intended, and that, if it was stopped at all, the stoppage was caused by the reception in it of *débris* which could not reasonably be expected to be in a sewer, and that the *débris* was in the sewer by reason of the fault and negligence of the plaintiff in this case, and, but for such *débris*, the sewer would not have become stopped up, and therefore you believe that the plaintiff in the case himself was negligent in permitting things—foreign substances—which could not reasonably be expected to be in a sewer to be there, then you would be authorized to conclude that the stopping was not caused by the change in the size of the sewer, but from the negligence of the plaintiff in permitting things to be in it which ought not to be in there; and, if that was the case, you would find for the defendant. If you believe that the water in the cellar of the plaintiff was caused by the plaintiff stopping up the outlet from his cellar into his sewer himself with any material which prevented the water from flowing out of it, and that such conduct as that was the reason why his cellar was flooded, as a matter of course the plaintiff would not be entitled to recover if the sewer would have carried off the water from the cellar from the intake, if there was an intake in it—in the cellar of the plaintiff—but for the fact that the plaintiff himself stopped up that intake; as a matter of course the damage in that event would be caused by the plaintiff stopping up the intake, and he cannot recover against the city any damages.⁵¹

§ 4000. Duty to repair public sewer

So much if the sewer was a private sewer. If it was a public sewer, in that it had been adopted by the defendant as a receptacle for the surface water from the street or alley, then, while the defendant would have had the right to cut it in building a system of sanitary sewerage, it would have been bound to exercise ordinary diligence in repairing it, so as to keep it reasonably capable for the purposes for which it had been theretofore used. The difference, practically, in your consideration of the manner of its repair, whether a public or a private sewer, would be in the difference of information which the city might have, in your opinion, or ought to have had. You would

⁵¹ *Mayor, etc., of City of Macon v. Small*, 34 S. E. 152, 108 Ga. 309.

take into consideration, if it was a public sewer, what knowledge the city had, or in the exercise of ordinary diligence ought to have had, about the volume of water likely to flow into the sewer, and you would hold the city to the exercise of that diligence which a prudent man, under like circumstances, with like knowledge, would have exercised in repairing a sewer to preserve its reasonable capacity for the purposes for which it was used. To illustrate: If it should be decided by you to be a private sewer, you might reasonably decide what the city knew about what volume of the water and the contents of the sewer might be from the cellars. If it received surface water, it would be a question for you to decide as to what the city ought to have known, by reasonable diligence, about the volume of surface water that would flow into it, and what would likely go along with the surface water. In both cases the city was only bound to exercise ordinary diligence, in the light of the facts, to repair the sewer in a workmanlike manner, so as to make it reasonably safe for the purposes for which it was intended, and reasonably as serviceable after the work as before. So that on that proposition, if you should find that the city did exercise proper diligence in repairing the sewer, then the defendant would not be liable for any stoppage which might have resulted from the repairs being inadequate, even though they were inadequate in fact. If you believe that proper diligence was exercised in making them, there would be no liability upon the city for consequences flowing from the repairs. If they were inadequate, and that inadequacy followed from improper diligence in the repairing of the sewer, then there would be liability for such damages as flowed from such repairs.⁸²

§ 4001. Liability for injuries to abutting owners through overflow of sewage

The court instructs the jury that, if you believe from the evidence that the sewer in ——— street referred to in the proof was negligently permitted to become and remain stopped up, and that by reason thereof the water or sewage from said sewer was caused to flow back into plaintiffs' property through the connecting pipe referred to in the proof, and plaintiffs were thereby injured, and you further believe from the evidence that defendant knew or by the exercise of ordinary care could have known of the stoppage in said sewer, if there was any, long enough before the flowing back of the water or sewage into plaintiffs' property through the connecting pipe, if any there was, so as to have enabled the defendant by the exercise of ordinary care to have removed or caused to be removed said stoppage before said flowing back of said water or sewage into plaintiffs' prop-

⁸² Mayor, etc., of City of Macon v. Small, 34 S. E. 152, 108 Ga. 309.

erty and thereby prevented the injury to plaintiffs' property, if there was any on said account, then you will find a verdict for plaintiffs.⁸³

The court instructs the jury that, if you believe from the evidence that the sewer in ——— street referred to in the proof was not stopped up or if you believe from the evidence that it was stopped up, but that defendant did not know of said stoppage or by the exercise of ordinary care could not have known of said stoppage long enough before the flowing back of the water or sewage through the connecting pipe into plaintiffs' property to have enabled defendant in the exercise of ordinary care to have removed or caused to be removed said stoppage before said backing of said water or sewage into plaintiffs' property, or if you believe from the evidence that there was a stoppage in the sewer in ——— street, but that said stoppage did not cause the water or sewage to flow back through the connecting pipe into plaintiffs' property, or if you believe from the evidence that the water or sewage was caused to flow back into plaintiffs' property through the connecting pipe by reason of any other cause whatsoever other than the stoppage of the sewer in ——— street, then in either or any of said events you will find a verdict for defendant. The word "negligently," as used in the foregoing instruction, means the failure to exercise ordinary care, and the words "ordinary care" mean that degree of care which ordinarily careful and prudent persons engaged in the same or a similar business ordinarily exercise under the same or similar circumstances.⁸⁴

§ 4002. Duty to provide for flood caused by extraordinary storm

You are instructed that, while it is the duty of the city, in the constructing of water-ways, to take into consideration, not only the ordinary and usual quantity of water in ordinary times, but also the liability to freshets occasionally occurring, still if they should so provide, and there should occur an unusual and extraordinary storm, whereby the whole immediate country around should be overflowed and flooded, and which, by the exercise of ordinary prudence, could not be provided for and guarded against, and the damage accrued by reason of such disastrous storm, the city will not be liable, the law only holding the city to the exercise of ordinary care and prudence.⁸⁵

You are instructed that it is claimed by the defendant that the water coming down ——— street overflowed ——— street at its conjunction with ——— street on the south, and then down at or near ——— street, when it struck said ——— street, undermining said ——— street with such a volume and with such force as to raise the

⁸³ *Toebbe v. City of Covington*, 141 S. W. 421, 145 Ky. 763.

⁸⁴ *Toebbe v. City of Covington*, 141 S. W. 421, 145 Ky. 763.

⁸⁵ *German Theological School v. City of Dubuque*, 17 N. W. 153, 64 Iowa, 736.

stone curbing and flagging, and breaking up the street, and that the damage was the result of the action of the flood thus coming onto said street, and not from any negligence on the part of the city. If you so find from the evidence, and the damage complained of was the washing out of said vacant lot, and that the same was not caused by the result of any negligence on the part of the city in the negligent or defective construction of the improvement upon the streets of said city, the city would not be liable.⁸⁶

§ 4003. Liability for pollution of waters by sewage

The court instructs the jury that, if you believe from the evidence that the defendant, city of ———, within ——— years next before the institution of the plaintiffs' several actions did construct its several sewers at ——— street and through its suburb, ———, in such a manner as to cause them to empty into ——— creek any human excrement, or other deleterious or putrid matter, and shall further believe from the evidence that said matter, if any there was emptied into said creek, produced a foul and nauseating or poisonous stench, and polluted the waters of the creek to such an extent as to pollute or poison the atmosphere, and thereby deprive the plaintiffs or either of them of the reasonable use of the waters of the creek as stock water, or impair the reasonable use, comfort, and enjoyment by the plaintiffs, or any of them, of their homes or lands, then and in that event, you should find for the plaintiffs, or such of them, if any, as were so injured, such damages, if any, as you may believe from the evidence they or he sustained thereby. But, unless you shall so believe and find from the evidence as above required, your verdict should be for the defendant.⁸⁷

§ 4004. Same—Right of one buying property with knowledge of acts of city

You are instructed that, although you may believe that the plaintiffs knew at the time that they bought the land that said sewer was emptied into such land, yet this fact does not preclude a recovery on their part, and, notwithstanding the water was to some extent contaminated or polluted by said sewage at the time of said purchase, and the plaintiffs knew thereof, yet that will not defeat a recovery in this case unless the general character of the injury and of the acts exercised were substantially as offensive and to so great extent as at the time suit was brought; and, if you believe from the evidence at the time plaintiffs purchased the premises in question the damages could not then for all time be ascertained and estimated, then the fact that

⁸⁶ German Theological School v. City of Dubuque, 17 N. W. 153, 64 Iowa, 736.

⁸⁷ City of Henderson v. Robinson, 153 S. W. 224, 152 Ky. 245.

said water was to some extent impure at the time of the purchase will not defeat a recovery.⁸⁸

§ 4005. Liability for diversion of surface waters

§ 4005(1). Illinois

You are instructed that it may be stated as a general principle that, when the situation of two adjoining fields, lots, or pieces is such that the water falling or collected by melting snows upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his lands, if desired by the owner of the upper field; but the latter cannot, by artificial trenches or otherwise, cause the natural mode of its being discharged to be changed to the injury of the lower field or lot, as by conducting it by new channels in unusual quantities onto particular parts of the lower field or lot; therefore, if the jury believe, from the evidence, that the water which flowed into the basement of the building, and occupied by plaintiffs in ———, would have flowed upon the lot covered by the building, in a state of nature, than it still had the right to flow over the same, and the jury should find for the defendant. But if the jury also believe, from the evidence, that the natural flow of the said water across ——— street was interfered with by the grading of ——— street, and that the water was sought to be conducted by the city by drains and sewers down ——— street to ——— river, and that, by reason of such interference and of insufficient sewers and drains, or by allowing the sewers to fill up, the city conducted the water by new channels in unusual quantities into the basement of said building, then the city is liable to the plaintiffs in this suit.⁸⁹

§ 4005(2). Iowa

You are instructed that the city, as a public corporation, has a right to establish grades for the streets, and to fill up the streets to correspond with the grade established, and, if the work is done in a careful and skillful manner, the city will not be liable for injuries to property, which are the necessary results of the careful and skillful grading of the streets. On the other hand, if the city, in grading the streets, did the work in an unskillful and improper manner, by making improper or insufficient gutters, by reason of which the water was caused to flow from the street upon the premises of plaintiff, she will be entitled to recover if you find the injuries complained of resulted from such alleged unskillful construction of the street.⁹⁰

§ 4006. Diversion of surface water into water course

The court instructs the jury that, if you find for plaintiffs, or any of them, you should not allow them or any of them any damages that

⁸⁸ Fansler v. City of Sedalia, 176 S. W. 1102, 189 Mo. App. 454.

⁸⁹ City of Aurora v. Gillett, 56 Ill. 132.

⁹⁰ Ellis v. Iowa City, 29 Iowa, 229.

resulted to them, or any of them, by reason of the city's draining, or allowing the drainage, of surface water alone into said creek before or after the sewers on ——— street and from ——— were constructed.⁹¹

§ 4007. Contributory negligence

You are instructed that as a matter of course the plaintiff was bound to exercise ordinary diligence himself to prevent injury to his goods, and also to avoid any injury to them by the negligence of the defendant, if there was any. Hence, if you believe from the testimony that the plaintiff's fault in the improper use of the sewer caused the sewer to become stopped, plaintiff cannot recover, even though the defendant was negligent in its repairs. But the fault of the plaintiff must be such as would likely have caused the sewer to become stopped if it had been in its original condition. The plaintiff would have the right to use the sewer in the same manner and on the idea that it was in the same condition as it had theretofore been.⁹²

§ 4008. Damages for failure to keep sewer in repair

§ 4008(1). Georgia

You are instructed that, if you should find that the city was negligent in its conduct, and that that negligence caused the plaintiff to suffer damage, then you would consider the question of the amount of the damages. If entitled to recover at all, the plaintiff would be entitled to recover whatever diminution was caused to the market value of his merchandise by coming in contact with the water. To determine that question, you would look to the evidence to see what the damage was. If any articles of merchandise were entirely destroyed, as a matter of course the measure of damages as to those articles would be the market value at the time of destruction. If articles were not destroyed, but only injured, then the measure of damages as to those articles would be the diminished market value of the articles caused by the contact with the water. You would look to the evidence for enlightenment on this subject. The plaintiff would not be entitled to recover for any breakage of any barrels or other things containing merchandise, in moving them, or in placing them about the cellar. If the water washed down any property so as to cause it to fall and burst, why that would be a damage that is recoverable. The plaintiff cannot recover any damages except what the jury believes to be reasonable and were consequences of the contact with the water. And hence, if, in moving the property from the cellar to any other place, it was thrown down or otherwise broken, that would not be a damage which could be recoverable by the plaintiff in this case. If the water came in contact with anything in the cellar—anything put

⁹¹ *City of Henderson v. Robinson*, 153 S. W. 224, 132 Ky. 245.

⁹² *Mayor, etc., of City of Macon v. Small*, 34 S. E. 152, 108 Ga. 309.

up in barrels, which could not be injured by the water unless the barrel bursted, or unless the water caused the barrel to burst—as a matter of course there could be no recovery for any barrels not bursted or their contents; but if the water coming in contact with anything either burst the vessel in which it was contained, or soaked through by leaking into the vessel, injuring and damaging the contents such as would be injured from the contact of the water, that would be damages that are recoverable. Any items of expense necessarily incurred in the preservation of the property and the saving of it from further damage by contact with the water are recoverable, but no items of expense except such as were necessary for that purpose are recoverable. The burden is on the plaintiff to show, therefore, not only those items, but that they were necessarily incurred for the preservation of the property, and that, therefore, the incurring of them inured to the benefit of the defendant by lessening the damages, and making them smaller than they would otherwise have been but for such expense, and the same principle applies to any allegation as to the breaking of a sewer and repairing of it. Unless such work was necessary for the preservation of the property from further damage, and it inured to the benefit of the defendant by the prevention of greater damage than was sustained, there can be no recovery for any such outlay. If it was necessary, in order to take the goods out of the water, or to preserve them from further injury or destruction, to rent a temporary place for the proper handling of the goods to save further damage to them, such necessary expense as that might be recovered. In a word, only those items of damage which are shown to the jury to have been reasonable and necessary consequences of the contact of the water with the goods are recoverable, and such items as were reasonably necessary and proper to preserve the goods from total destruction are included in the damage. The burden is on the plaintiff to show you what damage was sustained, before you are authorized to find for the plaintiff.⁹³

§ 4008(2). Kentucky

The court instructs the jury that, if you find a verdict for plaintiffs, you will award them such sum of money as you may believe from the evidence will fairly and reasonably compensate them for the cost of disconnecting the drain referred to in the proof, not exceeding on this account the sum of \$——, and for the diminution, if any, in the value of the use and occupancy of the property referred to in the proof to plaintiffs from the time of the flowing back of the water or sewage into plaintiffs' property in ——, up to the date of the filing of the petition herein arising solely and exclusively by reason of the water or sewage flowing back into the property and cellar of

⁹³ Mayor, etc., of City of Macon v. Small, 34 S. E. 152, 108 Ga. 309.

plaintiffs through the drainpipe referred to in the proof, if you believe from the evidence that said water or sewage did so flow back into said cellar through said drainpipe, but your verdict must not in any event exceed the sum of \$——, the amount prayed for by plaintiffs in their petition. The court instructs the jury that you shall not consider, in arriving at a verdict in this case, any damage or injury to the plaintiffs, or their use or enjoyment of their property occasioned by any overflowing of said property prior to the overflow described in the proof as occurring in ——, nor subsequent to the disconnecting of the pipe from plaintiff's property to said sewer, up to the filing of the petition on ——.⁹⁴

§ 4009. Damages for pollution of water course by sewage

The court instructs the jury that, if you find for plaintiffs, or any of them, as predicated in instruction No. ——, you should allow them, or him, such a sum in damages, if any, as you may believe from the evidence will fairly compensate them or him, for the diminution, if any, in the value of the use and enjoyment of the lands and homes owned or occupied by them or him, and for the diminution, if any, in the value of the appurtenant use of the creek for stock water, that may have resulted from and been directly caused by the act of defendant in so constructing its sewers as to cause their contents to empty into the creek, if they did so empty therein, but the damages, if any are allowed, should not exceed \$—— to each plaintiff found to have been damaged.⁹⁵

§ 4010. Measure of damages for diversion of surface water

You are instructed that, in determining what damages, if any, the plaintiffs have sustained to the store building, the damages would be the difference between the value of the store building at the time the injuries were sustained and the value of the same after the injuries were sustained; that is, the amount in money that it would take to repair the damages caused by the defendant, if any. And in determining the damages, if any, the plaintiffs have sustained to their real estate, the damages would be the difference between the value of said real estate, that is the lots, at the time the injuries to said lots were sustained, if any, and the less value of such real estate immediately after such damages were sustained, if any, by reason of the deposit of sand, etc., upon said real estate.⁹⁶

§ 4011. Duty of plaintiff to mitigate damages resulting from negligence of city with respect to drain

You are instructed that, if you believe, from the evidence, that the plaintiffs had notice or knowledge that their sugar, coffee and tea were

⁹⁴ *Toebbe v. City of Covington*, 141 S. W. 421, 145 Ky. 763.

⁹⁵ *City of Henderson v. Robinson*, 153 S. W. 224, 152 Ky. 245.

⁹⁶ *Oklahoma City v. Stewart*, 184 P. 779, 76 Okl. 211.

being injured by the water, then it was their duty to remove the same, if they could have conveniently done so; and all damage that accrued to the said groceries after such notice the plaintiffs cannot recover, if the evidence shows that the same could have been removed without much trouble or inconvenience.⁹⁷

F. LIABILITY FOR OBSTRUCTING WATER COURSE

§ 4012. Flooding lands of riparian owner—Proximate cause

The court instructs the jury that if they believe from the testimony that an unprecedented rainfall and flood, which could not have been reasonably anticipated by an ordinarily cautious person, was the efficient cause, the one cause that necessarily set in operation said causes contributing to plaintiffs' injury, that plaintiff cannot recover.⁹⁸

§ 4013. Same—Damages

You are instructed that, if you find that the defendant increased the height of the dam mentioned in the plaintiff's petition, on or about the time mentioned therein, and that by reason thereof the water in the channel of the creek was caused to back up on the premises of the plaintiff, and you further find by a preponderance of the evidence that the premises of the plaintiff described in the petition were injured thereby, and that by reason thereof the market value of his land was diminished, and the plaintiff damaged thereby, your verdict should be for the plaintiff; and in this connection you are further instructed that, if you find for the plaintiff, the measure of his damage, which means the amount of his recovery, should be the difference in the market value of the land described prior to the raising of the dam in ——— and its value thereafter caused by the increased height of said dam, if any, without regard to any general increase or depreciation in the value thereof from any other cause or source; and in arriving at the difference in the value of said land, if any, you may take into consideration the effect the backing up of the water on the premises had upon the sand beds in the creek on said premises, if any, the inconvenience, if any, you find the backing up said water had or might have in the use of the fords or crossings on the creek on plaintiff's premises, the increase, if any, of the distance the plaintiff would be compelled to travel in going to and from the city of ———, or his nearest market, the effect, if any, it had in the use of the pasture on said premises, the effect it had, if any, on the banks of the creek, the washing away of trees and soil from said premises, if any, and such other matters and things as you may find was the direct and proximate result, if any, tending to increase or decrease the market

⁹⁷ City of Aurora v. Gillett, 56 Ill. 132.

⁹⁸ City of Piqua v. Morris, 120 N. E. 300, 98 Ohio St. 42, 7 A. L. R. 129.

value of said premises, and allow him such amount as you may find will compensate him for the detriment caused thereby, but you will not allow the plaintiff any damage caused by said dam prior to the raising thereof in the year ———.⁹⁹

You are instructed that you cannot allow the plaintiff special damages for any specific or particular item of injury, if any, he may have sustained by reason of the backing up of said water; but you may consider all such specific and particular items and matters mentioned in the foregoing instruction, for the purpose only of arriving at the difference in the market value of the land prior to the raising of said dam and its market value thereafter.¹⁰⁰

G. MATTERS PERTAINING TO REMEDIES AGAINST CITY

§ 4014. Conditions precedent to enforcement of claim—Presentation to council

You are instructed that it is provided in substance by the charter of the city of ———, that all claims against the city shall be audited and allowed by the common council, and that a statement of the claim shall be made by the claimant, and filed with the common council, and verified by the oath of the claimant before the claim is allowed, and that it shall be a conclusive answer to any suit, brought by the party to enforce such a claim, that it had not been presented to the council. In my judgment, gentlemen of the jury, that provision of the charter is applicable to this case. It is conceded by the plaintiff that, before commencing this suit, he did not present any claim to the common council for a return or payment back to him of this tax as provided by the charter; and consequently for this reason it becomes my duty, as I view the law, to instruct you that the plaintiff cannot recover in this action, and that your verdict should be for the defendant.¹⁰¹

H. TAXATION

§ 4015. Validity of special tax bills—Description of premises

You are instructed that, if the jury find from the evidence that the land described in the tax bill sued on is inclosed in one general inclosure, and the said land is under the charge and control of the defendant cemetery association, then it was legal and proper to issue the special tax bills against the same as one tract, and the special tax bills are legal and valid as against whatever interest the said defendant has in said land, and plaintiff is entitled to a special judgment against said land, and whatever interest said defendant has therein.¹⁰²

⁹⁹ City of Kingfisher v. Zalabak, 186 P. 936, 77 Okl. 108.

¹⁰⁰ City of Kingfisher v. Zalabak, 186 P. 936, 77 Okl. 108.

¹⁰¹ Crittenden v. City of Mt. Clemens, 49 N. W. 144, 86 Mich. 220.

¹⁰² Mullins v. Mt. St. Mary's Cemetery Ass'n, 168 S. W. 685, 259 Mo. 142.

CHAPTER CCXI

MUTUAL BENEFIT INSURANCE

- § 4016. Constitution and by-laws of association as part of insurance contract.
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- 4018. Same—Statements as to use of liquor.
- 4019. Suspension for failure to pay dues—Sufficiency of notice of assessment.
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 - 4023(1). Indiana.
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- 4028. Same—Insanity of insured.
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- 4030. Defense that deceased committed suicide.
- 4031. Right of insured to appeal to courts—Duty to exhaust remedy within society.
- 4032. Presumptions and burden of proof.
- 4033. Presumption of payment of premium.
- 4034. Presumption against suicide.

§ 4016. Constitution and by-laws of association as part of insurance contract

You are instructed that it is admitted in the pleadings that the defendant is a fraternal insurance corporation or association and that the plaintiff was in good standing in this association on _____. The pleadings also admit a number of the provisions contained in the constitution and by-laws of the defendant. The jury is instructed that all of these provisions contained in the constitution and by-laws of the defendant corporation and alleged in the answer of the defendant are binding upon the plaintiff, and plaintiff can only recover in this case by showing that under the terms and conditions contained in the constitution and by-laws of the defendant plaintiff is entitled to recover.¹

§ 4017. Avoidance of policy for misrepresentations by insured

The jury are instructed that, if you believe that the answer given by the assured to the question set up in instruction No. _____

¹ Kendall v. Travelers' Protective Ass'n of America, 160 P. 751, 87 Or. 179.

was untrue, and was known by her at the time of making of the application, or the receipt of said policy, to be untrue, and was made by her for the purpose of deceiving the defendant insurance company and procuring the policy thereby, and the defendant was deceived into issuing said policy by such untrue statement, which was known by her to be untrue, the law is for the defendant, and the jury should so find.²

You are instructed that, if you believe from the evidence that the question, "Have you ever been afflicted with any of the following complaints or diseases: Any diseases of the alimentary, genital, or urinary organs?" did not convey to an ordinarily intelligent person, under circumstances such as described by the proof, that an answer was required as to diseases of the kidneys, and you further believe from the evidence that said question was not explained to decedent, as requiring such an answer, and that such decedent did not know or understand, and could not understand, by the exercise of such diligence and understanding as persons of ordinary diligence and understanding ordinarily exercise under the same or similar circumstances to those in this case, that such an answer was required, then you will not find decedent's answer to said question untrue, even though you may believe from the evidence that decedent, at the time he so answered said question, had been afflicted with a disease of the urinary organs.³

§ 4018. Same—Statements as to use of liquor

The court charges the jury that, in order to find a verdict for the defendant on the ground that insured used alcoholic or other stimulants, you must believe that at the time of making his application for membership in the defendant's order it was the habit of ——— to use alcoholic or other stimulants.⁴

§ 4019. Suspension for failure to pay dues—Sufficiency of notice of assessment

You are instructed that the defendant's laws read in evidence required the recorder of ——— Council No. ———, of which the deceased was a member, to send notices of contributions, which he was required to pay, to his regular address. The words, "regular address," as used in said by-laws, mean the place where the member is known by the recorder to receive customarily his mail. That is, the place where he is known to expect his mail to be addressed to him, and where he usually receives it, although he may not al-

² National Council, Knights and Ladies of Security, v. Dean, 231 S. W. 29, 191 Ky. 622. This is correct as far as it goes.

³ Brotherhood of Railroad Train-

men v. Swearingen, 171 S. W. 455, 161 Ky. 665.

⁴ Supreme Lodge, Knights and Ladies of Honor, v. Baker, 50 So. 958, 163 Ala. 518.

ways be present at such place. In determining whether at the time mentioned above the regular address of the deceased was at No. ———, ——— avenue, in the city of ———, or at No. ———, ——— avenue, ———, you are to take into consideration all the facts and circumstances in evidence in this case tending to show whether the deceased expected to receive regularly his mail at one place rather than at the other, in the absence of any special direction, and also tending to show what knowledge or information, if any, the recorder of ——— Council No. ——— had of this intention. If you believe and find from the evidence in this case that No. ———, ——— avenue, in the city of ———, was the regular address of the deceased at the time mentioned above, and that the recorder of ——— Council, on or about the ——— day of ———, deposited in the United States mail postage prepaid, addressed to the deceased to such place, a notice or call for a contribution due from him for the month of ———, that said contribution was not paid by the deceased or by any person for him on or before the first meeting night of said council in ———, and that thereupon he was suspended by said council at said meeting for the nonpayment of said contribution, and that notice of such suspension was deposited in the United States mail by the supreme recorder of defendant, postage prepaid, and addressed to the deceased at said number on ——— avenue, in the city of ———, and that thereafter the deceased made no application to be reinstated in said council prior to his death, then your verdict must be in favor of the defendant.⁵

You are instructed that, if you believe from the evidence that on or about the ——— day of ———, the recorder of ——— Council deposited in the United States mail, postage prepaid, and addressed to deceased, ———, at No. ———, ——— avenue, ———, a notice or call for a contribution due from him for the month of ———, and that such notice was forwarded from said ——— avenue address to the deceased at No. ———, ——— avenue, ———, and was there received by him in time to have enabled him to have paid said contribution within ——— days from the date of said notice, and that he failed to make such payment, and was suspended by said council at its first meeting in ———, on ———, then the question of the regular address of the deceased is immaterial, and your verdict must be in favor of the defendant.⁶

⁵ Bange v. Supreme Council Legion of Honor of Missouri, 161 S. W. 652, 179 Mo. App. 21.

⁶ Bange v. Supreme Council Legion of Honor of Missouri, 161 S. W. 652, 179 Mo. App. 21.

§ 4020. Same—Notice of suspension

You are instructed that, if you believe from the evidence that _____ was declared suspended at the meeting of _____ Council held on _____, and his suspension reported to the supreme recorder of defendant, and that notice of his suspension was mailed to him by said supreme recorder directed to him at No. _____, _____ avenue, _____, and that said notice was at once forwarded by mail from said _____ avenue address by the wife or mother-in-law of said _____, to his _____ address, No. _____, _____ avenue, _____, and was received at said _____ address in time to have enabled said _____ to have applied for reinstatement as a member of _____ Council, within _____ days from date of said suspension, and that thereafter he made no application to be reinstated as a member of defendant organization or of said _____ Council, and neither paid nor offered to pay any assessments or dues, and never did anything indicating that he considered himself a member of said council or of defendant, or indicating any desire on his part to continue such membership, then the verdict of the jury must be in favor of defendant.⁷

§ 4021. Same—Effect of failure to apply for reinstatement

You are instructed that, if _____ in any manner obtained knowledge that he was or had been suspended from membership in the _____, then if he did not desire to acquiesce in such suspension it was his duty, within a reasonable time, to make known such fact to the officers of the defendant or the officers of said _____ Council, and if you believe from the evidence that after becoming aware of said suspension from membership in _____ Council on _____, if you find as a fact that he did so become aware thereof, he took no steps to protest against such suspension or to procure his reinstatement as such member, or in any way express to any officer of the defendant or to said _____ Council that he did not consent to such suspension, then the plaintiff is not entitled to recover, and your verdict must be in favor of the defendant.⁸

§ 4022. Forfeiture of membership by failure to pay assessments

The court instructs the jury that, if they believe from the evidence that _____ failed, neglected, or refused to pay his assessment for the months of _____ to _____, in the time prescribed by the by-laws, that being the regular monthly assessment due by him, and after he had been requested to pay same by _____, the financial secretary of _____ Council No. _____, _____, then.

⁷ Bange v. Supreme Council Legion of Honor of Missouri, 161 S. W. 652, 179 Mo. App. 21.

⁸ Bangs v. Supreme Council Legion of Honor of Missouri, 161 S. W. 652, 179 Mo. App. 21.

he forfeited his membership in the ———, and the plaintiff cannot recover in this action.⁹

§ 4023. Waiver of forfeiture for failure to pay assessments

§ 4023(1). Indiana

You are instructed that if the local union officer who collected the assessments for the months of ———, ——— and ———, collected the same unconditionally, and as being in full compliance with the terms of the contract, and as having been paid when due and did not treat said payment as having been made when ——— months in arrears, but treated the same as having been paid prior to the ——— day of ———, and did not report said member as suspended to the defendant, and that the head officers did not know of these facts and of the acts and conduct of said deceased until the receipt of proofs of death, yet that, upon receipt of this information, they did not repudiate the acts of said local union officer, and did not offer to return the money so collected or any money thereafter collected, and thereby ratified the acts of said officer of said local union and estopped themselves from setting up said defenses, then, if you find for the plaintiff, you will assess, etc.¹⁰

§ 4023(2). Virginia

The jury are further instructed that as a matter of law the receipt of said money by the said ———, financial secretary of ——— Council No. ———, ———, on behalf of said ———, was without right or authority on his part, and that the acceptance by him of said money was not a waiver of the conditions by the said defendant under which said benefit certificate was issued. To the contrary each and every benefit certificate is issued only upon the conditions stated in and subject to the constitution and by-laws of the order of said ———.¹¹

The jury are further instructed that the said ———, as financial secretary of the said ——— Council No. ———, ———, and said ——— Council No. ———, ———, in administering the powers and duties provided under the laws of said defendant, were not the agents of the said order, but the agents of the members thereof, and that the acceptance of said money by said ——— after said forfeiture of membership of said ——— did not create, or cannot be construed to create, any liability on the part of said defend-

⁹ *Knights of Columbus v. Burroughs' Beneficiary*, 60 S. E. 40, 107 Va. 671, 17 L. R. A. (N. S.) 246.

¹⁰ *Brotherhood of Painters, Decorators and Paperhangers of America*

v. Barton, 92 N. E. 64, 46 Ind. App. 160.

¹¹ *Knights of Columbus v. Burroughs' Beneficiary*, 60 S. E. 40, 107 Va. 671, 17 L. R. A. (N. S.) 246.

ant to said plaintiff. Therefore the verdict should be for the defendant.¹²

§ 4024. Power of local court to waive forfeiture

The jury are instructed that the relation between the district courts and the supreme court of defendant is that of agency, and whatever the district court did, through its proper officer, in the matter of the suspension and reinstatement of ———, is binding on the defendant.¹³

You are instructed that ——— Court No. ——— of the ——— was an agent for the supreme court in all its dealings with the deceased, ———; and if the jury believe from the evidence that said local court, acting by its officer, the recorder, ———, accepted from the said ——— assessments and general dues after his suspension on ———, and reinstated him upon the books of said local lodge, and if the jury further believe, from the evidence, that the said ——— was a member in good standing upon the books of said local court at the time of his death, and that he had paid all assessments and general dues then owing by him to said order, that is evidence from which the jury might infer that the defendant waived the right to declare the contract of insurance forfeited.¹⁴

§ 4025. Right to accident benefits—Blood poisoning resulting from attempt to remove ingrowing hair

The jury is instructed that if plaintiff directed the barber to remove the ingrowing hair from his chin, and the barber proceeded to remove the hair under instructions from plaintiff, plaintiff cannot recover in this case, even though the work of the barber was unskillfully done, and the results were such as neither plaintiff nor the barber anticipated.¹⁵

§ 4026. Agreement to pay in case of total disability of insured—Ability to do manual labor

The jury are instructed that the term "manual labor," in its ordinary and usual meaning and acceptance, means labor performed by and with the hands or hand, and it implies the ability for such sustained exercise and use of the hands or hand at labor as will enable a person thereby to earn or assist in earning a livelihood. Being able to temporarily use the hands or hand at and in some kind of labor, but without the ability to sustain such ordinary exercise and use of the hands at some useful labor whereby money

¹² *Knights of Columbus v. Burroughs' Beneficiary*, 60 S. E. 40, 107 Va. 671, 17 L. R. A. (N. S.) 246.

¹³ *Court of Honor v. Dinger*, 77 N. E. 557, 221 Ill. 176.

¹⁴ *Court of Honor v. Dinger*, 77 N. E. 557, 221 Ill. 176.

¹⁵ *Kendall v. Travelers' Protective Ass'n of America*, 188 P. 188, 95 Or. 569.

may be earned to substantially assist in earning a livelihood at some kind of manual labor, does not constitute the ability to perform manual labor as it must be understood was contemplated by the parties to the indemnity contract sued upon and relied on in this action.¹⁶

§ 4027. Exception from policy of death occurring while violating the law

§ 4027(1). Alabama

The court charges the jury that under the clause in the policy which states that, "if the holder of said policy should die as a consequence of the violation or attempted violation of the laws of the state of ———," no recovery can be had, the question is with you as to whether he died as a consequence of the violation or attempted violation of the laws of ———.¹⁷

§ 4027(2). Michigan

The jury are instructed that the one simple thing for you to determine is, Who was the aggressor? Did the insured intend to bring about this controversy—start an affray, an assault, which resulted unfortunately in his death? If he did, if he was doing something that was in violation of the criminal law of the land, of the state, that is, seeking to assault or commit an assault and battery upon the person of the man ———, and brought about the affray which resulted in his death, he was violating the law of the land, and the plaintiff cannot recover. If you find that the insured went to the house of ———, and that he then and there, by means of any words spoken, did maliciously threaten any injury to the person of the said ———, with intent to extort money or any pecuniary advantage, or with intent to compel said ——— to return his ———, or pay him for the ——— against his will, or to compel the said ——— to do, or refrain from doing, any act against his will, and as a result of such threats a fight was brought on, in which the insured lost his life, then the insured met his death while violating the laws of the land, and your verdict must be for the defendant.¹⁸

§ 4028. Same—Insanity of insured

The jury is instructed that, if you find from the evidence that at the time the deceased made the assault upon the marshal, ———, he knew right from wrong, and he knew it was wrong to make

¹⁶ *Grand Lodge Locomotive Firemen v. Orrell*, 69 N. E. 68, 206 Ill. 208.

¹⁷ *Woodmen of the World v. Wright*, 60 So. 1006, 7 Ala. App. 255.

¹⁸ *Payne v. Union Life Guards*, 99 N. W. 376, 136 Mich. 416, 112 Am. St. Rep. 368.

said assault, then, under the law, he was sane, unless you find that at the time he was acting under an irresistible impulse arising from a defect in his will caused by the diseased condition of his mind, and was not acting from mere anger or revenge.¹⁹

The jury are instructed that, if you believe from the evidence in this case that at the time the deceased made an attack upon the marshal of the city of ——— he was temporarily insane, and that such temporary insanity, if such there was, was produced by the voluntary recent use of ardent spirits, it would afford no excuse for the assault made by him upon the officer, if the act was otherwise criminal.²⁰

§ 4029. Death resulting from vicious, intemperate, or immoral habits

You are instructed that, if you believe from a preponderance of the evidence that the insured, after the issuance of the beneficiary certificate in question, became so intemperate from the use of intoxicating liquors as to produce delirium tremens, or that he died from the direct result of the drinking of intoxicating liquors, or died from a disease, resulting from his own vicious, intemperate, or immoral habits, act or acts, then, in that event, the plaintiff cannot recover in this case, and you should return your verdict for the defendant.²¹

§ 4030. Defense that deceased committed suicide

The court instructs the jury that if they believe from the evidence that the decedent voluntarily and intentionally drank carbolic acid at a time when his mind was in sufficiently sound condition to know the probable consequences of the taking of the carbolic acid, if he did so do it at all, with the intention of bringing about or producing his death, then in that event the law is for the defendant, and the jury should so find; but, on the contrary, the court says to the jury that although they may believe from the evidence that the decedent died from the effects of carbolic acid which he had taken, still, if they should further believe from the evidence that said poison was not voluntarily or intentionally taken by him for the purpose of committing suicide, but by accident, or mistake, on his part, then and in this latter event, if the jury so believe, the law is for the plaintiff, and the jury should so find as directed in No. ———.²²

¹⁹ *Eminent Household of Columbian Woodmen v. Howle*, 187 S. W. 176, 124 Ark. 224.

²⁰ *Eminent Household of Columbian Woodmen v. Howle*, 187 S. W. 176, 124 Ark. 224.

²¹ *Sovereign Camp of Woodmen of the World v. Hutchins*, 159 P. 920, 60 Okl. 181.

²² *Sovereign Camp of Woodmen of the World v. Valentine*, 190 S. W. 712, 173 Ky. 182.

You are instructed that, although the jury may believe from the evidence that ——— was insane at the time he drank the carbolic acid, if he did so, and took his own life, yet the jury should find for the defendant unless they should believe from the evidence that at the time he did so he was insane and did not have enough mind to know the act that he was committing would probably result in his death.²³

The court instructs the jury to find for the plaintiff the sum of \$—— with interest from ———, unless they believe that the decedent voluntarily committed suicide, while sane as is defined in instruction No. ———.²⁴

§ 4031. Right of insured to appeal to courts—Duty to exhaust remedy within society

The jury are instructed that the constitution of the defendant society provides that a member making a claim for indemnity on account of total disability shall present his proof of such disability, and that the question of his right to receive payment shall be referred to a board of the officers of the grand lodge, and further provides, if such claims are disallowed by the board, the claimant may appeal to the grand lodge in session. This provision does not deprive the plaintiff of his right to sue the claim in a court of law. But it was his duty before beginning such suit to first lay his claim before the proper officers or board of the defendant, and give it opportunity to pay without further litigation; and, if he failed to show that he made such proofs before commencing this suit, he cannot recover.²⁵

§ 4032. Presumptions and burden of proof

You are instructed that the law presumes knowledge on the part of deceased of the constitution and general laws of the defendant order and of the by-laws of ——— Council No. ———, which were in force during the entire time that he was a member of defendant organization.²⁶

You are instructed that, in order for the plaintiff to recover in this action it is not necessary for her to prove that ——— at the time of his death was in good standing in the defendant order, but, on the contrary, to defeat recovery the defendant must establish by a preponderance or greater weight of the evidence that ——— was lawfully suspended on the ——— day of ———, or that said

²³ Sovereign Camp of Woodmen of the World v. Valentine, 190 S. W. 712, 173 Ky. 182.

²⁴ Sovereign Camp of Woodmen of the World v. Valentine, 190 S. W. 712, 173 Ky. 182.

²⁵ Lillie v. Brotherhood of Railway Trainmen, 86 N. W. 279, 114 Iowa, 252.

²⁶ Bange v. Supreme Council Legion of Honor of Missouri, 161 S. W. 652, 179 Mo. App. 21.

—— acquiesced in such suspension, although you may believe and find from the evidence that such suspension was illegal.²⁷

§ 4033. Presumption of payment of premium

The court instructs the jury that the burden is upon the plaintiff, not only to show the issuing of the policy, but the performance of the specifications of its conditions, and among these conditions the performance of the specifications respecting the payment of dues. The law, however, in actions upon insurance policies, presumes in favor of the payment of the premium. That presumption of law, gentlemen, takes the place of positive testimony on the part of the plaintiff to the payment of the premium, and it results that, upon the introduction by the plaintiff of this policy and proof of the death of ——, she is entitled to a verdict for the amount of the policy unless the presumption of law that the premium was paid has been overcome by the testimony introduced here by the defendant; and there, gentlemen, you come to the only question in the case. If the testimony in the case has been sufficient to overcome the presumption of law that the premium was paid, then the verdict here must be for the defendant. The defendant is ~~not~~ bound to prove by a preponderance of evidence that the payment was not made, but the defendant is bound to put into the case evidence fairly tending to show that the payment of this premium was not made, in order that the jury may be able to say that the presumption of the payment has been overcome.²⁸

The court instructs the jury that, in determining the question whether or not the presumption of payment has been overcome, you have a right, of course, to take into consideration all the evidence which has been submitted in your presence. Certain books of account have been introduced in evidence. It will be the duty of the jury to look over these books of account in connection with all the testimony relating to the books of account. Do you find from the evidence that the books of account were correctly kept? Do you find that they correctly set forth the transactions between the defendant and the deceased? These are all questions of fact for the jury. You have a right to take into consideration these books of account in connection with all the other evidence in the case, and say whether or not, under all the evidence in the case, the presumption of law that the premium was paid has been overcome. As I have said, if you are able to say that it has been overcome, then the verdict must be for the defendant, the insurance company; but, unless you are able to say that that presump-

²⁷ *Bange v. Supreme Council Legion of Honor of Missouri*, 161 S. W. 652, 179 Mo. App. 21.

²⁸ *Rousseau v. Brotherhood of American Yeomen*, 152 N. W. 939, 186 Mich. 101.

tion has been overcome, then it will be your duty to render a verdict in favor of the plaintiff.²⁹

§ 4034. Presumption against suicide

The jury are instructed that a man's natural instinct is to preserve his life and not to destroy it. Therefore the presumption is that ——— did not commit suicide, and that presumption should be considered in deciding whether or not he did commit suicide.³⁰

²⁹ *Rousseau v. Brotherhood of American Yeomen*, 152 N. W. 939, 186 Mich. 101.

³⁰ *Tackman v. Brotherhood of American Yeomen*, 106 N. W. 350, 132 Iowa, 64, 8 L. R. A. (N. S.) 974.

CHAPTER CCXII

NAVIGABLE WATERS

- § 4035. What are navigable streams.
- 4036. Same—Burden of proof.
- 4037. Liability for injuries caused by unlawful obstruction—**Negligence per se.**
- 4038. Same—Logging boom.
- 4039. Same—Failure to construct bridge as required by statute.
- 4040. Same—Proximate cause.
- 4041. Recovery for injuries to bridge—Defense that it constituted an unlawful obstruction.
- 4042. Duty to remove wreck—Liability for injuries caused by deflection of current.
- 4043. Rights of riparian owners in accretion or reliction.
- 4044. Title to land as dependent upon whether it was formed by process of accretion or reliction.
- 4045. Same—Burden of proof.
- 4046. Same—Sufficiency of evidence as to whether land in dispute was an island or accretion.
- 4047. Ownership of islands.
- 4048. Ownership of tide lands.

§ 4035. What are navigable streams

You are instructed that a stream, to be navigable, must furnish a common passage capable of floating vessels for the transportation of property conducted by the agency of man, and a stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact, if it be a fact, that there is water enough in places or at certain seasons of the year for rowboats or small launches, is not sufficient to make the stream navigable in fact.¹

The jury are instructed that a stream of water, to be navigable in fact, must in its ordinary and natural condition furnish a highway over which commerce is or may be carried in the customary mode in which such commerce is conducted by water.²

§ 4036. Same—Burden of proof

The court instructs the jury that a party who alleges or claims that a stream is navigable has got the burden of showing that fact, if it be a fact.³

§ 4037. Liability for injuries caused by unlawful obstruction—**Negligence per se**

You are instructed that, if you find that the defendant, ——— through its agent or employes deposited or caused to be deposited

¹ Sanitary Dist. of Chicago v. Boening, 107 N. E. 810, 267 Ill. 118.

³ Sanitary Dist. of Chicago v. Boening, 107 N. E. 810, 267 Ill. 118.

² Sanitary Dist. of Chicago v. Boening, 107 N. E. 810, 267 Ill. 118.

any trees or brush in the north fork of the —— river or its branches, without a permit so to do from the Secretary of War of the United States, and that said brush and trees were carried by ordinary rise of water in such manner as to proximately cause the damage complained of, then you are instructed that the said defendant was and is guilty of negligence. The court has instructed you that the depositing of trees and brush, or either, in the waters of the north fork of the —— river without a permit would be a violation of the law; in other words, would constitute negligence per se on the part of defendant.⁴

§ 4038. Same—Logging boom

The jury are instructed that lumbermen or persons running logs cannot by custom acquire the right to obstruct a navigable stream by maintaining a boom across the river so as to prevent the passage of vessels along said river, and if they do so they are liable for the proximate damages occasioned thereby.⁵

§ 4039. Same—Failure to construct bridge as required by statute

The court instructs the jury that the law regarding the —— drawbridge under consideration is that it shall have spans of not less than —— feet in length in the clear on each side of the central or pivot pier of the draw. This means that the open span between the piers must be —— feet when measured at right angles with the pier. If you shall find from the testimony that the —— bridge was built diagonally across the river, and not at right angles with the piers of the bridge, the measurement along the line of the track of the railroad or the chord of the bridge is not the proper measurement, and the distance of —— feet thus obtained is not a compliance with the act of Congress requiring —— feet in the clear, and to the extent of this difference between a line at right angles with the piers and the measurement along the track or chord of the —— bridge, it is an unauthorized structure, so far, at least, as any question pertaining to and connected with this case is concerned.⁶

§ 4040. Same—Proximate cause

You are instructed that, though you may find from the testimony that the width between the piers as constructed is less than the act of Congress requires, yet this violation of the law by the defendant, in the construction of its bridge, is not available to plain-

⁴ Myrtle Point Transp. Co. v. Port of Coquille River, 168 P. 625, 86 Or. 311.

⁵ Gifford v. McArthur, 22 N. W. 28, 55 Mich. 585.

⁶ Missouri River Packet Co. v. Hannibal & St. Joseph R. Co. (C. C. Mo.) 2 F. 285.

tiff in recovering damages, unless it caused or contributed to the injury by plaintiff complained of.⁷

§ 4041. Recovery for injuries to bridge—Defense that it constituted an unlawful obstruction

I charge you that the requirement of law is that that bridge must be constructed and maintained according to the requirements of the plans approved and sanctioned by the Secretary of War. I charge you further that if any one constructed such an obstruction as a bridge, assuming it to be under the authority of the state and of the permission of the Secretary of War, and does not construct it so as to conform with the plans and regulations, it is an unlawful structure, and the person who constructs it is under the statute liable to a severe penalty, to be inflicted by the United States, for disobeying the requirements of the plans in the construction or maintenance of that bridge, and is also liable by the United States authorities to be ordered to remove it, and make it conform to those plans. No matter what the circumstances may be, they can be required to move or alter it, or change it to conform to those plans. It is an unlawful structure in that sense; but I charge you that it is not an unlawful structure in the sense that anybody has a right to go and knock it down or move it, or disregard it. To illustrate what I mean: If a wharf is authorized by the United States to extend towards the channel 66 feet, and the wharf owner, through inattention or inadvertence, constructs to 67 feet, that does not mean that anybody can hurl a heavy barge against it, the whole pier, or that he can destroy a part of the wharf, or that he can take an ax and destroy the wharf because the requirement at the time was disobeyed, and it was constructed ——— feet out in the channel, instead of ——— feet. So I charge you, gentlemen, that if a person or a corporation is authorized to construct a bridge and he is directed by the plans to construct it with a draw ——— feet in width, and he constructs it ——— feet, or ——— feet ——— inches, so as to be less than the requirement by ——— inches, that does not authorize anybody to destroy that bridge, or hurl a boat, or any other object which will hurt it, against it, and destroy it because the party who constructed it may have made an immaterial and unsubstantial alteration and have disobeyed the requirements of the plans. The remedy in those cases is not that the whole bridge is declared outlawed, open to destruction and to be ignored by any one, but that the party should be reported, and required under the statute by the War Department to tear down his bridge and reconstruct it, if necessary, as the War Department

⁷ *Missouri River Packet Co. v. Hannibal & St. Joseph R. Co.* (C. C. Mo.) 2 F. 285.

may accept and ratify, or the party is liable to prosecution and punishment by fine for not having obeyed the plans; but, because he has done it, he is not open to have his property destroyed as if he were an outlaw. His bridge is there, and has been authorized to be there, though required to be put there according to the plans approved by the War Department; yet a variation between those plans and the actual structure does not mean that the party who constructed it forfeits all right to his property or to the use of it. I therefore charge you in this case that the fact that the draw in this case may at this time, nearly ——— years after the original authorization of the construction of the bridge, vary from the width required by the plans to the extent of ——— inches, does not mean that anybody who wishes may disregard the whole authority for the construction of the bridge, and treat it as an unlawful construction existing, which they can destroy, and for which the party owning it is not entitled to any remedy or reparation if it is carelessly or negligently destroyed; if it is not constructed according to the plans, not only is he subject to prosecution under the statute, but to the general common law that he must place no obstruction in navigable waters which causes injury as the proximate cause. A man is not liable to another simply because he has an obstruction in the navigable water. He is only liable if that unlawful obstruction is the cause of injury to another, to the individual, as distinguished from the government, and therefore I charge you in this case that not only if he did not follow the plans is he still bound by the law that his obstruction must not be one that is such an obstruction to the navigable stream as in any case causes injury to a party; but I charge you that, if that draw was less than ——— feet, he is not entitled on the construction of the draw to any protection as having fully complied with the plan in this respect. If he constructed it ——— feet wide, then any boat that touched or injured that bridge was negligent. If he conformed to the law and constructed it full ——— feet wide, then that was the requirement of the law, and no boat passing through that draw had the right to strike the fender and obstruction on either side, so as to injure it; but if he constructs it at less than ——— feet he is deprived of that absolute protection, and a party who strikes it is not presumptively negligent or careless, but the bridge owner would be presumptively in fault, unless he can show that the lessening of the width, if the jury find it to be unsubstantial, was not any one of the factors or causes which contributed to the injury. What I mean is this, gentlemen, to put it more concretely to you: If the law authorized the construction of a bridge there with a width of ——— feet, any boat that goes through there is expected to do so without striking anything at the side. She is

notified by law that she has a clear way of ——— feet, and no more, and is to be piloted, managed, and guided accordingly; and if she strikes within the ——— feet, when it is ——— feet, unless he can show it was due to some uncontrollable cause, which exists whenever you deal with navigation, a boat that strikes is presumptively negligent; but, if it is less than ——— feet, then that presumption is destroyed, and the bridge owner is entitled to recover from the boat it strikes or injures only if he can show that lessening of the width was in no way responsible for or contributed to the accident or disaster. If there was, if the barge was so navigated and towed through that lane or bridge way, so that it was carelessly and negligently allowed to strike against the side with an impact not simply incident to the usual and ordinary impact of a boat going through, then I charge you you would be authorized to infer that there was negligence on the part of the boat. Now, it is for the jury to say: Was it negligently carried through, so as to strike the bridge structure? And if it did, and broke it down, and in consequence of such carelessness and negligent management it then struck against—directly or indirectly against—the swinging bridge and injured that, then I charge you that the defendant would be in the first instance responsible. In this case there is no question of narrowing of the waterway at the swinging bridge itself, because the testimony is that at the time the bridge was completely swung away, off the waterway, did not protrude to one side, and the only question is: Was this barge so unskillfully handled by the tug which was towing it, by the people on board the barge, that she by any unskillful management struck against those piles and injured the bridge structure and the bridge? If that was due to the negligence of the parties on the tug or the barge, then they are responsible. But, however, if you find that that was due to the fact that the draw opening at that point was ——— feet ——— inches, and not ——— feet, that the diminution of it by ——— foot ——— inches was the contributive cause of that striking against the bridge, then they would not be responsible, as, for instance, if a boat which had a beam of ——— feet could be safely carried through, and when she got to a place where the width was reduced to ——— feet ——— inches, there was ——— inches too little, why then that would manifestly be the responsibility of the bridge, because the boat that went through was entitled to ——— feet, and if ——— feet prevented it from going through it, with only ——— feet ——— inches it would be the responsibility of the bridge. That is, of course, an extreme case. Now, I charge you in this case that, if you find that this boat was ——— feet beam, and that the lessening of the draw opening to ——— feet ——— inches at that point was a concurring, contributing, proxi-

mate cause of the injury, was the concurring thing in making the boat strike, it would be contributory negligence on the part of the bridge owner, and although there may have been unskillful management of the tug in causing it to strike in the first instance, the tug owner or barge owner would not be responsible, and that is pretty much this case. There has been some evidence, I charge you, as to the condition of the iron structure of the bridge, but the testimony is that that was all removed from this draw opening; that, therefore, could not be a contributing cause to the accident at all, and the only contributing causes in this case, shown upon the testimony, that would justify the jury in finding it, are: First, the lessening of the draw width; and, next, the decayed—if you find it existed—rotten condition of the fenders and piles, that they were in an unsafe condition. Now, if you find that those piles and fenders were so decayed as not to be able to withstand the ordinary, usual bump, scrape, touch, or contact to the sides in the passage of a boat of this size through that draw opening, then I charge you you are also authorized to find that there was contributing negligence on the part of the plaintiff, provided that was a concurring, contributing, proximate cause of the accident. Under the testimony those are the only two causes which are shown to have been capable of contributing to the injury here. One is the lessening of the size of the draw by ——— inches; the other is the condition of the piles and fenders, shown not to be in accordance with the plans, according to the testimony to have been in a decayed condition; if either of those factors, the lessening of the width of the draw or the condition of the piles and fenders, were in any wise the contributing, concurring, proximate cause of this accident then the plaintiff is not entitled to recover.*

§ 4042. Duty to remove wreck—Liability for injuries caused by deflection of current

Regarding the pontoons, at one time kept and maintained by the defendant company, extending from the south pier up the south bank of the river, testified to, you are instructed that the company owning the bridge was not, by law, required to put them there or keep them in position, yet, if the owners of the bridge, for the protection thereof, or for any reason, kept them there, and they were, from any cause, sunk, and thereby diverted the current of the river from its usual and ordinary course or channel, thus causing difficulty or danger in the approaching of the bridge draw by boats, and that such change of the current caused or contributed to the collision of plaintiff's boat with the drawrest of the bridge,

* *Savannah & N. Y. Transp. Co. v. Klaren Bridge Co.* (C. O. A. S. O.) 252 F. 499, 164 C. C. A. 415.

you are authorized to find for the plaintiff, provided the plaintiff company, navigating its boats on the occasion of the collision, did so with care and skill, and did not contribute to the injury by its own neglect or improperly handling its vessel. Those navigating the river are under no obligation to remove wrecks which may be made in the ordinary and proper course of navigation. While this is undoubtedly the law, it is also the law that he who, for his own benefit, and not for the purpose of navigation or commerce, uses any navigable part of a river, is liable in damages to the party injured if such use causes a diversion and change in the ordinary course of the channel of the river, and thereby increases the difficulty and danger of navigation, and injury results therefrom.⁹

You are instructed that, while the defendant company were under no legal obligation to keep pontoons from the bridge pier to the banks of the river, as testified to, yet if for any reason they kept them there, and they were sunk by ice or otherwise, the company was bound to remove them; and if it failed to do so, and a change of current was caused by this neglect, and the plaintiff's boat was injured in consequence of such change, you are justified in finding for plaintiff, unless unskillfulness or neglect on the part of plaintiff in handling his boat caused or contributed to the collision.¹⁰

§ 4043. Rights of riparian owners in accretion or reliction

§ 4043(1). Iowa

The jury are instructed that, when the United States surveyed the land through which the ——— river flowed, and abutting thereon on either side of said river, the same was treated as a navigable river, and the land along its shores was meandered on both sides of said river, and the space between the meander lines on each shore was excluded in calculating the number of acres in any section or part thereof through which said river flowed; and the purchasers of the tracts of land abutting upon said river acquired title to the meander line of said river, but at the same time became what is known in law as "riparian owners," so that the encroachment by the river upon their land, and washing away, would be their loss, and at the same time any accretions made by the river to their land abutting upon said river would inure to their benefit and become their property; and hence, if you find from the evidence in the case that on the south side of the river, and east of the line ——— rods west of the east line of said section,

⁹ *Missouri River Packet Co. v. Hannibal & St. J. R. Co. (C. C. Mo.)* 2 F. 285.

¹⁰ *Missouri River Packet Co. v. Hannibal & St. J. R. Co. (C. C. Mo.)* 2 F. 285.

there have been accretions to the land in said section ———, abutting upon said river, by reason of which the quantity of land abutting thereon has been increased, then such increase would inure to the benefit of the abutting owner thereof, and if the plaintiff was such abutting owner thereof, on the south side of said river, it would inure to her benefit, but only to the extent to which the same was added to her land abutting thereon, and included in said southeast quarter section, east of the ——— rod line.¹¹

§ 4043(2). Missouri

You are instructed that, if you shall find from the evidence that the plaintiff's grantors, ——— and ———, the parties under whom he claims, were in possession of the land described in the petition, using it as a pasture, and exercising acts of ownership over it, and claiming title thereto as an accretion to their land, and it was an accretion to their land, and that afterwards the defendant, without the consent of plaintiff's grantors, and without any claim of title, entered upon said land, and was at the time of the institution of this suit, and still is, in possession of same, then plaintiff is entitled to recover upon said prior possession and title of his grantors, and the court will so find.¹²

You are instructed that, if you shall find from the evidence that at the time of the institution of this suit the defendant was, and still is, in possession of the land described in the petition, and shall further find that said land in controversy was, by the action of the ——— river in gradually abandoning its old channel and running further south, imperceptibly and from time to time added to the north bank of the ——— river, against the land patented by the United States to ———, and the accretions thereto, then the deeds read in evidence passed the title to the land described in the petition to plaintiff, and the finding must be in his favor.¹³

You are instructed that, if you shall find from the evidence that the defendant was at the time of the institution of this suit, and still is, in possession of the land described in the petition, and that said land was not formed to and against the north bank of the ——— river, but in the former bed of said river, and not connected with either bank, but was formed by the river abandoning its old bed, and its waters receding therefrom and running south of its former channel, leaving this land sued for in said abandoned bed of the river, then the deed or patent from ——— county to the plaintiff passed to him the legal title to said land, and the finding must be in his favor.¹⁴

¹¹ Dashiell v. Harshman, 85 N. W. 85, 113 Iowa, 283.

¹² McBaine v. Johnson, 55 S. W. 1031, 155 Mo. 191.

¹³ McBaine v. Johnson, 55 S. W. 1031, 155 Mo. 191.

¹⁴ McBaine v. Johnson, 55 S. W. 1031, 155 Mo. 191.

The court instructs the jury that under the law of this state persons owning land on or bounded by the ——— river own to the water's edge, and when the water recedes gradually, making new land, the owner of the land bounded by the river is owner of the land so made, and such owner's rights to such made land remain equal to his river front, and such riparian rights cannot be encroached upon by adjoining owners so running their boundary lines as to diminish such river front or accretions.¹⁵

The court instructs the jury that the term "accretion," as used in the instructions in this case, means portions of soil added to that already in possession of the owner by gradual deposit caused by a change in the bed of the river, and that accretion belongs to the owner of the land, and it makes no difference whether the accretions were formed before or after the ownership has accrued, and that ownership may be acquired by adverse possession as well as by deed.¹⁶

§ 4044. Title to land as dependent upon whether it was formed by process of accretion or reliction

The jury are instructed that the deeds read in evidence in behalf of plaintiff constitute color of title to the land lying on the north bank of the ——— river immediately north of the lands described in plaintiff's petition, and if the jury believe from the evidence that plaintiff and his grantors have been in the open, notorious, peaceable, and adverse possession of said land, situate on the said north bank of said ——— river, for a period of ——— years or more next before the institution of this suit, then such possession vested in plaintiff the legal title to said premises, and also vested in him the title to all accretions made thereto; and if the jury so believe, and shall further believe that the land sued for was made to and against the said north bank by the gradual and imperceptible deposit of earth, sand, and sediment against said bank by the action of the water, and by the gradual receding of the water of said river from said north bank, then the jury must find the issues for plaintiff.¹⁷

The court instructs you that the plaintiff, only taking title to the margin of the river, can claim in addition to the original grants only such land as may have been added thereto by the regular process of accretion or reliction. Land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of

¹⁵ Benne v. Miller, 50 S. W. 824, 149 Mo. 228.

¹⁶ Benne v. Miller, 50 S. W. 824, 149 Mo. 228.

¹⁷ Chinn v. Naylor, 81 S. W. 1109, 182 Mo. 583.

the water, belongs to the owners of the contiguous land to which the addition is made. The formation or reliction must be imperceptible, and must be made to the contiguous land, so as to change the position of the water's edge or margin, and the owner of contiguous land is not the owner of an island or sand bar that springs up or forms in the midst of the stream; and in this case, unless the jury find from the evidence that the land in controversy was an accretion to lands owned by plaintiff, and not an island originally formed out in the river, then the verdict should be for defendant.¹⁸

The jury are instructed that it is for them to determine as a question of fact from the evidence whether the tract of land sued for was formed as an island in the ——— river, or as an accretion to the north bank of said river; and if the jury find from the evidence that said land was formed against the north shore by the gradual receding of the waters of the river from said shore, and the deposit of earth and other substances against said bank, then your verdict must be for the plaintiff.¹⁹

You are instructed that, although the jury may believe from the evidence that the land in question first appeared above the water as a large bar, made to and against the north shore or bank of the ——— river, after an overflow and rise of the waters of said river, still, if this bar was so made by the gradual deposit of earth, sand, and sediment by the action of the water, and by the gradual receding of the water of said river to the south, it is an accretion, and your verdict will be for plaintiff.²⁰

You are instructed that, although the jury may believe from the evidence that after an original bar was formed in the river, if you find the bar was formed therein, and willows had begun to grow thereon, there was deposited upon said bar by the waters in one season earth, sand, and other substances, so as to raise the sand bar four or five feet higher than where it was first formed or made, still this will not prevent the same from being an accretion to the north shore of the river, provided the jury shall find from the evidence that the land or bar as originally made was formed against and annexed to the said north shore by the action of the waters in receding from said shore and running further south.²¹

The jury are instructed that, if they believe from the evidence that a slough, or arm of the ——— river ran between Island ——— and survey ———, at the time of making the United States survey, and that since that time the same has been filled up, so as to connect

¹⁸ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

¹⁹ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

²⁰ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

²¹ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

the island with the mainland, and make the island and survey one continuous tract of land, then the adjacent owners of Island —— and survey —— are entitled to the accretions to their respective lands; but if the slough simply filled up from the bottom, or by deposits within the bed of said slough, and said accretions did not form on the one side or the other, then the center of the slough, as it was before the water deserted it, is the boundary between said survey and said island.²²

§ 4045. Same—Burden of proof

You are instructed that, before the plaintiff can recover in this case, he must prove to the satisfaction of the jury that the lands in controversy are accretions to his shore land, formed by the action of the —— river in washing sand or dirt against said land, and from thence said lands were formed out into the —— river, and, unless said lands were so formed, your finding must be for the defendant.²³

§ 4046. Same—Sufficiency of evidence as to whether land in dispute was an island or accretion

The jury are instructed that, notwithstanding the county of —— caused the land sued for to be surveyed as an island and conveyed it to defendant as such, still this is not evidence that it was an island, to control the jury in this case; but the jury must determine that question from all the facts and circumstances in evidence before them.²⁴

The jury are instructed that although there may have been, since the years —— and ——, a low place or wide depression between the lands described in plaintiff's deeds and the land in controversy in this action, with well-defined banks, and that waters of the —— river have passed through and over the same in time of overflow and high water, still, notwithstanding you shall so find, you should return a verdict for plaintiff, provided you shall further find from the evidence that the land in dispute was originally made to and against the lands described in plaintiff's deeds as an accretion.²⁵

The court instructs you that, before the plaintiff can recover in this case, he must prove by a preponderance of the testimony that he is the owner of the land in controversy, and, unless he has done so to your satisfaction, you should find for the defendant.²⁶

²² Buse v. Russell, 86 Mo. 209.

²³ Chinn v. Naylor, 81 S. W. 1109, 182 Mo. 583.

²⁴ Chinn v. Naylor, 81 S. W. 1109, 182 Mo. 583.

²⁵ Chinn v. Naylor, 81 S. W. 1109,

182 Mo. 583.

²⁶ Chinn v. Naylor, 81 S. W. 1109, 182 Mo. 583.

§ 4047. Ownership of islands

The court instructs the jury that under the law of this state all islands and sand bars forming in the ——— river are the property of the county, and the county court has a perfect right to convey the same to this defendant, or any one else; and in this case, if you find that the land in controversy was an island or sand bar formed out in the ——— river, your verdict should be for the defendant.²⁷

The court instructs the jury that if you find from the evidence that a sand bar or an island formed in the ——— river opposite plaintiff's land, and that the waters of the ——— river ran around said island or sand bar for any considerable length of time, then such island or sand bar is not an accretion to plaintiff's land, although the jury may further find that by the washing of the ——— river such island or sand bar is now connected with plaintiff's land; and in such case your finding must be for defendant.²⁸

The court instructs you that, if you find and believe from the evidence that there was a well-defined slough between the land now owned by plaintiff and the land in controversy, which existed for any considerable length of time after the formation of the land in controversy, and that said formation was originally an island or sand bar, then you should find for the defendant.²⁹

You are instructed that, if the jury find from the evidence that the land in controversy formed out in the ——— river, and did not form by connecting with or accreting to the land on the north bank of said river, then in that event plaintiff cannot recover in this proceeding.³⁰

The court instructs you that, unless you find and believe from the evidence that the land sued for is an accretion to plaintiff's land, as in these instructions explained, your verdict must be for the defendant.³¹

§ 4048. Ownership of tide lands

The court instructs the jury that by statute the bounds of every man's land lying on the seaboard is extended to ordinary low-water mark, and that a drain or gut which goes bare at ordinary low water does not cut off or prevent the extension of such line, but the same is continued across and beyond such stream down to ordinary low-water mark.³²

The court instructs the jury that if they believe from the evidence that the division line between the upland of the plaintiff

²⁷ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

²⁸ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

²⁹ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

³⁰ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

³¹ *Chinn v. Naylor*, 81 S. W. 1109, 182 Mo. 583.

³² *Whealton & Wisherd v. Doughty*, 72 S. E. 112, 112 Va. 649.

and those under whom she claims, and the uplands of the defendant and those under whom he claims, is a straight line for some distance before it reaches high-water mark, then the law continues such line in the same course to low-water mark, and, if the course of such line has been changed below high-water mark, the burden is upon the plaintiff to show it, but in deciding this question the jury should consider all the evidence heard in the case.³³

³³ Whealton & Wisherd v. Doughty, 72 S. E. 112, 112 Va. 649.

CHAPTER CCXIII

NEGLIGENCE

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A. IN GENERAL

§ 4049. Definition and elements of negligence

§ 4049(1). United States

I may say to you in a general way that negligence consists in doing that which a person of ordinary prudence and care would not do under the circumstances of a particular or given situation, or in omitting to do something that such a person would do under those circumstances. Now you know, and everybody knows, that acts under certain circumstances—acts of a person under certain circumstances—might not be negligence under those particular circumstances which would be under other and different circumstances.¹

You are charged that negligence as meant in this charge, is the failure to do what reasonably prudent persons would ordinarily have done in like circumstances, having due regard to the proper protection of the life and limb of themselves and others.²

§ 4049(2). Alabama

The court instructs the jury that negligence is the failure to do what an ordinarily prudent person would have done under the circumstances, or the doing of that which an ordinarily prudent person would not have done.³

§ 4049(3). Colorado

The court instructs the jury that negligence is the failure to observe, for the protection of the interests of others, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.⁴

§ 4049(4). Delaware

You are instructed that negligence has been defined as the failure to observe for the protection of the interests of another, that degree of care, prudence and vigilance which the circumstances justly demand, whereby such other person suffers damages. It has been termed the want of ordinary care; that is, the want of

¹ Illinois Cent. R. Co. v. Nelson (U. C. A. Iowa) 203 F. 956, 122 C. C. A. 258.

² Norfolk & Portsmouth Traction Co. v. Rephan (C. C. A. Va.) 188 F. 276, 110 C. C. A. 254.

³ Alabama Consol. Coal & Iron Co. v. Heald, 53 So. 162, 168 Ala. 626.

⁴ Colorado Springs & I. Ry. Co. v. Marr, 141 P. 142, 26 Colo. App. 48.

such care as a reasonably prudent and careful man would exercise under similar circumstances.⁵

§ 4049(5). *Illinois*

The jury are further instructed that negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do.⁶

§ 4049(6). *Indiana*

The jury are instructed that negligence, whether on the part of the defendant or plaintiff, may be briefly defined to be the doing or failing to do some act or thing which, under the circumstances, it is the duty of the party to do or to leave undone.⁷

§ 4049(7). *Iowa*

The jury are instructed that negligence, or what is the same thing, the absence of reasonable care, is the foundation of this action, and it is to be determined by what you find an ordinary, prudent, and careful man would have done under the particular circumstances of this case.⁸

The jury are instructed that negligence is a failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances.⁹

§ 4049(8). *Kentucky*

You are instructed that negligence, as used in these instructions, means the failure to use ordinary care, and by ordinary care, as used in these instructions, is meant such care as ordinarily prudent persons would usually exercise under the same or similar circumstances, as proved in this case.¹⁰

You are instructed that negligence is the failure to exercise ordinary care.¹¹

§ 4049(9). *Missouri*

You are instructed that negligence is the want of ordinary care, and ordinary care is that degree of care that ought reasonably to

⁵ Cecil v. Mundy, 92 A. 850, 5 Boyce, 291.

⁶ Perryman v. Chicago City Ry. Co., 89 N. E. 980, 242 Ill. 269; Pease v. Chicago & S. Traction Co., 158 Ill. App. 446.

⁷ Van Camp Hardware & Iron Co. v. O'Brien, 62 N. E. 464, 28 Ind. App. 152.

⁸ McLaughlin v. Griffin, 135 N. W. 1107, 155 Iowa, 302.

⁹ German Ins. Co. of Freeport v. Chicago & N. W. Ry. Co., 104 N. W. 361, 128 Iowa, 386.

¹⁰ Louisville & N. R. Co. v. Holloway's Administrator, 173 S. W. 343, 163 Ky. 125.

¹¹ Cross v. Illinois Cent. R. Co., 110 S. W. 200, 33 Ky. Law Rep. 432.

be expected from a person of ordinary prudence, in view of all the circumstances developed in evidence.¹³

§ 4049(10). *Nebraska*

The jury are instructed that by the term "negligence," as used herein, is meant the failure to exercise such care, prudence, and forethought as under the circumstances duty requires should be given or exercised.¹³

§ 4049(11). *New York*

The jury are instructed that if defendant would not, in the exercise of ordinary care, have anticipated that the accident in which the plaintiff was injured would occur, then plaintiff cannot recover.*

§ 4049(12). *North Carolina*

The jury are instructed that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done.¹⁴

The jury are instructed that negligence is the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.¹⁵

§ 4049(13). *Oklahoma*

You are instructed that negligence is the failure to do what a reasonably prudent man, under the circumstances, would have done, or doing what a reasonably prudent man would not have done under the circumstances.¹⁶

§ 4049(14). *Oregon*

You are instructed that negligence is the counter term of diligence. It is the want of that reasonable care which would be exercised by a person of ordinary prudence under the existing circumstances, having in mind the probable danger of injury.¹⁷

§ 4049(15). *Texas*

The jury are instructed that negligence is the failure to do what a reasonable and prudent person would have done under the same or similar circumstances, or doing what such a person would not have done under the same or similar circumstances.¹⁸

¹³ *Anderson v. Union Terminal Co.*, 61 S. W. 878, 161 Mo. 411.

¹⁴ *Bauer v. Grless*, 181 N. W. 156.

* *Whitney v. Terry & Tench Co.*, 143 N. Y. S. 905, 158 App. Div. 608.

¹⁵ *Turrentine v. Wellington*, 48 S. E. 739, 136 N. C. 308.

¹⁶ *Everett v. Receivers of Richmond & D. R. Co.*, 27 S. E. 991, 121 N. C. 519.

¹⁷ *Folsom-Morris Coal Mining Co. v. De Vork*, 160 P. 64, 61 Okl. 75, L. R. A. 1917A, 1290.

¹⁷ *Northwest Door Co. v. Lewis Inv. Co.*, 180 P. 495, 92 Or. 186.

¹⁸ *St. Louis Southwestern Ry. Co. of Texas v. Woodall* (Civ. App.) 159 S. W. 1012.

The jury are instructed that negligence is the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.¹⁹

§ 4049(16). *Washington*

You are instructed that "negligence" has been aptly defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do, under the circumstances of a given case. Before you can find for the plaintiff, therefore, you must find the defendant to have been guilty of negligence as alleged in the complaint.²⁰

§ 4050. What constitutes ordinary care and diligence

§ 4050(1). *Georgia*

I charge you that the standard of care and diligence required by law of both the plaintiff and the defendant is the same. It is ordinary care and diligence. Ordinary care and diligence is that care and diligence which every prudent man takes of his own property of a similar nature, or that care and diligence which every prudent man would exercise under similar circumstances and like surroundings. The absence of such care and diligence is termed "ordinary neglect."²¹

§ 4050(2). *Illinois*

The court instructs the jury that when it is said in these instructions that the plaintiff was required to exercise ordinary care for his own safety, it is meant that he was required to exercise that degree of care which an ordinarily prudent person, situated as plaintiff was before and at the time of the accident, would have exercised for his or her own safety.²²

§ 4050(3). *Kentucky*

You are instructed that ordinary care as used in these instructions is that degree of care that ordinarily prudent persons would usually exercise if surrounded by the same or similar circumstances to those proved in this case.²³

§ 4050(4). *Missouri*

The jury are instructed that ordinary care, effort, and diligence, as the terms are used in these instructions, mean such care, effort, and diligence as a person of ordinary sense or prudence engaged

¹⁹ *Galveston, H. & S. A. Ry. Co. v. Simon*, 54 S. W. 309.

²⁰ *Traver v. Spokane St. Ry. Co.*, 65 P. 284, 25 Wash. 225.

²¹ *Mosteller v. City of Rome*, 80 S. E. 635, 141 Ga. 140.

²² *Pierson v. Lyon & Healy*, 90 N. E. 693, 243 Ill. 370.

²³ *Cross v. Illinois Cent. R. Co.*, 110 S. W. 290, 33 Ky. Law Rep. 432.

in the same business or similar business might reasonably be expected to use under the same or similar circumstances.²⁴

§ 4050(5). Nebraska

The jury are instructed that by the term "due and ordinary care," as used in these instructions, is meant such a degree of care as a prudent and reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would exercise under the existing circumstances and conditions.²⁵

§ 4050(6). Tennessee

The jury are instructed that "ordinary care" is such care as an ordinarily and reasonably prudent and cautious man would use in his own affairs, about his own business, in preventing personal injury to himself.²⁶

§ 4050(7). Texas

The jury are instructed that by the terms "ordinary care," "ordinary skill," and "ordinary diligence," as same may be used in this charge, is meant that degree of care, skill, and diligence, respectively, that an ordinarily prudent person would use in the transaction of his own business under like or similar circumstances.²⁷

§ 4050(8). Wisconsin

You are instructed that ordinary care is such care as the great mass of mankind ordinarily use in the same or similar circumstances.²⁸

§ 4051. Conduct of man of ordinary or reasonable prudence as standard of care required

§ 4051(1). United States

You are instructed that you fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject.²⁹

§ 4051(2). Idaho

Cnkovich v. Success Mining Co., 166 P. 567, 30 Idaho, 623, citing *Grand Trunk R. Co. v. Ives*, 12 S. Ct. 679, 144 U. S. 408, 36 L. Ed. 485. See § 4051(1).

²⁴ *Springfield Crystallized Egg Co. v. Springfield Ice & Refrigerating Co.*, 168 S. W. 772, 259 Mo. 604.

²⁵ *Bauer v. Griess*, 181 N. W. 156.

²⁶ *Nashville, C. & St. L. Ry. v. Wade*, 153 S. W. 1120, 127 Tenn. 154, Ann. Cas. 1914B, 1020.

²⁷ *Guitar v. Randel* (Civ. App.) 147 S. W. 642.

²⁸ *Palmer v. Schultz*, 120 N. W. 348, 138 Wis. 455.

²⁹ *Grand Trunk Ry. Co. of Canada v. Ives*, 12 S. Ct. 679, 144 U. S. 408, 36 L. Ed. 485.

§ 4051(3). Indiana

The court instructs the jury that negligence is the doing of a thing that a reasonably prudent person would not do under the circumstances surrounding him at the time, or it is the omission to do a thing that a reasonably prudent person would do under the circumstances. The degree of care required in any given case, to avoid the imputation of negligence, is ordinary care. The law interprets ordinary care to be that degree of care which a person of ordinary prudence under the particular circumstances is presumed to exercise to avoid injury. Such care is required to be in proportion to the danger to be avoided and the fatal consequences that may result from neglect.³⁰

§ 4051(4). Missouri

The court instructs the jury that in law one is liable for such consequences of his acts as a reasonably prudent man may reasonably anticipate as likely to flow from his acts, and is not responsible for unforeseen and unexpected consequences a reasonably prudent person would not anticipate. Therefore, unless you find and believe from the evidence that the defendant, in the exercise of "reasonable care," as the term is in these instructions defined, had reasonable grounds to anticipate that the acts complained of by plaintiff would reasonably and probably flow from and be the result of such failure to exercise ordinary care, then your verdict must be for the defendant.³¹

§ 4051(5). Oregon

You are instructed that this is the standard by which you are to determine in this case whether there was any negligence upon the part of the defendant. You will observe that this description of negligence, which I have given you, does not call for the highest degree of care, nor yet is it satisfied with a low degree of care. The law has taken as its standard the man of ordinary prudence, and when the law undertakes through the tribunal which is called upon to determine the fact whether one has been negligent or not, the question is: Was the conduct of the one charged the reasonable conduct of a person of ordinary prudence, under the existing circumstances, having in view the probable danger of injury?³²

§ 4052. Gross negligence

The jury are instructed that gross negligence means a failure to observe slight care.³³

³⁰ Shirley Hill Coal Co. v. Moore, 103 N. E. 802, 181 Ind. 513.

³¹ Davis v. Springfield Hospital (App.) 196 S. W. 104.

³² Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

³³ Louisville & N. R. Co. v. Smith, 122 S. W. 806, 135 Ky. 462.

§ 4053. Good faith as affecting question of negligence

The court charges the jury that a negligent act is none the less negligently performed because of the good faith which characterizes it.³⁴

§ 4054. Acts in emergencies

You are instructed that ordinary care is such care as a person of ordinary prudence would usually exercise under like circumstances, and the law does not hold a person who is faced with a sudden danger to the same degree of judgment and presence of mind as would otherwise be required of him under circumstances not indicating sudden peril.³⁵

§ 4055. Duty to guard against sudden and unanticipated acts of another**§ 4055(1). Michigan**

You are instructed that in this case the defendant claims that the plaintiff and other children were playing ball in the back yard of the house where these goods were being moved out; that after the van was loaded up the defendant's servants got on the wagon to drive away, and just at the time the driver was about to start the horses the ball was thrown by some one from the back yard and went under the back end of the van; and that this little girl, the plaintiff, suddenly and unexpectedly ran from the back yard to and under the back end of the van to get the ball, and that her hands were caught under the back wheel, and that this was a sudden and unexpected act on the part of this child, which the driver did not anticipate.³⁶

Now, I charge you as a matter of law that if this injury and accident was due to the sudden, unanticipated, and unforeseen act of this child, and the defendant's agents did not know or did not have reason to anticipate, that this plaintiff was going to suddenly run under the back of the wagon, she cannot recover in this case. The law does not impose any duty on another to guard against sudden, unforeseen, and unanticipated acts of another.³⁷

§ 4055(2). Missouri

The jury are instructed that the defendant had a right to open the trapdoor in question, and defendant's servant had a right to assume that persons using the street at that point would exercise ordinary care and caution to avoid injury from the crowbar in

³⁴ *Tannehill v. Birmingham Ry., Light & Power Co.*, 58 So. 198, 177 Ala. 297.

³⁵ *Cole Motor Car Co. v. Ludorff*, 111 N. E. 447, 61 Ind. App. 119.

³⁶ *Czarniski v. Security Storage & Transfer Co.*, 170 N. W. 52, 204 Mich. 276.

³⁷ *Czarniski v. Security Storage & Transfer Co.*, 170 N. W. 52, 204 Mich. 276.

question, and such servant was not negligent unless a person in his situation, and engaged in what he was actually doing, would, in view of the then uses of the street, have anticipated the possibility of a footman passing the point in question, and of injury to such footman, in the exercise of ordinary care, from the manner in which the jury believe from the evidence such servant of defendant was using the crowbar at the time in question.³⁸

§ 4055(3). Washington

You are instructed that before you can find a verdict for the plaintiff in this case you must find, from a fair preponderance of the evidence, that the plaintiff, without any negligence on her part contributing thereto, attempted to step over the cable described in the evidence in this case, while the said cable was lying upon the planking of ——— avenue, and that some agent of the defendant, city of ———, with knowledge that she was attempting to step over said cable, or who by the exercise of reasonable diligence should have known from some word or action of the plaintiff that she was about to step over said cable, started or caused to be started the donkey engine attached to said cable, and as a result said cable was raised in the air, and the plaintiff was tripped or thrown and injured by the raising of said cable.³⁹

B. PARTICULAR ACTS OF NEGLIGENCE

§ 4056. Duty not to frighten horses

The court instructs you that if you find from the evidence that, while plaintiff was driving a one-horse wagon at the place on ——— avenue, mentioned in the evidence, and that the agent of the defendant in charge of a certain steam street roller, mentioned in the evidence, negligently blew a steam whistle on said steam street roller, and that the horse of the plaintiff, as a direct result of the blowing of said steam whistle so negligently blown on said steam street roller, became frightened and unmanageable and ran away, and caused the injuries to plaintiff complained of, and if you further find that the said blowing of said steam whistle, if any, was unnecessary in the performance of the work of finishing the surface on ——— avenue in which the defendant was engaged at the time, then your verdict should be for the plaintiff, unless you further find from the evidence that there was negligence on plaintiff's part directly contributing to the injuries sustained by him.⁴⁰

³⁸ *Henry v. Grand Ave. Ry. Co.*, 21 S. W. 214, 113 Mo. 525.

³⁹ *Zellers v. City of Bellingham*, 145 P. 613, 83 Wash. 601.

⁴⁰ *Phelan v. Granite Bituminous Paving Co.*, 167 S. W. 1059, 183 Mo. App. 531.

§ 4057. Same—Care required in handling stationary whistle

The jury are instructed that the law distinguishes the necessary nature of a locomotive whistle from that of a stationary whistle, intended for the purpose of notice only; that locomotive whistles are necessary, among other purposes, for the purpose of frightening animals off the track, and to give notice of the approach of trains to persons about to cross the track at such a distance that the bell cannot be heard or the trains readily observed; and that in these and other cases their use upon railroads is both sanctioned and required by law; and that in such cases the usefulness of the whistle depends upon the alarming and frightening character of the noise it makes, and one of the purposes for which it is used is to frighten and to alarm. But the court instructs the jury the rule is different in respect to stationary whistles, intended for notice only, and that if used, if there is no necessity for constructing or operating them in such a way as to alarm or frighten any person or animal of ordinary gentleness, any unnecessary alarming or frightening use of them, if productive of injury to another, is wrongful, and the proprietors should be holden responsible for the injury.⁴¹

§ 4058. Negligence in management of vehicles

The court instructs the jury that if you find and believe from the evidence that at the time defendant's driver started to back the defendant's wagon the plaintiff was in such a position of danger that if the defendant's driver continued to back his wagon his said wagon would run upon and against the plaintiff, and if you further find that at such time the driver saw, or by the exercise of ordinary care could have seen, the plaintiff in such a position of danger (if you find and believe from the evidence the plaintiff was in such a position), and that the defendant's driver did not notify or warn the plaintiff of his intention to continue backing, or notify the plaintiff of his perilous situation, but continued to back his said wagon upon and against the plaintiff, and if you further find that the failure of the defendant, after seeing and knowing of the perilous position of the plaintiff, to notify the said plaintiff of his intention to continue backing said wagon was a failure on the part of the defendant's driver to exercise ordinary care, then your verdict will be for the plaintiff, if you further find at said time plaintiff was exercising ordinary care for his own safety.⁴²

⁴¹ Powell v. Nevada, C. & O. Ry.,
82 P. 96, 28 Nev. 305.

⁴² Lauff v. J. Kennard & Sons Car-
pet Co. (Mo. App.) 195 S. W. 56.

§ 4059. Care required from driver of automobile with respect to person riding with him as guest or licensee

See, also, ante, § 3888.

§ 4059(1). Michigan

Now, in this particular case, the rule, as I say, is somewhat different than in the ordinary case, because this plaintiff was either a guest or a licensee, and as I view the law the rule is no different whether he is a guest or a licensee, so you will not have to struggle over that problem. The testimony is conflicting on that point. He says he was invited to ride. That would make him a guest. The defendant says that he invited himself. That would make him a licensee. So, of course, it is for you to determine whether he was invited to take this ride by the defendant, or whether he invited himself. One way he would be a guest and the other way a licensee. But, as I say, I do not think you need bother about which way that is, because the rule is about the same anyway. In other words, the rule is, as to a guest or a licensee, that the defendant, to be liable, must do some act that either increased the danger, or created a new danger, for, if you are invited to ride in a car by a man, or if you invite yourself, either way, you assume the risks that would naturally attach to riding in such a vehicle, that is, you know that there are certain dangers that are incident to an automobile and to riding in an automobile, and if you accept an invitation to ride, or you invite yourself, either way, you assume those ordinary risks, and if an accident happens in that way, then the driver is not liable to you. But if he does some act that increases those ordinary dangers, or creates a new danger entirely, then he is liable.⁴³

You are instructed that the rule in regard to the guest or licensee may be stated in this way: That any one knowing that there is always some danger in traveling in an automobile, who accepts an invitation to ride, as the guest of the driver, assumes the risk of the ordinary dangers of which he is aware, and cannot hold the driver of the car responsible in damages for an accident, if there was no fault or negligence or imprudence on the driver's part. The driver's duty and responsibility is merely to be careful and avoid committing any act of negligence or imprudence that might add to or increase the ordinary danger of the occupation.⁴⁴

As to the defendant, the question is, Did the defendant do what an ordinarily prudent person would do under similar circumstances? Or, did he fail to do what an ordinarily prudent person would do under similar circumstances? That is a good test. Because, if he

⁴³ Roy v. Kirn, 175 N. W. 475, 208 Mich. 571.

⁴⁴ Roy v. Kirn, 175 N. W. 475, 208 Mich. 571.

did, then he is not liable, and your verdict should be no cause of action. And if he did not do, as he approached this corner in driving this car, if he did not do or act as an ordinarily prudent person would under similar circumstances, then he is guilty of an act of negligence, and the plaintiff may be entitled to recover, providing you also find the other elements that I will explain to you.⁴⁵

You are instructed that defendant's duty in reference to the plaintiff was to use ordinary care, and not to increase the danger of his riding with him, or to create any new danger. One who invites another to ride is not bound to furnish a safe vehicle, or a safe horse, or a safe automobile, but if the driver fails to use ordinary care in driving the automobile, he thereby creates a new danger for which he is liable.⁴⁶

You are instructed that in this case you have to determine whether the defendant did any act that increased the danger of riding in an automobile, or that created a new danger? If he did, he is liable, and if he did not, he is not liable.⁴⁷

You are instructed that, if you believe the testimony of the plaintiff's witnesses that at the time that G. with his machine started to cross W. avenue the defendant in his automobile was a block away, and was coming as testified to by some of the plaintiff's witnesses, from ——— to ——— miles per hour, and that when G. in his car had got across the street car tracks into the space on W. avenue between the car tracks and the curb, that the defendant in his car had reached a point about the safety zone, or about ——— feet therefrom, and still coming at ——— or ——— miles per hour, and at that point he applied his brakes, or started to put on his brakes, and skidded ——— or ——— feet and hit the G. machine, and driving them both ——— or ——— feet beyond that after striking him—I say, if you believe all those facts, you can find from that evidence that the defendant did an act which increased the danger of riding in an automobile, and from that you could find him liable.⁴⁸

§ 4059(2). Nebraska

The jury are instructed that, when defendant invited ——— and his wife to ride in the automobile operated by him, and undertook to provide a conveyance for plaintiff and her husband, although defendant did so gratuitously, he was bound to exercise due and reasonable care in the operation of said car for the safety of his guests, and not by any act of his to increase the danger or

⁴⁵ Roy v. Kirn, 175 N. W. 475, 208 Mich. 571.

⁴⁶ Roy v. Kirn, 175 N. W. 475, 208 Mich. 571.

⁴⁷ Roy v. Kirn, 175 N. W. 475, 208 Mich. 571.

⁴⁸ Roy v. Kirn, 175 N. W. 475, 208 Mich. 571.

create a new and unnecessary danger. If, therefore, you find from the evidence taking into consideration the condition of the road, the experience, knowledge, and skill of defendant in driving the car, the speed at which he was going, and all the conditions and circumstances shown by the evidence, that defendant was negligent and careless in the operation of the car, or you find that by his acts he increased the danger or created a new and unnecessary danger, and you also find that defendant's negligence and want of care was the proximate cause of the injury and death of plaintiff's husband, then, if you so find, your verdict will be for the plaintiff.⁴⁹

§ 4060. Duty to avoid injury to passers-by from operation of hoisting appliances

You are instructed that before you can find a verdict for the plaintiff in this case you must find, from a fair preponderance of the evidence, that the plaintiff, without any negligence on her part contributing thereto, attempted to step over the cable described in the evidence in this case, while the said cable was lying upon the planking of ——— avenue, and that some agent of the defendant, city of ———, with knowledge that she was attempting to step over said cable, or who by the exercise of reasonable diligence should have known from some word or action of the plaintiff that she was about to step over said cable, started or caused to be started the donkey engine attached to said cable, and as a result said cable was raised in the air, and the plaintiff was tripped or thrown and injured by the raising of said cable.⁵⁰

§ 4061. Care required in operation of elevator to avoid injury to persons working about shaft

Duty to warn as to removal of elevator, see ante, § 3720.

§ 4061(1). Kentucky

The court instructs the jury that it was the duty of the defendant company and its employé in charge of its elevator at the time and place complained of by plaintiff to exercise ordinary care in the operation of defendant's elevator to avoid striking and injuring persons engaged in work about the elevator shaft; and if you shall believe from the evidence in this case that defendant's employé in charge of said elevator failed to exercise such care, and by reason of such failure, as a direct and immediate cause of such failure, plaintiff was struck and injured by same; then the defendant is chargeable with negligence, and the law is for the plaintiff, and you will so find; but, unless you shall believe from the evidence in this case that defendant has been proven guilty of negli-

⁴⁹ *Bauer v. Griess*, 181 N. W. 156.

⁵⁰ *Zellers v. City of Bellingham*, 145 P. 613, 83 Wash. 601.

gence, as defined to you in this instruction, then the law is for the defendant, and you will so find.⁵¹

The court instructs the jury that it was the duty of the defendant in the operation and management of its elevator to exercise the highest degree of care and skill usually exercised by prudent persons in the same business in the management and operation of elevators of the kind and character as shown by the proof, and if the jury believe from the evidence that the plaintiff entered the storehouse of defendant, and in the exercise of ordinary care attempted to enter the elevator cage in the storehouse to go to the cellar by invitation of defendant's servant, or when the acts of the servant were such that a person of ordinary prudence would reasonably infer such an invitation, and the plaintiff, in the exercise of ordinary care, when he attempted to enter the elevator, failed to discover that the elevator cage was not in the proper position, and by reason of the negligence of the defendant the plaintiff fell down into the elevator well, injuring himself by the fall, the law is for the plaintiff, and the jury should so find.⁵²

§ 4061(2). Missouri

You are instructed that if you find and believe from the evidence that the plaintiff is the widow of ———, deceased, that on or about ———, and at about the hour of ——— a. m. on said day, said deceased was in the employ of the ——— company, and was placing a safety gate on a doorway on the fifth floor of a passenger elevator in the ——— Building, corner of ——— and ——— streets, in ———, and was drilling a hole through a brick wall about one foot above the fifth floor landing at the doorway of said elevator for the purpose of attaching a guide roller of a safety gate, that, in order to drill said hole into said wall, the said deceased was compelled to place part of his body in the shaftway of said elevator, and that said defendant knew, or by the exercise of ordinary care should have known, that said deceased was required to place part of his body in the shaftway of said elevator in doing said work, that while said deceased was so engaged in drilling said hole the operator of said elevator carelessly and negligently ran said elevator down said shaftway and against the said deceased, without warning him of the approach of said elevator, and so crushed, bruised, and injured him that he died on the same day as the result of said injuries, and if you further find and believe from the evidence that said elevator was there and then under the management and control of the defendant, and was at the time being run by an employé of said defendant, and that the operator of said

⁵¹ Otis Elevator Co. v. Wilson, 145 S. W. 391, 147 Ky. 676.

⁵² Ellerman v. Farmer, 118 S. W. 289.

elevator knew, or by the exercise of ordinary care should have known, that said deceased was working in said shaftway in time to have avoided injuring said ———, and if you further find and believe from the evidence that the death of said ——— was caused by the carelessness and negligence of the operator of said elevator in carelessly and negligently running said elevator down said shaftway and upon the said deceased, without warning him of the approach of said elevator, and that at the time he was injured the deceased exercised the care of an ordinarily prudent person under the same or similar circumstances, then you will find for the plaintiff and against defendant, and assess her damages at such sum, not exceeding the sum of \$———, as you may deem fair and just, in view of all the evidence, and with reference to the necessary pecuniary injury (if any) resulting from such death to the plaintiff. And you are further instructed that, if you find no evidence or circumstances to the contrary, you may assume that the deceased at the time he was injured was in the exercise of ordinary care.⁵³

§ 4062. Recklessness in handling truck

You are instructed that, under the proof in this case, the plaintiff had a right to be upon the platform and grounds of the defendant railway company at the time and place where he claims to have been injured; and that defendant express company owed plaintiff the duty to use ordinary care in using and handling its express trucks, so as to avoid injuring plaintiff at such time and place. If therefore you find the defendant express company was guilty of negligence in the manner of using and handling its trucks, or the tongue or handle thereof, under the circumstances of the situation at the time, on ———; and if you find that by reason of such negligence, if any, it allowed the trucks or tongue or handle thereof to be and lie upon the platform commonly used by passengers and others having the lawful right to use and be upon said platform; and if you find that plaintiff, in the exercise of ordinary care, while walking upon said platform with his brother, in going from the train to his automobile, struck the tongue or handle of said truck with his foot, and fell over the same upon the platform, and thereby sustained injury; and if you find that said negligence of defendant express company, if any, was the proximate cause of said injury to plaintiff, if any, then you will find a verdict in favor of plaintiff against defendant express company, compensating him for the damages sustained by him by reason of said negligence, if any.⁵⁴

⁵³ *Hutchinson v. Richmond Safety Gate Co.*, 152 S. W. 52, 247 Mo. 71.

⁵⁴ *Wells Fargo & Co. v. Lowery* (Tex. Civ. App.) 197 S. W. 605.

§ 4063. Care required as to trespassers—Boys playing on defendant's wagon

You are instructed that, if you believe from the evidence that these defendants owned this stone wagon, which was driven by their employé, and that, while the wagon, with the horses harnessed thereto, was on a public highway of this city, this boy, one of the plaintiffs, climbed upon the wagon without the consent of the defendants or their driver, then I charge you that he was a trespasser, regardless of his age.⁵⁵

You are instructed that, if this boy was in fact a trespasser, then neither he nor his father can recover, unless you find from the evidence that the defendants or their driver wantonly or intentionally inflicted this injury, or acted in such a malicious manner that the injury resulted.⁵⁶

You are instructed that, if you find from the evidence that this boy was where he had no right to be on the property of the defendants, which they were using in a proper manner for a proper purpose, in the conduct of their business, and that the driver of the wagon did not intentionally or wantonly injure the boy, then your verdict should be for the defendant.⁵⁷

§ 4064. Violation of ordinance

Violation of statute or ordinance relating to use of highway, see post, §§ 4976, 4977.

You are instructed that the ordinances of the city of ——— provide that it shall be unlawful for any person or persons to recklessly and carelessly handle any express trucks on any railway platform within said city. If, therefore, you find that plaintiff's injuries, if any, were caused by the reckless or careless handling of the express trucks of the defendant express company, by its employés, by allowing said truck, or the tongue or handle thereof, to be and lie upon or across that portion of the platform of defendant railway company in use by passengers and others having the lawful right to go thereon, and if you find that it was reckless or careless for the employés of defendant express company to so leave said truck or the tongue or the handle thereof upon or across said platform, and if you find that such reckless or careless handling of said express truck, or the tongue or handle thereof, by defendant express company's employés in leaving said truck, or the tongue or the handle thereof, upon or across the platform, if they did, was the proximate cause of plaintiff's injury, if any, then you are instructed

⁵⁵ McGinnis v. Peoples, 94 A. 925, 249 Pa. 335.

⁵⁶ McGinnis v. Peoples, 94 A. 925, 249 Pa. 335.

⁵⁷ McGinnis v. Peoples, 94 A. 925, 249 Pa. 335.

that this was negligence in law, which would entitle plaintiff to recover against defendant express company.⁵⁸

You are instructed that the word "reckless," as the same is used in this paragraph, means gross negligence and a failure to exercise any care for the rights and protection of others under the circumstances. And you are instructed that the word "careless," as used in this paragraph, means free from care, or without care.⁵⁹

C. DANGEROUS PREMISES

§ 4065. Degree of care required in general

§ 4065(1). California

You are instructed that the defendant is only bound to exercise the care which housekeepers, or owners of houses, of common prudence are accustomed to exercise; and, if you find from the evidence that the defendant did exercise such care in and about keeping the platform in good condition, then your verdict will be in favor of the defendant.⁶⁰

§ 4065(2). New York

The jury are instructed that, if you find that there was a dangerous situation existing in the defendant's place, not known to the plaintiff, it was the duty of the defendant to warn or otherwise apprise the plaintiff of such danger.*

§ 4065(3). Oklahoma

The court instructs the jury that, if you find from a preponderance of the evidence that the pit or excavation was permitted to remain by the defendants upon the premises described in such relation to the public street and in such proximity to the excavation that the defendants could reasonably have foreseen that a person traveling on the public street in the exercise of due care himself would be injured, and that the plaintiff, while traveling along the public street in the exercise of due care, was allured by the condition of the premises from the public street and into the pit and sustained the injuries complained of, then your verdict should be for the plaintiff. But before you can so find you must first find that the situation regarding the pit and driveway was one from which it could reasonably have been foreseen by the defendants that the injury might occur to a person traveling carefully on the highway.⁶¹

⁵⁸ Wells Fargo & Co. v. Lowery (Tex. Civ. App.) 197 S. W. 605.

⁵⁹ Wells Fargo & Co. v. Lowery (Tex. Civ. App.) 197 S. W. 605.

⁶⁰ Baddeley v. Shea, 45 P. 990, 114

Cal. 1, 33 L. R. A. 747, 55 Am. St. Rep. 56.

* Chelfetz v. Hills, 148 N. Y. S. 103, 86 Misc. Rep. 7.

⁶¹ St. Louis & S. F. Ry. Co. v. Ray, 165 P. 129, L. R. A. 1918A, 843.

§ 4066. Injuries from falling objects

With relation to the operation, installation, and maintenance of the fan, the court instructs you it was the duty of the defendants to exercise ordinary care in the erection and installation of this appliance in the theater, and that that ordinary care is to be measured with relation, so far as this case is concerned, to the effect upon the patrons of the theater. If, therefore, you find that the fan in question fell on the —— day of ——, and injured the plaintiff while he was a patron in the theater it will be for you to determine whether or not such fall was the result of its negligent installation, operation, or maintenance. If you find that the fall was due to such maintenance, operation, or installation having been made in a negligent manner, your verdict in this case will be in favor of the plaintiff for such amount as you find from the evidence and under the instructions of the court he has suffered in the way of damages by reason of such negligence of the defendants, if you find they are negligent.⁶²

§ 4067. Duty as to children straying on premises

The jury are instructed that, if you believe from the evidence that defendant's employé, H., invited and permitted plaintiff to go upon the premises upon which said pumphouse was located, and knowingly permitted him to remain thereon; and if you further believe that said pumphouse and premises were dangerous for persons of plaintiff's age, intelligence, and experience; and if you believe that such fact, if it was a fact, was known to said H., or ought to have been known to him by the exercise of ordinary care; and if you further believe that in so inviting him and permitting plaintiff upon said premises, if the said H. did invite and permit him to be there, the said H. was guilty of negligence, as that term has been heretofore defined; and if you further believe that said negligence, if any, was the proximate cause of plaintiff's injury—you will find for the plaintiff, and assess his damages as hereinafter directed, unless you find for defendant under other portions of this charge.⁶³

§ 4068. Attractive nuisance—Injuries to children

Liability of city or contractor for permitting nuisance in street attractive to children, see ante, §§ 3948, 3971.

§ 4068(1). United States

The jury are instructed that to maintain the action it must appear from the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one

⁶² Haun v. Tally, 181 P. 81, 40 Cal. App. 585.

⁶³ Houston & T. C. R. Co. v. Bulger, 80 S. W. 557, 35 Tex. Civ. App. 478.

which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner it was left, it was not dangerous in its nature, the defendants are not liable for negligence. You are further to consider whether, situated as such turntable was, as the defendants' property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was unlocked or unguarded. If you find from the evidence that defendant did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence.*

The jury are instructed that the machine in question is part of defendants' road, and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that, if they went on the turntable to play, they would be likely to get injured thereby, then you cannot find a verdict against them; but if defendants did know, or had good reason to believe, under the circumstances of the case, that the children of the locality would resort to the turntable to play, and that, if they did, they would or might be injured, then if they took no means to keep the children away, and used no means to prevent accident, defendants would be guilty of negligence, and would be answerable for damages caused to children by such negligence.*

§ 4068(2). Colorado

You are instructed that plaintiff claims that the defendant was possessed of certain electric cars and left them exposed in a public street and with the appliances thereof unguarded and so insecure that the cars might be set in motion by children amusing themselves thereat, the defendant knowing that children were attracted and frequently had been attracted to such cars at the same place, and that plaintiff, being of tender years, seeing the cars so left, yielded to his natural propensity to amuse himself, and resorted thereto, and while playing about the cars the same were accidentally or ignorantly set in motion, and that by this means plaintiff was injured. Plaintiff's claim is that the injury was a permanent one, and will render him always incapable of labor or active movement. Plaintiff seeks to recover not only for this disability, but for the sufferings resulting from his injury.⁶⁴

You are instructed that, if the jury believe from the evidence that the defendant, knowing that its cars were attractive to chil-

* *Sioux City & P. R. Co. v. Stout*,
17 Wall. 657, 21 L. Ed. 745.

⁶⁴ *Denver City Tramway Co. v. Nicholas*, 84 P. 813, 35 Colo. 462.

dren, exposed them in a public street unfastened and unguarded, and in such a condition that a child playing thereat might ignorantly or accidentally set the same in motion, and that plaintiff was so inexperienced that he was unconscious of the danger which he incurred by amusing himself at the said cars and resorting thereto, and, by reason of the accidental or ignorant turning on of the current by the plaintiff, or the boy who was with him, the car was set in motion, and plaintiff, endeavoring to dismount therefrom, was injured, the verdict should be for the plaintiff.⁶⁵

§ 4068(3). Illinois

The court instructs the jury that the defendant is not liable in this case unless you find, from a preponderance of the evidence, that the defendant should have anticipated, prior to ———, that plaintiff's intestate or other children would have been attracted to defendant's premises by means of said push car standing on or near the platform, and would have been injured or killed by a railroad train when such children were playing with said push car.⁶⁶

The court instructs the jury that the defendants are not liable in this case, and you cannot find a verdict of guilty against the defendants unless you find, from a preponderance of evidence, first, that the chain and sprocket wheels in question were dangerous; second, that the defendants knew of the dangerous character of said wheels and chains, or by the exercise of ordinary care would have known thereof, before ———; third, that the defendants should have anticipated, prior to ———, that plaintiffs' intestate, or other children, would become caught in or injured or killed in and by means of said chain and sprocket wheel. If either one of the above propositions is not established by a preponderance of the evidence your verdict must be not guilty.⁶⁷

§ 4068(4). Iowa

The court instructs the jury that it is for the jury to determine whether or not the defendant was negligent, as charged by the plaintiff. The negligence charged against the defendant in this case may be stated thus: That at the time and place of the accident, at a time and place where little children were apt to be, the defendant was using an apparatus, dangerous in character, and of a nature likely to excite the curiosity and attract little children to play with, or interfere with, such apparatus; that defendant knew,

⁶⁵ Denver City Tramway Co. v. Nicholas, 84 P. 813, 35 Colo. 462.

⁶⁶ Follett v. Illinois Cent. R. Co., 123 N. E. 592, 288 Ill. 506. In this case the complaint alleged that defendant knew, or had opportunity to

know, that prior to the accident children were in the habit of playing around the push car.

⁶⁷ Stollery v. Cicero & P. St. Ry. Co., 90 N. E. 709, 243 Ill. 290.

or in the exercise of ordinary care should have known, that children were apt to be at that place at that time; that the defendant knew, or in the exercise of ordinary care should have known, that said apparatus was dangerous in character, and of a nature likely to excite the curiosity and attract little children to play with, or interfere with, such apparatus; that in such use of such apparatus the defendant did not exercise such care to guard against injury to such children as an ordinarily careful and prudent person would exercise under the circumstances. If that charge has been proved, by a preponderance of the evidence, you would be warranted in finding defendant was negligent, and you may consider as hereinafter instructed. If it has not been so proved, you will consider no further, but return your verdict for the defendant. That an accident may have happened, about the time and place alleged, does not establish, nor does it raise a presumption, that defendant was negligent. The defendant was not an insurer against accident, and can be held liable, if at all, only for damages, if any, which resulted from injury caused by the negligence of the defendant, charged by the plaintiff in his petition, and proved upon the trial. In determining whether the defendant was negligent, you will consider only the acts charged by the plaintiff as negligence, set forth and enumerated in these instructions, that have been proved, if any have been proved, and then only such negligence, if any, as was the proximate cause of the injury to ——. In determining whether the defendant was negligent, you will consider the definitions of "ordinary care" and "negligence," elsewhere given you in these instructions; and you will consider, as shown by the evidence, the nature and character of the business in which the defendant was engaged, the location where the accident is alleged to have occurred, and the surroundings thereabout, whether or not the place was one where small children were apt to be at that time, the location and character of the apparatus in use by defendant, and the manner of its use, whether or not said apparatus was of a nature likely to excite the curiosity of small children, and tempt them to play with or interfere with the same, whether or not said apparatus was dangerous in character, what, if any, precautions were taken by defendant to warn children and prevent injury to them, the age, intelligence, and experience of ——— at that time, and what might reasonably be expected from one of his age, experience, and intelligence, what defendant's employes, in charge of said apparatus, were doing, or in the exercise of ordinary care should have done, what the defendant's employes, in charge of said apparatus, knew, or in the exercise of ordinary care should have known, where the defendant's employes, in charge

of said apparatus, were, or in the exercise of ordinary care should have been, together with any other facts and circumstances disclosed by the evidence showing, or tending to show, that the defendant was or was not negligent, as defined in these instructions. In this connection you are instructed that what would be ordinary care as against injury to persons of mature years and judgment would not necessarily be ordinary care as against injury to persons of immature years and judgment. If the defendant's employés, while in the discharge of their duties as such employés, in the handling and operation of said ropes, pulleys, and apparatus, are proved to have been guilty of negligence, as defined in these instructions, such negligence would, within the meaning of these instructions, be the negligence of the defendant. The defendant, at the time and place of the accident, had the right to use the street in placing its cable upon the telephone poles, and had a right to use tackle, apparatus, and machinery, which were necessary for the accomplishment of that purpose.⁶⁸

§ 4068(5). Kentucky

The court instructs the jury that the defendant had the right to stack the iron building material where it was at the time plaintiff was injured, using ordinary care in so doing; but if it was so stacked as to be attractive or inviting to children to go upon it, and they did go upon it to play, and the defendant, or its agents or employés, knew that fact, it was the duty of the defendant to exercise ordinary care to prevent the said stack of material from being dangerous to children so using it; and if the jury shall believe from the evidence that the defendant, or its agents or employés, did not exercise that degree of care for the protection from injury of the children who so used the said stack, and that by reason of that failure the plaintiff received the injury of which he complains, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the plaintiff was negligent, and thereby helped to cause or bring about his injuries, and but for which he would not have been injured, as defined in instruction No. _____.⁶⁹

§ 4068(6). Minnesota

The jury are instructed that, if they believe from the evidence that the turntable mentioned in the evidence was situated in a public place, that it was unfastened, and when so unfastened could easily be put in motion by small children, and that such turntable was thus rendered attractive to children, and if the jury further

⁶⁸ Ashbach v. Iowa Telephone Co., 146 N. W. 441, 165 Iowa, 473.

⁶⁹ Louisville Ry. Co. v. Esselman, 93 S. W. 50, 20 Ky. Law Rep. 333.

believe from the evidence that many children were in the habit of going upon such turntable to play, and that when it was put in motion it was dangerous to them, and if the jury further believe that the defendant knew that such turntable, when left unfastened, was easily revolved, and so was attractive to small children, and that, when put in motion, it was dangerous to them, and that many children were in the habit of going upon such turntable to play, then defendant was bound to exercise ordinary care to protect children from injury by such turntable, and if they further find from the evidence that defendant did not exercise ordinary care to keep children away from such turntable, or to guard them against injury from such table, and that by reason thereof the plaintiff, while playing on such turntable, was injured while exercising such reasonable care as a child of his age and understanding was capable of using, and if they further find there was no negligence on the part of his parents or guardians contributing to his injury, they will find for the plaintiff.*

§ 4068(7). Oklahoma

In this case, you are instructed that if you find from a preponderance of the evidence that said ——— was injured as alleged, and that such injuries, if any, were occasioned by and the result of the emission of steam, water, and hot mud from the pipe as alleged in the plaintiff's petition, and you further find that the steam, hot water, and hot mud were discharged from said pipe while the employees of the company in a negligent and careless manner, and with a knowledge of the presence of the said ——— on the said premises, at or near the said pipe in question as alleged in his petition, and you further find that the said ——— was free from any negligent and careless conduct on his part which contributed to his injury, then you should find for the plaintiff, and assess his recovery at such sum as you find, from all the facts and circumstances in the evidence and under the instructions hereinafter given you, he is justly entitled to, in no event to exceed the sum sued for, to wit, \$———. ⁷⁰

§ 4069. Same—Injuries to animals

You are instructed that, if you find from the evidence that defendant had erected such structure as has been described, and that, acting as a reasonably prudent person, it ought to have foreseen

* *Keffe v. Milwaukee & St. P. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393.

⁷⁰ *Chicago, R. I. & P. Ry. Co. v. Wright*, 161 P. 1070, 62 Okl. 134. Where plaintiff is a trespasser, as he was in this case, this instruction

should be accompanied by instructions that, before plaintiff can recover, he must prove that he was injured through wanton and willful negligence.

under all the circumstances that, if left open, a cow would be attracted, and would enter and be injured, and that defendant negligently left same open, and that plaintiff's cow did enter, and was so injured that her death resulted, you will find for the plaintiff for such an amount as the evidence shows to have been the value of the cow.⁷¹

§ 4070. Responsibility for latent defects

You are instructed that those latent defects which are either concealed in defective workmanship, or are incident to the ordinary wear and tear of houses, are among the casualties which no man can avoid without that extraordinary care and vigilance which the law does not impose. If you believe from the evidence that the platform through which the plaintiff broke was constructed in a good and substantial manner, and gave no indication of being unsafe, up to the accident testified to, then I instruct you the defendant was under no legal obligations to have the said platform inspected from time to time; and if you find from the evidence that the defect in said platform was secret, and unknown to defendant, and was incident to the ordinary wear and tear of said platform, then you will find a verdict for the defendant.⁷²

D. PROXIMATE CAUSE

§ 4071. Necessity that actionable negligence be proximate cause of injury sued for

§ 4071(1). Arkansas

You are instructed that, if the jury believe from the evidence that the defendant set fire to the grass in the ——— yard, at the request of plaintiff's mother or of his own volition, that after the grass had about burned out he left, that plaintiff then went into the yard with pieces of paper and set fire to some of the grass which had not burned, and while engaged in thus setting fire to the unburned grass she in some way accidentally caught on fire—the defendants are not liable.⁷³

§ 4071(2). California

You are instructed that the "proximate cause" of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred; it is the efficient cause, the one that necessarily sets the other cause in operation.⁷⁴

⁷¹ *Buckeye Cotton Oil Co. v. Horton*, 173 S. W. 423, 117 Ark. 1.

⁷² *Baddeley v. Shea*, 45 P. 990, 114 Cal. 1, 33 L. R. A. 747, 55 Am. St. Rep. 56.

⁷³ *Arkansas Valley Trust Co. v. McIlroy*, 133 S. W. 816, 97 Ark. 160, 31 L. R. A. (N. S.) 1020.

⁷⁴ *Baillargeon v. Myers*, 182 P. 37, 180 Cal. App. 504.

§ 4071(3). *Indiana*

You are instructed that "proximate cause" may be defined as an act which immediately causes or fails to prevent an injury which might reasonably have been anticipated would result from such negligent act or omission.⁷⁵

The court instructs the jury, if two or more causes combine to produce an injury, a person who is responsible for only one of such causes will not be relieved from liability when the person injured was not responsible for either of the causes, and was free from fault.⁷⁶

The jury are instructed that, before the plaintiff is entitled to recover in this case, he must establish by a fair preponderance of the evidence, first, that he received the injuries or some part thereof, as urged in his complaint; and, second, that the carelessness of the defendant, as charged in the complaint, was the direct and proximate cause of such injury.⁷⁷

§ 4071(4). *Iowa*

You are instructed that negligence is the proximate cause of an injury which follows such negligent act, if it can be fairly said that, in the absence of the alleged negligence, the injury and damage complained of would not have occurred.⁷⁸

§ 4071(5). *Kansas*

You are instructed that, as applied to this case, the defendant company is not to be held for any alleged act of negligence that was not the proximate cause of the injury. Negligence being the failure to exercise the ordinary care of prudent men under all the attending circumstances, it follows that the negligence of a person cannot be the proximate cause of a harm to another following it, unless, under all the attending circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to some one. The general test as to whether negligence is the proximate cause of an accident is therefore whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby. It is not necessary that the injury in the precise form in which it in fact resulted should have been foreseen; it is enough that it appears to have been a natural and probable consequence. In other words, it is not necessary to establish, in addition to a defendant's negligence, that the

⁷⁵ *Kingan & Co. v. Albin*, 123 N. E. 711, 70 Ind. App. 493.

⁷⁶ *Indianapolis Traction & Terminal Co. v. Springer*, 93 N. E. 707, 47 Ind. App. 35.

⁷⁷ *Indianapolis Traction & Terminal Co. v. Holtsclaw*, 82 N. E. 986, 41 Ind. App. 520.

⁷⁸ *Reed v. Rex Fuel Co.*, 141 N. W. 1056, 160 Iowa, 510.

consequences of his negligence could have been foreseen by him; it is sufficient that the injury or damage is the natural, though not the necessary and inevitable, result of the negligent act.⁷⁹

§ 4071(6). **Nebraska**

The court instructs the jury that, where the causal connection between the negligence complained of and the injury inflicted is interrupted by the interposition of an independent human agency, which of itself inflicts the injury, the independent agency, in law, is regarded as superseding the original wrong complained of. In such case, the new intervening cause becomes the proximate cause of the injury, while the original wrong becomes the remote cause only, and is not actionable.⁸⁰

§ 4071(7). **Oklahoma**

You are instructed that to constitute actionable negligence, where the alleged wrong is not willful and intentional, three essential elements are necessary and must concur: First, the existence of a duty on the part of the defendant to protect the plaintiff from injury; second, failure of the defendant to perform that duty, and, third, injury to the plaintiff proximately resulting from such failure.⁸¹

§ 4071(8). **Texas**

You are instructed that, if you believe there was such a rock on said premises, yet if you believe that said rock, if any, was not the cause of plaintiff's wagon being careened and turned, or if you believe from the evidence that defendant's agents and servants were negligent in permitting said rock to be upon its premises, if they did, but that said rock being in such place, if it was, was not the proximate cause of plaintiff's wagon being careened and turned, causing plaintiff to be injured, then in either event you will find for the defendant.⁸²

You are instructed that the "proximate cause" of an injury, as that term is herein used, means an efficient cause, or that which in natural and continuous sequence unbroken by any new or intervening cause produces the injury, and without which it would not have occurred. In order to constitute proximate cause of an injury the act or omission complained of must be of such a nature that a very careful, cautious, and prudent person might anticipate that some injury might result therefrom.⁸³

⁷⁹ Barnett v. United Kansas Portland Cement Co., 139 P. 484, 91 Kan. 719.

⁸⁰ Amend v. Lincoln & N. W. R. Co., 135 N. W. 235, 91 Neb. 1.

⁸¹ Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141, 61 Okl. 4.

⁸² Schaff v. Brasher (Civ. App.) 224 S. W. 1117.

⁸³ Missouri, K. & T. Ry. Co. of Texas v. Whitsett (Civ. App.) 185 S. W. 406.

The jury are instructed that, in order to warrant a finding that negligence is the proximate cause of an injury, it should appear that the injury was the natural and probable consequence of the negligent act, and that it ought to have been foreseen, not necessarily the precise, actual injury, but some like injury likely to result therefrom.⁸⁴

§ 4072. Liability of district telegraph company for failure to set burglar alarm

You are instructed that, even although you conclude that the alarm was not put on, unless you find that the failure to put it on was negligence, and you are convinced by the evidence that the failure to set the alarm was the proximate cause of the loss of the articles that it is claimed were stolen, your verdict must be for defendant. The proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new cause, produces the event. The consequence must be the natural and probable consequence, distinguished from the possible consequences. The natural and probable consequences are those which human foresight can foresee, because they happen so frequently that they may be expected to happen again. The possible consequences are those which happen so infrequently that they are not expected to happen again. Unless the proximate cause of the robbery was the failure to set the alarm, your verdict must be for the defendant. If you are convinced that the robbery was the natural and probable consequence that would be expected to follow a failure to set the alarm, and that the alarm was not set, you will be justified in finding a verdict in favor of the plaintiff.⁸⁵

§ 4073. Proximate result of negligence in obstructing water course

The court instructs the jury that it is contended by the defendant that, even though it did negligently, by its railroad grades and embankments, accumulate and divert the waters of ——— creek and ——— creek, and thereby imperil the life and safety of ———, it would not be liable for her death, because the proximate cause of her death was the overturning of the boat in which she was being conveyed from her home to higher and more elevated ground. But, before you could find that the overturning of the boat was the proximate cause of the death of ———, you must find that the intervening cause of the overturning of the boat was not procured or produced by the original act of accumulating and diverting the waters of the creeks aforesaid, if you find they were wrongfully

⁸⁴ Bering Mfg. Co. v. Peterson, 67 S. W. 133, 28 Tex. Civ. App. 194.

⁸⁵ Nirdlinger v. American District Telegraph Co., 91 A. 883, 245 Pa. 453, Ann. Cas. 1915D, 1184.

and negligently accumulated and diverted. Where the evidence discloses a succession of intermediate events, each dependent upon the one immediately preceding it, and all depending upon the original act complained of, such original act is, in legal contemplation, the primary and proximate cause of the resultant injury.⁸⁶

§ 4074. Negligence of defendant concurring with other causes in producing injuries complained of

The jury are instructed that negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. If you find from the evidence that defendant was negligent in either particular alleged in the complaint, and that said negligence in that particular concurred with some other cause or causes in bringing about and causing plaintiff's injury, the defendant's said negligence would be a proximate cause within the meaning of that term as used in these instructions.⁸⁷

§ 4075. Concurrent negligence of two or more persons

§ 4075(1). Illinois

You are instructed that, if the negligence of two unite in causing an accident by which another is injured, it is no defense for one of such wrongdoers to show that the other is also to blame in causing such accident.⁸⁸

§ 4075(2). Washington

You are instructed that, while there can be but one recovery of damages for an injury, the law holds all those whose negligent acts directly contributed or united in causing the injury liable both jointly and severally to the person injured. I instruct you that, if you shall find from a fair preponderance of the evidence that the plaintiff was injured as a proximate result of the concurrent or combined negligence of two or more of the defendants, and that the defendants whose acts of negligence so concurred or combined, in the exercise of ordinary care and prudence, should have foreseen that an injury would naturally and probably have resulted from their negligence, then all defendants so contributing to plaintiff's injury are jointly and severally liable.⁸⁹

You are instructed, in the present case, that if you should find that the premises of the defendant S. were kept in a manner so as to be an unlawful obstruction to the view of the defendants driving their automobiles at these street intersections, and yet you should find that the manner in which the defendants operated their

⁸⁶ Amend v. Lincoln & N. W. R. Co., 135 N. W. 235, 91 Neb. 1.

⁸⁷ Grand Trunk Western Ry. Co. v. Poole, 93 N. E. 26, 175 Ind. 567.

⁸⁸ Frank Parmelee Co. v. Wheelock, 79 N. E. 652, 224 Ill. 194.

⁸⁹ Ross v. Smith & Bloxom, 182 P. 582, 107 Wash. 493.

automobiles or either of them was such in itself as to be sufficient to produce this collision and injury to the plaintiff, without the concurrence of any obstruction on the defendant S.'s premises, then I charge you that you could not hold S. liable in this case, because his negligence, if any, would not have been the proximate or efficient cause.⁹⁰

§ 4076. Act of God concurring with negligence of defendant

You are instructed that when two causes combine to produce an injury, both of which causes are, in their nature, proximate, and both contributing to an injury, the one being a culpable negligent act of the defendant, and the other some occurrence in the nature of an act of God, for which neither party is responsible, then the defendant is liable for such loss as is proximately caused by his own act concurring with the act of God, provided the loss would not have been sustained by the plaintiff, but for such culpable, negligent act of the defendant (if there was any such culpable, negligent act).⁹¹

E. CONTRIBUTORY NEGLIGENCE

§ 4077. Contributory negligence as proximate cause of injury

Contributory negligence of traveler as proximate cause of injury from vehicle, see post, § 5001.

§ 4077(1). Alabama

You are instructed that contributory negligence, in order to avail the defendant, must not only be a want of ordinary care, but there must further be a proximate connection between this want of ordinary care and the injuries.⁹²

§ 4077(2). Illinois

The jury are instructed that contributory negligence is such negligence on the part of plaintiff as helped to produce the injuries complained of, and if the jury find from a preponderance of all the evidence in the case that plaintiff was guilty of any negligence that helped to bring about or produce the injuries complained of, then and in that case the plaintiff cannot recover in this action.⁹³

§ 4077(3). Kentucky

You are instructed that contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from injury, and, by reason of such failure, helped to cause or bring about the injury complained of.⁹⁴

⁹⁰ *Ross v. Smith & Bloxom*, 182 P. 582, 107 Wash. 493.

⁹¹ *Mulrone v. Marshall*, 88 P. 797, 35 Mont. 238.

⁹² *Herring v. Louisville & N. R. Co.*, 82 So. 166, 203 Ala. 136.

⁹³ *Baltimore & O. S. W. R. Co. v. Young*, 54 N. E. 791, 153 Ind. 163.

⁹⁴ *McLaughlin v. Louisville Electric Light Co.*, 37 S. W. 851, 100 Ky. 173, 18 Ky. Law Rep. 693, 34 S. W. 512.

§ 4077(4). *Massachusetts*

The jury are instructed that it does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be remote.⁹⁵

§ 4077(5). *Texas*

The jury are instructed that contributory negligence, in its legal signification, is such an act or omission on the part of the plaintiff, amounting to a want of ordinary and proper care and prudence, as, concurring or co-operating with some negligent act of the defendant, is the proximate cause of the occasion of the injuries complained of.⁹⁶

§ 4077(6). *Washington*

You are instructed that by contributory negligence is meant any negligence upon the part of the person injured which proximately or naturally contributed to his injury.⁹⁷

§ 4078. *Duty to exercise ordinary care*§ 4078(1). *Missouri*

The jury are instructed that by contributory negligence is meant the want of such care and prudence on the part of the plaintiff as an ordinarily careful and prudent person would have used under the same circumstances.⁹⁸

§ 4078(2). *Texas*

You are instructed that plaintiff was required to exercise such care for his own safety as an ordinarily careful and prudent person would exercise under the same or similar circumstances, and if you believe from the evidence that plaintiff, in loading his wagon with hay in the manner and in the amount in which he did, failed to exercise such care for his own safety as an ordinarily careful and prudent person would exercise under the same or similar circumstances, and that such failure, if any, caused or contributed to cause his injury, if any, then you will find for the defendant.⁹⁹

You are instructed that plaintiff cannot be charged with the duty of anticipating and avoiding negligence, if any, on the part

⁹⁵ *Wiswell v. Doyle*, 35 N. E. 107, 160 Mass. 42, 39 Am. St. Rep. 451.

⁹⁶ *International & G. N. R. Co. v. Anchonda*, 75 S. W. 557, 33 Tex. Civ. App. 24.

⁹⁷ *McLeod v. City of Spokane*, 67 P. 74, 26 Wash. 346.

⁹⁸ *Buckner v. Stockyards Horse & Mule Co.*, 120 S. W. 766, 221 Mo. 700.

⁹⁹ *Schaff v. Brasher* (Civ. App.) 224 S. W. 1117.

of the defendants or either of them, and he had a right, in carefully using said platform, to assume that the defendants and their employes had and would use ordinary care to prevent injury to him. But it was plaintiff's duty to so conduct and care for himself as to avoid any danger or injury that was known to him, or that could have been known to him by the exercise of ordinary care, to threaten him by reason of negligence, if any, of the defendants, and also to avoid any injury that might result to him in the ordinary and proper operation of the businesses of the defendants under the circumstances of the situation at that time.¹

You are instructed that it was the duty of plaintiff to exercise ordinary care in going upon and walking along and upon the platform and premises of the defendants at the time and place of the accident, to avoid injury to himself and for his own protection, and if you find that plaintiff failed to exercise ordinary care for his own safety under the circumstances of the situation at the time, and if you further find that the tongue or handle of the truck was down upon the platform, and that plaintiff, in the failure to exercise ordinary care, walked against and fell over same, and that this was the proximate cause of his injury; then if you so find you will find for both defendants.²

You are instructed that if you find that the tongue or handle of the truck was hooked up, and you further find that plaintiff walked against said tongue or handle and knocked it down and fell over it, and thereby received his injuries; you will find for both defendants.³

You are instructed that if you find that plaintiff, by going upon and along the platform and from the train of defendant railway company with his brother, by the route and along the way he did go, was guilty of contributory negligence, and if you find that this was the proximate cause of his injury, if any, then, if you so find you will find for both defendants.⁴

The court instructs the jury that the plaintiff in this case was employed as a watchman by the ——— Railway Company, and as such it was his duty to exercise ordinary care to keep a lookout for vehicles upon ——— street approaching the railway tracks, and also to exercise ordinary care to keep a lookout for the approach of the motorcar of the defendant railway company. It was also his duty to exercise ordinary care to give signals of warning to approaching vehicles. It was also his duty to exercise ordinary care to signal drivers of vehicles as to approaching trains in time

¹ Wells Fargo & Co. v. Lowery (Civ. App.) 197 S. W. 605.

² Wells Fargo & Co. v. Lowery (Civ. App.) 197 S. W. 605.

³ Wells Fargo & Co. v. Lowery (Civ. App.) 197 S. W. 605.

⁴ Wells Fargo & Co. v. Lowery (Civ. App.) 197 S. W. 605.

so as to avoid any danger to said vehicles or their drivers from the approaching trains. If you find and believe from the evidence that he failed to exercise this degree of care in any of these respects, and that this failure, if any, caused or contributed to cause his injuries, if any, then he was guilty of contributory negligence, in which event he cannot recover against the defendant ———, whose team of mules is alleged to have forced plaintiff upon the railroad track in front of the approaching motor car of the defendant railroad company, and in such event his recovery, if any, you find against the ——— Railway Company, should be diminished in accordance with instructions given in the court's main charge.⁵

§ 4078(3). Wisconsin

The court instructs the jury that by "ordinary care" is meant such care as the great mass of mankind ordinarily exercise under the same or similar circumstances, and if you find the pick was defective, and further find that plaintiff by the exercise of ordinary care could have examined it and observed its condition before using it, then you must find this question in the affirmative, or, if you find that he was otherwise guilty of any want of ordinary care that contributed to produce his injury, then you will answer the question in the affirmative.⁶

§ 4079. Duty to restrain, or to avoid the consequences of, the negligent acts of third persons

You are instructed that if you find that the defendant express company was guilty of negligence in the manner of handling its trucks, or the tongue or handle thereof, under the circumstances of the situation at the time it is claimed plaintiff received an injury; and if you find that by reason of said negligence, if any, the truck, or the handle or tongue thereof, was allowed to be and lie upon the platform commonly used by passengers and others having the lawful right to use and be upon said platform; and if you find that defendant railway company knew or ought to have known in the exercise of ordinary care that defendant express company and its employes, in the use of its trucks, did allow the truck, or the tongue or handle thereof, to be and lie upon the platform, if it did; and if you find that plaintiff, in the exercise of ordinary care, while walking upon said platform with his brother, going from the train to his automobile, struck the handle or tongue of said truck with his foot, and stumbled and fell upon said platform and thereby sustained injury; and if you find that said negligence, if any, upon the part of defendant railway company, was the prox-

⁵ Sulzberger & Sons Co. of America v. Page (Civ. App.) 195 S. W. 928.

⁶ Lehman v. Chicago, St. P., M. & O. Ry. Co., 122 N. W. 1059, 140 Wis. 497.

mate cause of said injury, if any, to plaintiff, then, if you so find you will find for plaintiff against the defendant railway company a verdict compensating him for the damage sustained by reason of said negligence, if any.⁷

§ 4080. Duty with respect to anticipating negligence of another

I further charge you that it is an established rule of law that one person will not be allowed to impute a want of vigilance to another injured by his act if that very want of vigilance were the consequence of an omission of duty on his part; that is, if the defendant, by his own act, throws a plaintiff off his guard, the plaintiff's lack of vigilance cannot be regarded as negligence, and one is not chargeable with contributory negligence in failing to anticipate the negligence of another, and in not providing against it. Every one has a right to presume that others will act in a lawful and proper manner; consequently the law will not hold it imprudent in a plaintiff to act upon a presumption that the defendant has done or will do his duty.⁸

§ 4081. Duty of one riding with another to restrain recklessness of latter

See, also, post, § 4889.

§ 4081(1). Colorado

You are instructed that plaintiff while in a buggy as the guest of another, and when such other is driving, is charged with certain duties to care for her own safety, and that such duties are those imposed upon an ordinarily careful and prudent person under the circumstances, and that said plaintiff cannot, because another is driving, escape all obligation and care for her own safety; and that, if you find from the evidence that she failed to exercise the care and caution that an ordinarily careful and prudent person would have done under the circumstances, then she is guilty of contributory negligence, and cannot recover in this action, even if defendant was guilty of the negligence charged.⁹

§ 4081(2). Oregon

You are instructed that the plaintiff in this case was required to exercise reasonable care; that is, that degree of care which a person of reasonable prudence would exercise in the situation in which he was placed. If he had reason to suspect carelessness or incompetency on the part of the driver, it was his duty to protest and remonstrate with or caution him against being careless, or to cau-

⁷ Wells Fargo & Co. v. Lowery (Tex. Civ. App.) 197 S. W. 605.

⁸ Steele v. Northern Pac. Ry. Co., 57 P. 820, 21 Wash. 287.

⁹ Denver City Tramway Co. v. Armstrong, 123 P. 136, 21 Colo. App. 640.

tion him concerning the operation of the car, and if the driver was running the car at a dangerous rate of speed, and the plaintiff knew of the rate of speed and its danger, or, in the exercise of reasonable prudence, ought to have known and appreciated it, it was his duty to remonstrate against such speed, and direct the driver to slacken the same, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so.¹⁰

§ 4082. Acts in sudden exigency

See, also, post, §§ 4882, 4996.

Acts of servant in sudden emergency, see ante, § 3779.

Care required from passenger in alighting from vehicle of transportation, see ante, § 1702.

Negligence of person injured in railroad crossing accident as defense to action against railroad, see post, § 4427.

Negligence of traveler as defense in action against city for injuries, see ante, § 3983.

§ 4082(1). California

You are instructed that, if the deceased was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault. In such case, even if in bewilderment he runs directly into the very danger which he fears, he is not at fault.¹¹

§ 4082(2). Delaware

You are instructed that the plaintiff would be entitled to recover notwithstanding there had been some negligence on the part of the deceased, if it was the negligence of the defendant alone that was the proximate or immediate cause of the accident. A person will not be held guilty of contributory negligence who in the effort to avoid immediate danger, in the exigency of the moment, suddenly and without time or opportunity for reflection, puts himself in the way of other perils without fault on his part, and particularly so if the defendant has placed him in such position. It is an established rule of law that when one is required to act suddenly and in the face of imminent danger, he is not required to exercise the same degree of care as if he had time for deliberation. The question under such circumstances is not whether the person acted in that way which in the light of after events appeared to be the one most likely to have avoided the danger, but is whether he

¹⁰ *Elling v. Blake-McFall Co.*, 166 P. 57, 85 Or. 91.

¹¹ *Randolph v. Hunt*, 183 P. 358, 41 Cal. App. 739. This instruction was approved as an abstract proposition.

acted as a person of ordinary prudence and discretion would have acted under like conditions.¹²

§ 4082(3). Minnesota

The jury are instructed that, where one is placed by the negligent acts of another in such a position that he is compelled to choose, upon the instant and in the face of apparent great and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence, placed in the same situation, would probably make, and injury results therefrom, the fact that, if he had chosen the other hazard, he would have escaped injury, does not prove contributory negligence.¹³

§ 4082(4). South Carolina

The jury are instructed that, when one is placed by the negligence of another in a situation of terror, his attempt to escape danger even by doing an act which is in itself dangerous, and from which injury results, is not contributory negligence such as will prevent him from recovering. If a man is in danger, and, in order to avoid that danger bona fide does something which is dangerous, that would not be considered in law contributory negligence.¹⁴

§ 4083. Care required of children

See, also, post, §§ 4348, 4430.

Care required from children to avoid injuries from explosives, see ante, § 2378.

Care required from children to avoid injuries from vehicles, see post, § 4908.

Care required to avoid injuries from electricity, see ante, § 2229.

Negligence of child as defense in action against city for injuries, see ante, § 3984.

Negligence of minor as defense to action against master for injuries, see ante, § 3788.

§ 4083(1). California

The court instructs you that a child of such tender years and immature judgment as to be incapable of knowing, comprehending, and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger. In determining this proposition in connection with this case, you must consider the age, sex, and all the conditions surrounding the plaintiff at the date of the injury, as disclosed to you by the evidence.¹⁵

§ 4083(2). Colorado

You are instructed that the plaintiff is not to be allowed to recover if, upon all the evidence, it appears to you that he was con-

¹² *Nailor v. Maryland, D. & V. Ry. Co.*, 97 A. 418, 6 Boyce, 145.

¹³ *Wilson v. Northern Pac. R. Co.*, 3 N. W. 333, 26 Minn. 278, 37 Am. Rep. 410.

¹⁴ *Mitchell v. Charleston Light & Power Co.*, 22 S. E. 767, 45 S. C. 146, 31 L. R. A. 577.

¹⁵ *Rosenberg v. Durfee*, 26 P. 793, 87 Cal. 545.

scious of the hazard and danger of resorting to the cars to amuse himself. But the conduct of plaintiff is not to be measured by the discretion of an adult person. No greater measure of prudence, circumspection, and discretion can be required of him than that reasonably to be expected of a child of the same age, capacity, and experience.¹⁶

§ 4083(3). Delaware

You are instructed that, while it is a rule of law that contributory negligence, on the part of the person injured, will defeat the recovery of damages for the injury, yet such rule is somewhat affected by the relative rights and duties of the plaintiff and the defendant at the time and under the circumstances of the accident, growing out of the infancy of the plaintiff or person injured. It is a well established rule of law that the conduct of children in the matter of contributory negligence, should not be governed by the same rule that governs adults. For while it is the duty of the infant to exercise ordinary care to avoid the injuries of which he complains, ordinary care for him is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances. But this is not an inflexible rule, and is to be modified according to the maturity and capacity of the infant, his ability to understand and appreciate the danger, and his familiarity with all the surroundings and conditions in each particular case, and it is for the jury to say whether under all the circumstances the infant exercised reasonable care.¹⁷

§ 4083(4). Kansas

You are instructed that children of tender age are not held to the same strict accountability as persons of full age and experience, but are required to exercise such prudence and care as persons of their age, experience, knowledge, and intelligence are ordinarily expected to exercise under like circumstances.¹⁸

§ 4083(5). Kentucky

You are instructed that it was the duty of the plaintiff at the time mentioned in the petition to exercise for his own protection from injury the degree of care usually exercised by persons of his age, experience, and intelligence under the same or similar circumstances; and if he failed to exercise that degree of care, and by reason of such failure, if any there was, helped to cause or bring about his injury, and but for such failure or contributory negligence

¹⁶ *Denver City Tramway Co. v. Nicholas*, 84 P. 813, 35 Colo. 462.

¹⁷ *Linthicum v. Truitt*, 80 A. 245, 2 Boyce, 338.

¹⁸ *Eames v. Clark*, 177 P. 540, 104 Kan. 65.

he would not have been injured, then the law is for the defendant, and you should so find.¹⁹

§ 4083(6). *Oklahoma*

You are instructed, gentlemen of the jury, that said defendant alleges in its answer that said injuries, if so received by said —, were directly occasioned and were the proximate result of the plaintiff's own negligence and want of care, and if you find from the evidence said —, through carelessness or negligence upon his part, contributed to the injuries received by him, or that said injuries were a result of his own negligence and want of care, then your verdict should be for the defendant, but in this connection you are instructed that a child under — years of age will be, and a child between — and — years of age is presumed to be, incapable of guilt of more than technical trespass, as affecting the question of duty of an owner in respect to dangerous condition of premises, and the character of the trespass may be a circumstance to be considered by the jury in ascertaining whether there is contributory negligence.²⁰

§ 4083(7). *Oregon*

You are instructed that a child is not to be held to the same degree of care as an adult, but he must exercise only that degree of care commensurate with his age, experience, and understanding, and that unless he fails to exercise commensurate care he is not guilty of contributory negligence.²¹

§ 4083(8). *Washington*

You are instructed that plaintiff was required to act as a reasonably prudent person of the age and capacity of the plaintiff here would naturally be expected to act under similar circumstances. And, should you find that the plaintiff here was not using his faculties or powers of observation in a reasonable way, having in consideration his age and experience, and, if he had been using the same in such manner, the accident would not have happened, or that his failure to use the same contributed in any material degree to the happening of the accident, and these things you believe by a fair preponderance of the evidence, then he cannot recover.²²

You are instructed that, in determining the question whether or not — was guilty of contributory negligence to such an extent as to directly and proximately and materially contribute to the injury which he suffered, it is the duty of the jury to take into con-

¹⁹ *Louisville Ry. Co. v. Esselman*, 93 S. W. 50, 20 Ky. Law Rep. 333.

²⁰ *Chicago, R. I. & P. Ry. Co. v. Wright*, 161 P. 1070, 62 Okl. 134.

²¹ *Lawrence v. Portland Ry., Light & Power Co.*, 179 P. 485, 91 Or. 559.

²² *Barton v. Van Gesen*, 157 P. 215, 91 Wash. 94.

sideration the boy's age and all of the circumstances surrounding him, his experience or lack of experience, his knowledge or lack of knowledge, the amount of prudence and care and judgment which would ordinarily and reasonably be expected of a boy of that age under the circumstances and conditions shown by the testimony in this case. That is the rule by which the question of whether or not he is guilty of contributory negligence is to be measured by the jury. You should not apply to the plaintiff in the case the same rules you would apply to a grown man. You should make allowances for his youth, and in attempting to determine the question of his contributory negligence or the lack of it inquire whether or not he exercised such care as would reasonably and ordinarily be expected of a boy of his age and intelligence and experience under like circumstances and conditions.²³

§ 4084. Intoxication of injured person

See, also, post, §§ 4347, 4432, 4886.

Care required from intoxicated person to avoid injury from vehicles, see post, § 5000.

Consideration of intoxication of injured servant on question of his negligence, see ante, § 3789.

Consideration of intoxication of traveler on question of his negligence in action against city for injuries, see ante, § 3985.

Liability of carrier to intoxicated passenger, see ante, § 1707.

The court further instructs the jury that if you find and believe from all the evidence that the deceased, ———, directly contributed to his injury and death by his own negligence or want of ordinary care at the time and place of falling into the excavation in question, then plaintiff cannot recover in this case, and your verdict should be for the defendant; and in this connection you are further instructed that the law does not permit any one to voluntarily incapacitate himself from the ability to exercise ordinary care for his own safety, and then to recover for an injury to which his own want of care, so caused, had directly contributed, nor can the widow of a man, injured while so incapacitated and through a want of care so caused, recover for his death brought about by such injury. If the jury do find from the evidence in this cause that said deceased fell into the excavation in question while in a state of intoxication, and that such intoxication directly contributed to the happening of such injury, and that such injury would not have occurred but for such intoxication, then your verdict will be for the defendant.²⁴

²³ *Akin v. Bradley Engineering & Machinery Co.*, 99 P. 1038, 51 Wash. 658.

²⁴ *Voelker v. Hill-O'Meara Const. Co.*, 131 S. W. 907, 153 Mo. App. 1.

§ 4085. Imputed negligence

The court instructs the jury that even if you believe, from the evidence, that the plaintiff's mother was guilty of negligence in permitting the plaintiff to go upon the street, or that his brother was guilty of negligence in not taking proper care of him while upon the street, still such negligence, if any, upon their part, cannot be charged against the plaintiff, and it is not a defense to this suit.²⁵

§ 4086. Imputing negligence of parent to child**§ 4086(1). Colorado**

The jury is instructed that you will entirely disregard the defenses sought to be interposed by the defendant of the negligence of plaintiff's parents, or either of them, at the time when, and the place where, the injury occurred.²⁶

§ 4086(2). Virginia

The court instructs the jury that, though they believe from the evidence that the father and mother of plaintiff (or either of them) were guilty of negligence in not keeping said plaintiff from going on the defendant's tracks, such negligence of the father or mother, or of both of them, cannot be imputed to said plaintiff.²⁷

§ 4087. Negligence of parent as precluding recovery for injuries to child in action for benefit of parent

Care required from parents with respect to letting child go on street car track, see post, § 4888.

You are instructed that, if you believe from the evidence that those in charge of defendant's cars used reasonable care and skill in the operation of said cars to prevent the killing of said child, or if you believe the parents of the child or person in charge thereof failed to exercise ordinary prudence and diligence to prevent its going upon defendant's track, then plaintiff would not be entitled to recover.²⁸

§ 4088. Imputing negligence of husband to wife**§ 4088(1). Iowa**

In this connection you are instructed that in determining whether or not the deceased was guilty of contributory negligence you shall consider her own acts and conduct, and all other circumstances shown in evidence surrounding the accident and injury to her, and, if you find from the preponderance of all the evidence that she acted as a person of ordinary prudence under all the circumstances,

²⁵ *Perryman v. Chicago City Ry. Co.*, 89 N. E. 980, 242 Ill. 269.

²⁶ *Denver City Tramway Co. v. Brown*, 143 P. 364, 57 Colo. 484.

²⁷ *Southern Ry. Co. v. Wiley*, 70 S. E. 510, 112 Va. 183.

²⁸ *San Antonio & A. P. Ry. Co. v. Vaughn*, 23 S. W. 745, 5 Tex. Civ. App. 195.

and if you find that plaintiff had no control over the vehicle, and did not seek in any way to manage or control the horse and vehicle, you should find her free from contributory negligence, although you may find that her husband was guilty of negligence in the driving and management of the horse and vehicle.²⁹

§ 4088(2). Ohio

You are instructed that the doctrine of imputed negligence does not prevail in the state of ———; and if you find that ——— died through the wrongful act, neglect, or default of the defendant, by himself or his agent, then the plaintiff is not deprived of the right of action in this case by reason of contributory negligence on the part of her husband or any one else, unless such person was acting as her agent at the time.³⁰

§ 4089. Imputing negligence of driver of vehicle to guest

Rule in action against railroad company for personal injuries, see post, § 4433.

§ 4089(1). United States

I charge you that, where a person hires a public hack or carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another, he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he is riding, or of the driver of the other. He may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time. The passenger in the carriage may direct the driver where to go—to such a park or to such a place that he wishes to see. So far the driver is under his direction; but my charge to you is that, as to the manner of driving, the driver of the carriage or the owner of the hack—in other words, he who has charge of it, and has charge of the team—is the person responsible for the manner of driving, and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers or to anybody else, why then he might be liable, because it was by his own command and direction that it was done; but,

²⁹ Fisher v. Ellston, 156 N. W. 422, 174 Iowa, 364.

³⁰ Davis v. Guarneri, 15 N. E. 350, 45 Ohio St. 470, 4 Am. St. Rep. 548.

ordinarily in a public hack, the passengers do not control the driver, and therefore I hold that unless you believe plaintiff exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control, and required the driver to cross at this particular time, then he would be liable because of his interference.³¹

§ 4089(2). Arkansas

The court instructs the jury that, if the plaintiff was at the time of the collision a passenger in an automobile over which she had no control, and if she was not at the time directing or controlling its movements, then the negligence of the driver of the automobile, if there was any negligence on his part, cannot be imputed to the plaintiff; and if under those circumstances the driver of the automobile was negligent, that negligence, if you should find it existed, cannot defeat a recovery by the plaintiff, provided the negligence of the defendants, if any, combined with the negligence of the driver, if there was such negligence, caused the injury to the said plaintiff. But if you find that the negligence of the driver of the automobile was the sole cause of the accident, you will find for the defendant.³²

You are instructed that if the deceased, ———, was at the time of the collision a passenger in the automobile, and if he was not at the time directing or controlling its movements, then the negligence of the driver of the automobile, if there was such negligence, cannot be imputed to said ———; and if, under those circumstances, the driver of the automobile was negligent, that negligence, if it existed, cannot defeat a recovery by the plaintiff herein, provided the negligence of the defendant, if there was such negligence, caused the death of said ———, deceased. But if you find that the negligence of the driver of the automobile was the sole cause of the accident, you will find for the defendant.³³

§ 4089(3). California

You are instructed that, if you find from the evidence that plaintiff, when he was injured by the defendant's touring car, was about to board the automobile truck as the guest of its driver, neither exercising nor assuming any control over it, then, even though you may also find that the auto truck was not properly equipped or lighted, or that its driver was negligent in any other respect, such negligence must not be imputed to plaintiff. The plaintiff is responsible only for the exercise of ordinary care on his own part.³⁴

³¹ Little v. Hackett, 6 S. Ct. 391, 116 U. S. 386, 29 L. Ed. 652.

³² Miller v. Ft. Smith Light & Traction Co., 206 S. W. 329, 136 Ark. 272.

³³ Ward v. Ft. Smith Light & Traction Co., 185 S. W. 1085, 123 Ark. 548.

³⁴ Irwin v. Golden State Auto Tour Co., 171 P. 1059, 178 Cal. 10.

§ 4089(4). *Colorado*

The court instructs the jury that the plaintiff cannot be held to be guilty of contributory negligence so as to defeat a recovery in this action upon that ground, unless you find from the evidence that the said plaintiff failed herself to exercise that degree of care and caution which a reasonably prudent and cautious person would have exercised under similar circumstances, and that that failure on her part caused or contributed to cause the striking of the vehicle in which she was riding, by the defendant's car. If the plaintiff exercised no control over the movements of the vehicle in which she was riding, but was simply an invited guest of the driver, and had no control over the manner or way in which the buggy was driven, the negligence of the driver, if there was any such negligence, cannot be imputed or charged to her.³⁵

§ 4089(5). *Delaware*

You are instructed that, where the plaintiff is merely a passenger in a vehicle and has no control over the driver, the negligence of the driver, if any, cannot be imputed to the passenger so as to defeat the latter's right of recovery against a third person for injuries resulting from the concurrent negligence of such driver and third person.³⁶

§ 4089(6). *Illinois*

The jury are instructed that, if the jury find from the preponderance of the evidence that the plaintiff was injured as charged in her declaration by reason of the alleged negligence of the defendant, and that at and before the time of receiving such injury the plaintiff was in the exercise of ordinary care and caution for her own safety, and that when injured she was riding in the cutter in question as the invited guest of ———, then, even though it should appear that said ——— was guilty of some want of care, that contributed in some measure toward the bringing about of the accident in question, such want of care, if any, on the part of said ———, will not be imputable to the plaintiff.³⁷

§ 4089(7). *North Dakota*

You are instructed that, even though you find that ———, with whom the plaintiff was riding at the time of the accident, was guilty of negligence, and that such negligence contributed to plaintiff's injury, yet the plaintiff may recover, provided you do not find that she herself was guilty of negligence in remaining in the buggy and riding past the engine.³⁸

³⁵ *Denver City Tramway Co. v. Armstrong*, 123 P. 136, 21 Colo. App. 640.

³⁶ *Campbell v. Walker*, 78 A. 601, 2 Boyce, 41.

³⁷ *West Chicago St. R. Co. v. Peters*, 63 N. E. 662, 196 Ill. 298.

³⁸ *Ouverson v. City of Grafton*, 65 N. W. 676, 5 N. D. 281.

§ 4089(8). *South Carolina*

I charge you that, where a person is a passenger in a private vehicle or automobile, that the negligence of the driver of the automobile cannot be imputed to the passenger unless the passenger had some right to manage or control the driver, unless some relation of master and servant existed between them or some relation of principal and agent, unless the driver was the agent of the passenger, that is, unless the passenger had employed the driver as his servant, as his agent. So, unless there is testimony in this case showing that plaintiff had the right to control the operation of the machine and give directions about the operation and control of it, why she cannot be held liable, and it would not affect her case if you should find that the driver was negligent.³⁹

§ 4089(9). *Washington*

The court instructs the jury that a person riding in a wagon with another person who is driving a team which is hauling said wagon is not responsible for the negligence of such driver in a case of this kind, unless he caused said driver to be negligent, and unless plaintiff's negligence concurs with the negligence of the driver. In this case, if you believe that the driver of the ice wagon was negligent, but that plaintiff did not cause such negligence and was not responsible therefor and was not guilty of negligence on his part, then it would be no defense to plaintiff's right to recover against defendant.⁴⁰

§ 4090. *Effect*

See, also, ante, § 3986.

See, also, post, §§ 4350, 4365, 4435, 4938, 5002.

Effect of negligence of injured servant, see ante, § 3790.

§ 4090(1). *Missouri*

The jury are instructed that, although you may find from the evidence that defendant's employé was guilty of the acts of negligence charged in plaintiff's petition, yet if you further find and believe from the evidence that the plaintiff, through his agent, was also guilty of the act or acts of negligence charged, and that such negligence concurred with defendant's negligence (if you believe there was such negligence) in causing the collision, that is, that both parties were guilty of negligence, and that such joint negligence caused the collision and damages, then your verdict must be for the defendant.⁴¹

³⁹ *Latimer v. Anderson County*, 78 S. E. 879, 95 S. C. 187.

⁴⁰ *Cathey v. Seattle Electric Co.*, 108 P. 443, 58 Wash. 176. In this case there was no evidence tending to show that it was any part of plain-

tiff's duty to drive the team, or that he had any supervision or control over the driver.

⁴¹ *Williams v. Tucker* (App.) 224 S. W. 21.

§ 4090(2). *New York*

The jury are instructed that, if the plaintiff was guilty of any contributory negligence which was the proximate cause of his hurt, or contributed to his hurt, then he cannot recover in this case.*

§ 4090(3). *Tennessee*

You are instructed that, if you believe from the evidence that plaintiff was guilty of negligence, and that this negligence combined with the negligence of defendant to produce the accident, so that both acts together constituted the proximate cause of the injury, then the negligence of the plaintiff, however slight, would bar a recovery, and you should find for the defendant.⁴³

§ 4091. **Contributory negligence as defense in action based on wanton conduct**

Effect of negligence of servant, where negligence of master is wanton, see ante, § 3792.

The court charges the jury that before a party can be said to be guilty of willful or wanton conduct it must be shown that the person charged therewith was conscious of his conduct, and conscious through his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.⁴³

§ 4092. **Comparative negligence**

Rule in action against railroad for personal injuries, see post, §§ 4353, 4439. Rule in actions between master and servant, see ante, § 3796.

The court instructs the jury for the plaintiff that contributory negligence is no longer an absolute defense in a suit for damages, but such negligence, if any, only goes to the question of the amount of the damages, so that, if you believe from the evidence plaintiff was injured and damaged by the negligence of the defendant in the manner charged herein, so as to make defendant liable for such damages, then the court instructs you that even though you believe the plaintiff was guilty of contributory negligence, you cannot, for that reason, find against him.⁴⁴

* *Stokes v. Barber Asphalt Pav. Co.*, 100 N. E. 597, 207 N. Y. 252.

⁴² *Memphis St. Ry. Co. v. Haynes*, 81 S. W. 374, 112 Tenn. 712.

⁴³ *Seaboard Air Line Ry. v. Laney*, 75 So. 15, 199 Ala. 654.

⁴⁴ *Mississippi Cent. R. Co. v. Lott*, 80 So. 277, 118 Miss. 816.

F. EVIDENCE

§ 4093. Burden of proof

§ 4093(1). California

The court instructs the jury that plaintiff is not required to show particularly what the specific act of negligence was which produced the accident, but is only required to show that the accident is one which would not ordinarily occur had due care been employed. The burden then shifts to the defendant to show its freedom from negligence.⁴⁵

§ 4093(2). Missouri

The court instructs the jury that the burden is upon the plaintiff in this case to establish, to the reasonable satisfaction of the jury, by the greater weight of the evidence given in the case, that the plaintiff was injured by reason of defective radial stays in the crown sheet of said engine, and that by reason of said defective radial stays, and from no other cause, said crown sheet gave way and caused the explosion, and that plaintiff was injured thereby; and, unless the plaintiff has so proven to your satisfaction, you will return a verdict for the defendant.⁴⁶

§ 4093(3). New York

The jury are instructed that the burden of proving that defendant was negligent in either or any particular alleged by plaintiff is upon the plaintiff.*

§ 4094. Res ipsa loquitur

Presumption in action against abutting owner by travelers to recover for injuries from accident in street, see ante, § 592.

Presumption of negligence from collapse of building, see ante, § 654.

Rule in action by traveler for injuries from vehicles, see post, § 5007.

Rule in action by passenger for personal injuries against carrier, see ante, § 1716.

Rule in action to recover for injuries from explosives, see ante, § 2381.

§ 4094(1). California

In applying the above doctrine to this case the court instructs you, gentlemen, that, if you find that the falling of the fan mentioned in the evidence was such a thing as does not ordinarily happen if those who have the management thereof use proper care in the management and operation thereof, it affords prima facie evidence of negligence, and would justify a verdict in favor of the plaintiff unless the evidence in the case negatives that prima facie

⁴⁵ Soto v. Spring Valley Water Co., 178 P. 306, 39 Cal. App. 187.

⁴⁶ Sparkman v. Wabash R. Co., 177 S. W. 703, 191 Mo. App. 463.

* Reaney v. Standard Oil Co., 41 N. Y. S. 768, 10 App. Div. 326.

presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants.⁴⁷

The court instructs the jury that, when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.⁴⁸

You are instructed that, in order for the plaintiff to be entitled to recover against the defendant, the plaintiff must show, by preponderance of evidence outside of the mere proof of the fact that a collision occurred, that such collision was due to the negligence of defendant; and, if the plaintiff has failed to show by preponderance of evidence satisfactory to your mind that the accident or collision in which the plaintiff received her injuries was caused by the negligence of the defendant, then the plaintiff is not entitled to recover against the defendant, and your verdict must be in favor of the defendant.⁴⁹

§ 4094(2). *Indiana*

The court instructs the jury that, if the plaintiff agreed with the defendant to make and put in place in defendant's boiler room a galvanized iron hopper, the size and approximate weight of which was known to defendant, and, as part of the contract, the defendant agreed to construct a scaffold to be used by plaintiff and other workmen in erecting said hopper, and if defendant was informed as to the number of men that would be required to go upon said scaffold, and accordingly caused its workmen to construct the scaffold, and, when completed, the plaintiff and his helpers went upon said scaffold, and while in the act of putting said hopper in place the scaffold broke and fell, and plaintiff was thrown to the ground and sustained the injuries complained of, in the absence of other evidence of the cause of the fall of said scaffold, the jury may infer from the very fact that it broke and fell that the defendant was negligent in doing the work of its construction or in selecting the material therefor, if it appears that at the time the scaffold broke it was being used in the manner as contemplated by defendant.⁵⁰

§ 4094(3). *Maryland*

The court instructs the jury that, if you find from the evidence that the servants or agents of the defendant, while moving or hoist-

⁴⁷ *Haun v. Tally*, 181 P. 81, 40 Cal. App. 585.

⁴⁸ *Soto v. Spring Valley Water Co.*, 178 P. 305, 39 Cal. App. 187.

⁴⁹ *Sauer v. Eagle Brewing Co.*, 84 P. 425, 3 Cal. App. 127.

⁵⁰ *Talge Mahogany Co. v. Hockett*, 103 N. E. 815, 55 Ind. App. 303.

ing a heavy piece of structural iron or column by means of a derrick, and acting within the scope of their employment, permitted and allowed said piece of structural iron or column to strike against a valve or pipe upon plaintiffs' premises with such force as to break same, this will be prima facie evidence of negligence on the part of the servants or agents of the defendant under the circumstances while moving or hoisting said piece of structural iron or column; and, unless upon the whole evidence such prima facie evidence is rebutted, then the verdict must be for the plaintiffs.⁵¹

§ 4094(4). Oklahoma

The jury are instructed that the collision of two cars upon the railroad track of a scenic railway creates a presumption of negligence on the part of the owner and operators of said railway, and establishes a prima facie case of negligence against said owner and operators.⁵²

§ 4094(5). Utah

You are instructed that if you should find from a preponderance of the evidence that the piece of coal which rolled down the mountain side and struck the plaintiff was a part of the coal being unloaded by the defendant at the time and place alleged in plaintiff's complaint, the rolling of such piece of coal down the steep mountain side raises a presumption of negligence on the part of the defendant, and unless you should find from all the evidence in the case that such presumption is overcome, you should find for the plaintiff.⁵³

§ 4095. Burden of proof as to contributory negligence

Rule in action against railroad company for personal injuries, see post, §§ 4356, 4442.

Rule in action against town or county for injuries caused by defects in highway, see post, § 4919.

Rule in action by servant against master, see ante, § 3822.

Rule in action by traveler against municipality for personal injuries, see ante, § 3991.

Rule in action by traveler against street car company for personal injuries, see post, § 4896.

Rule in action for death by wrongful act, see ante, § 2120.

§ 4095(1). California

You are instructed that, in an action for injuries alleged to have been caused through the negligence of the defendant, it is sufficient for the plaintiff to show, in the first instance, that the injury

⁵¹ *Chesapeake Iron Works of Baltimore City v. Hochschild, Kohn & Co.*, 86 A. 345, 119 Md. 303.

⁵² *Sand Springs Park v. Schrader*, 198 P. 983.

⁵³ *Furkovich v. Bingham Coal & Lumber Co.*, 143 P. 121, 45 Utah, 89, L. R. A. 1915B, 426

resulted from the negligence of the defendant, and he need not show a want of contributory negligence in himself. Contributory negligence is an affirmative defense to be established by the defendant; and such contributory negligence must be shown by the defendant, by a preponderance of the evidence, to have been the proximate cause of the plaintiff's injury. In this connection you are instructed that defendant can show such contributory negligence, not only by his own evidence, but from all the evidence, including that of plaintiff.⁵⁴

§ 4095(2). *Kansas*

The court instructs the jury that, if you find from the evidence that plaintiff would be entitled to recover, but for her own contributory negligence, then I instruct you that the burden of proof is upon defendant to establish the contributory negligence of plaintiff, and this must be determined, the same as all other questions at issue, from the facts and circumstances proven in the case.⁵⁵

§ 4095(3). *Missouri*

The jury are instructed that contributory negligence is a matter of defense, to be alleged in the answer and proved to exist by a preponderance of the evidence, and whether there is sufficient evidence to overcome the presumption of due care which arises in plaintiff's favor, founded on instincts of self-preservation, is a question for the jury.⁵⁶

§ 4095(4). *Washington*

The court instructs the jury that, as to this defense which is interposed by the defendant company, in which they allege that the boy was guilty of contributory negligence, the burden is upon the defendant company in order to establish that defense to prove by a fair preponderance of the evidence to the satisfaction of the jury that the boy was guilty of contributory negligence. If you should find by a preponderance of the evidence in the case that the defendant company was guilty of negligence in the particulars in issue here, and as the result of that negligence proximately and directly the plaintiff was injured, it would then be necessary for you to further inquire as to whether or not the defendant company has shown by a fair preponderance of the evidence that the boy was guilty of contributory negligence. If you should find by such preponderance of the testimony that the plaintiff was guilty of contributory negligence, and that that contributory negligence

⁵⁴ *Wistrom v. Redlick Bros.*, 92 P. 1048, 6 Cal. App. 671.

⁵⁵ *City of Topeka v. Myers*, 63 P. 273, 10 Kan. App. 576.

⁵⁶ *Shrank v. Chicago & A. R. Co.*, 140 S. W. 319, 159 Mo. App. 299.

directly and proximately contributed to this injury, then you should find for the defendant.⁵⁷

§ 4096. Sufficiency of evidence

The jury are instructed that, if the jury believe, from the evidence, that the defendant was guilty of negligence as charged in the declaration, then it makes no difference, as to the responsibility of the defendant, whether such negligence appears and is proved by the testimony on the part of the plaintiff, or by the testimony of the defendant's own witnesses.⁵⁸

§ 4097. Same—Injuries due to one of two possible causes

The court instructs the jury that if you are unable to determine, from the evidence in the case, the cause of said explosion, or if it appears as reasonable to you that said explosion was the result of water becoming low on or around said crown sheet as that it may have been due to defective radial stays in the crown sheet, then you will return a verdict for the defendant.⁵⁹

⁵⁷ *Akin v. Bradley Engineering & Machinery Co.*, 99 P. 1032, 51 Wash. 658.

⁵⁸ *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608.

⁵⁹ *Sparkman v. Wabash R. Co.*, 177 S. W. 703, 191 Mo. App. 463.

CHAPTER CCXIV

NOTARIES PUBLIC

§ 4098. Liability for error in taking acknowledgment.

§ 4098. Liability for error in taking acknowledgment

The court instructs the jury that the taking of an acknowledgment to a deed by a notary public is, under the law of ———, a judicial act, and a notary public is by the law of ——— authorized to take acknowledgments to deeds of all persons appearing before him for that purpose, within the limits of the county or city for which he is appointed; and the question as to whether or not he can take a valid acknowledgment to a deed, in which he is named as trustee, is a question of law, and for an error on the part of a notary public in taking acknowledgments as such and in good faith to any deed to which he is a party as trustee, he is not liable for damages to a party who suffers damage or loss thereby.¹

¹ Yates v. Ley, 92 S. E. 837, 121 Va. 265.

CHAPTER CCKV,

NOTICE

§ 4099. Constructive notice.

4100. Effect of constructive notice—Notice in one capacity as binding in another capacity.

§ 4099. Constructive notice

In this connection I charge you that a presumption arises, in the absence of evidence to the contrary, that a managing director of a bank has knowledge of its doings and transactions, whenever by ordinary diligence he could have acquired the same, and whether or not such presumption is satisfactorily overcome in any case is for you.¹

§ 4100. Effect of constructive notice—Notice in one capacity as binding in another capacity

The court instructs the jury that what the defendant knew or did, as the law partner of B., does not have any effect on the said B. as trustee; so that if you believe from the evidence that said B., as trustee in the second deed of trust, honestly and in good faith foreclosed said second deed of trust to enforce the payment of the note due ———, then your verdict should be for the defendants.²

¹ Rattlemill v. Stone, 68 P. 168, 28 Wash. 104.

² Tennent Shoe Co. v. Birdseye, 78 S. W. 1036, 105 Mo. App. 696.

CHAPTER CCXVI

NOVATION

§ 4101. Essential elements.

§ 4101. Essential elements

You are instructed that the assumption of a person's debt by a third party does not relieve the original debtor from liability to the creditor, even though the creditor is advised of the assumption by the second party. In other words, in this case the fact that the ——— Company agreed to pay this account or debt to plaintiff, and that plaintiff knew that said company had agreed to pay it, would not release defendant from the debt, unless plaintiff expressly agreed with defendant to release him, so that in this case the assumption of the debt by said company would not be sufficient to exonerate defendant, unless, in addition to the assumption of the debt, said company had paid the debt or the creditor had agreed to release the original debtor. So this case determines, and your verdict will turn upon whether or not the evidence in this case is sufficient to satisfy you that said company, after assuming this ——— indebtedness, paid that amount to plaintiff on the account of that old debt. If they have done so, and you are satisfied from the evidence that they have done so, you should, by your verdict, find for the defendant. If you are not convinced that they have done so, you should by your verdict find for the plaintiff in the amount that has not been proven to have been paid by said company.¹

¹ Albert Steinfeld & Co. v. Wing Wong, 128 P. 354, 14 Ariz. 336.

CHAPTER CCXVII

NUISANCE

CIVIL LIABILITY

- § 4102. Elements of cause of action for private nuisance.
- 4102(1). Alabama.
 - 4102(2). Arkansas.
 - 4102(3). Indiana.
 - 4102(4). Missouri.
 - 4102(5). Pennsylvania.
4103. Gin plant as nuisance.
4104. Factory for production of sulphuric acid fertilizer.
4105. Corn sheller plant as nuisance.
4106. Livery stable.
4107. Obstruction of public highway.
4108. Telephone pole in street as nuisance to abutter.
4109. Liability for permitting nuisance on one's premises.
4110. Liability of lessor for acts of lessee.
4111. Prescriptive right to maintain nuisance.
4112. Damages.
- 4112(1). Iowa.
 - 4112(2). Maryland.

B. CRIMINAL LIABILITY

4113. Rendering tank.
4114. Dam and millpond.
4115. Obstruction of street.
4116. Necessity of proving criminal intent.
4117. Proximate cause.

A. CIVIL LIABILITY

§ 4102. Elements of cause of action for private nuisance

§ 4102(1). Alabama

The court instructs the jury that the mere fact, if you believe it is a fact from the evidence, that odors from the septic tank can be detected at times from plaintiff's residence, would not entitle plaintiff to recover damages.¹

§ 4102(2). Arkansas

You are instructed that, if you find from the evidence that the defendant built or constructed its sawdust or shaving pits, and burns its shavings or sawdust in a place where the smoke, cinders, soot, or ashes are blown in on plaintiff's house in such a manner as to necessarily and materially annoy him and his family and disturb them in the peaceable use and comfortable enjoyment of the same, you will find for the plaintiff.²

¹ Murkerson v. Adler, 59 So. 505, 178 Ala. 622.

² Junction City Lumber Co. v. Sharp, 123 S. W. 370, 92 Ark. 538.

§ 4102(3). Indiana

You are instructed that a nuisance is, in contemplation of law, literally an annoyance, and signifies such a use of property or such a course of conduct as, irrespective of actual trespass against others, or of malicious or actual criminal intent, transgresses the just restriction upon the use of property or the conduct of business due to the limitation which the law imposes upon the enjoyment of the property where it interferes with the rightful enjoyment of the property of others.³

You are instructed that a private nuisance is one that affects a single individual, or a determinate number of persons, in the enjoyment of some private right in contradistinction to the public.⁴

§ 4102(4). Missouri

The court instructs the jury that, in determining whether the acts complained of constitute a nuisance, they must take into consideration the locality of the business of plaintiff and that of defendant, the nature of the business that is being conducted by defendant, the character of the machinery he is using, the manner of using the property producing the alleged injuries, and you may also consider the kinds of business, if any, which are being conducted and carried on in the vicinity of these premises.⁵

§ 4102(5). Pennsylvania

You are instructed that, under the pleadings in this case, the plaintiff must show that the defendants, in operating the lead works and shot tower, or one of them, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special or peculiar injury.⁶

You are instructed that the effect of a peculiar and very exceptional idiosyncrasy or susceptibility on the part of a person, by which he or she may be affected by a slight trace of arsenic or lead, which would not in any degree affect other persons, would not be such an injury as would of itself condemn the source of such effect as a nuisance.⁷

§ 4103. Gin plant as nuisance

You are instructed that, if you believe from the evidence that plaintiffs' property was damaged, but that it was so slight as to be merely trivial so as not to affect the market value of the prop-

³ *Merchants' Mut. Telephone Co. v. Hirschman*, 87 N. E. 238, 43 Ind. App. 283.

⁴ *Merchants' Mut. Telephone Co. v. Hirschman*, 87 N. E. 238, 43 Ind. App. 283.

⁵ *Bradbury Marble Co. v. Laclede Gaslight Co.*, 106 S. W. 594, 128 Mo. App. 96.

⁶ *Price v. Grantz*, 11 A. 794, 118 Pa. 402, 4 Am. St. Rep. 601.

⁷ *Price v. Grantz*, 11 A. 794, 118 Pa. 402, 4 Am. St. Rep. 601.

erty, then in that event you will find for the defendants; or if you believe from the evidence that the property of the plaintiffs was damaged, but that said damage was caused alone by the railroad trains, the canning factory, from dust from the streets, or from the vats or the smell from the sewer system, or that said damage caused by these other things mentioned above was increased and added to by said gin, but that said increase, if any, was so slight as to be trivial, and that it did not affect the market value of said property, and did not create a nuisance, then in either event you will find for the defendants.⁸

§ 4104. Factory for production of sulphuric acid fertilizer

The jury are instructed that, if the jury find that the plaintiff is possessed of the premises and dwelling houses referred to in the evidence, and that he leased the ground in the spring of the year —, and erected the dwellings immediately thereafter; and if the jury find that in —, the defendants leased certain ground in the same block with the plaintiff, and erected buildings, and commenced the manufacture of sulphuric acid fertilizers, and that by subsequent assignments they became possessed of certain other premises adjoining, which were leased by — in the fall of the year —, and on which said —, in the following winter, erected buildings and commenced the manufacture of sulphuric acid and fertilizers, and that the said — carried on their business during the daytime and without serious inconvenience to the plaintiff; and if they find that defendant has combined its works, begun in —, or thereabouts, with those of said —, and has largely increased their production by the use of larger quantities of material, and run the same, or a portion thereof, day and night; and that whilst so engaged the defendant caused large quantities of foul and offensive smoke and gas and dust of a suffocating character, and charged with acids, to be emitted from its premises, which settled upon the plaintiff's premises and entered his houses, and that the acids contained therein corrode and injure his buildings, and are destructive to the furniture and clothing therein, whenever exposed to the same, and if they find that said gas and smoke are emitted in such quantities as to cause great bodily discomfort to the plaintiff, and his guests and tenants, and that they produce violent coughing and nausea and headache, and prevent at times the taking of necessary food, and compel the occupants of said dwellings to keep their doors and windows closed at times, or seek relief by leaving the premises, and that thereby the value of plaintiff's property is depreciated, and he has suffered injury

⁸ Hunt v. Johnson (Tex. Civ. App.) 141 S. W. 1060.

by loss of tenants, or of custom, at the public house kept by him, if the jury find such, then the plaintiff is entitled to recover in this action.⁹

§ 4105. Corn sheller plant as nuisance

You are instructed that the erection and operation of a corn sheller and other things connected therewith does not in and of itself constitute a nuisance so long as the same does not materially interfere with the comfortable enjoyment of plaintiff's home as a private residence, or does not by reason of dust, and dirt, etc., materially affect the health of the occupants of said house. Therefore if you should find and believe from the evidence that defendant's corn-sheller plant and appliances connected therewith can be so run and operated that the same will not materially interfere with the enjoyment of the comforts of said home, and so as to not materially affect the health of the occupants of said home, then you are instructed that under the law you could not abate said corn-sheller plant; but, on the other hand, if you should find and believe from the evidence that defendant's corn-sheller plant from the manner of its construction and operation does materially affect the enjoyment of the comforts of plaintiff's home, if it does, or does materially affect and threaten the health of the occupants thereof, if it does, and you further find and believe from the evidence that it is not possible or practicable to operate said plant without materially affecting the health or comfort of the occupants of plaintiff's home, then you are instructed, if you so find and believe, you will return a verdict abating said plant.¹⁰

§ 4106. Livery stable

You are instructed that the maintenance and operation of a livery stable in the city is not unlawful. A stable is not a nuisance per se, or of itself; and, if it is not in fact a nuisance, any person has a perfect right to maintain one in the city. Every man is entitled to use his land in the ordinary and natural way, and if this use and enjoyment, without negligence or malice, and in the absence of conditions creating a nuisance, causes unavoidable injury to his neighbor, there is no legal wrong. If the stable of defendant is not in fact a nuisance, and defendant has not been guilty of malice or negligence, then you cannot find for the plaintiff.¹¹

⁹ *Susquehanna Fertilizer Co. of Baltimore v. Malone*, 78 Md. 268, 20 A. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595.

¹⁰ *Stark v. Coe* (Tex. Civ. App.) 134 S. W. 373.

¹¹ *Porges v. Jacobs*, 147 P. 396, 75 Or. 488.

§ 4107. Obstruction of public highway

The jury are instructed that, if the defendants were guilty of obstructing the public highway as claimed, and the jury further find that the effect thereof was to prevent the free ingress and egress to and from plaintiff's place of business, and that this caused to plaintiff a loss of trade and custom in his business as a merchant, then the defendant would be liable therefor.¹²

§ 4108. Telephone pole in street as nuisance to abutter

You are instructed that under the law the reasonable use of the streets of the city was not an additional servitude for which abutting owners were entitled to compensation; but the mere fact that the property owner has no right to recover damages for the erection of a pole in a street or highway of the city does not prevent the recovery of damages where the pole was so placed and maintained as to interfere with the comfortable and reasonable enjoyment of the premises.¹³

§ 4109. Liability for permitting nuisance on one's premises

You are instructed that, if the railroad company suffers a nuisance to be created or to be continued on its premises, in the pursuit of business for its benefit, when such railroad company has the power to prevent or abate it, it would be liable for any injury resulting therefrom.¹⁴

§ 4110. Liability of lessor for acts of lessee

The court charges the jury that if you find from the evidence in this case that defendants in any way participated in the maintenance of the purification plant in question during the year next preceding the filing of this suit, even though it be through defendant's lessees, ——— and ———, and further find that foul and offensive odors and smells emanated from the same during the year next preceding the filing of this suit that rendered the occupancy of plaintiff's property unpleasant and uncomfortable as a home for himself and his family, though it may have been so only at intervals, then your verdict should be for the plaintiff.¹⁵

§ 4111. Prescriptive right to maintain nuisance

The court instructs the jury that, although they may believe from the evidence that ashes, smoke, gases, soot, cinders, oil, and dust did proceed from defendant's works, and did damage plaintiff's stock of marble, from ——— to the date this suit was instituted, yet, if the jury further find from the evidence that defend-

¹² *Park v. Chicago & S. W. R. Co.*, 43 Iowa, 636.

¹³ *Merchants' Mut. Telephone Co. v. Hirschman*, 87 N. E. 238, 43 Ind. App. 283.

¹⁴ *Jones v. Seaboard Air Line Ry. Co.*, 45 S. E. 188, 87 S. C. 181.

¹⁵ *Jones v. Adler*, 62 So. 777, 183 Ala. 435.

ant had, for at least ——— continuous years prior to any complaint from plaintiff, maintained its said works at the same location, and that said works had, during all that time, discharged ashes, smoke, gases, soot, cinders, oil, and dust in the same manner that they were discharged from ——— to the date this suit was instituted, and if the jury further find that the discharge by said plant of said ashes, smoke, soot, gases, cinders, oil, and dust in said manner was adverse, notorious and undisputed, as defined in instruction No. ———, then their verdict must be for the defendant.¹⁶

§ 4112. Damages

§ 4112(1). Iowa

The jury are instructed that, if said nuisance caused a depreciation in the rental value of plaintiff's property, and that such depreciation was in consequence of such nuisance, then plaintiff would be entitled to recover the loss by reason of such depreciation of rental value in such reasonable sum as may be shown by the evidence for the period of time between ——— and ———, that you may find from the evidence that defendant maintained such nuisance upon plaintiff's premises. And in like manner if you find from a preponderance of the evidence that the plaintiff and his family in their home and house suffered inconvenience and discomfort, as shown to have been suffered during the time between ——— and ———, bearing in mind that the intent of the law is to compensate plaintiff for the injury he has suffered to his use and occupancy and enjoyment of his property, if any is shown, and no more, but in no event in a sum greater than is claimed in his petition.¹⁷

The jury are instructed that the measure of plaintiff's recovery will be the difference, if any is shown, between the fair and reasonable value of the use of his premises as they would have been without the alleged nuisance and the fair and reasonable value of the use of said premises with the existence of said nuisance, and in arriving at the amount you should take into account and consider the rental value of the plaintiff's premises without the alleged nuisance, as shown by the evidence, and the rental value of said premises with the alleged nuisance, as shown by the evidence, the discomfort and annoyance and deprivation of the comfortable enjoyment of the premises suffered by plaintiff and his family, if any is shown, and as shown by the evidence, by reason of the nuisance and offensive smells from the creek, occasioned by defendant's polluting its waters, if shown, and as shown, by the evidence, and allow him such sum as damages as you may find from all the

¹⁶ Bradbury Marble Co. v. Laclede Gaslight Co., 106 S. W. 594, 128 Mo. App. 96.

¹⁷ Boyd v. City of Oskaloosa, 161 N. W. 491, 179 Iowa, 387.

evidence will fully and fairly compensate him for any and all injury to his use, occupancy, and comfortable enjoyment of his premises which is shown by the evidence to have resulted from defendant's having polluted the waters of the creek, if you find from the evidence under the court's instructions that defendant did so pollute the waters of said creek.¹⁸

You are instructed that, if you find for plaintiff, then you will proceed to assess and determine from the evidence the amount of damages he is entitled to recover in this action; the measure of which will be the loss or diminution of the fair rental value of the property in question from the time you find said nuisance was established, if you find that the alleged nuisance in fact existed, up to the commencement of this suit, and find for the plaintiff in such sum.¹⁹

§ 4112(2). Maryland

The jury are instructed that, if they find for the plaintiff, then, in awarding damages, they may consider the interference caused by defendant with the uses to which the property has been put by the plaintiff, including any loss of rental and destruction of business up to the time of bringing this suit, and also any discomfort to the plaintiff occasioned thereby, up to the time of bringing the suit, but not for any injury, if they find such, occasioned by ——— and ———, the predecessors of defendant.²⁰

B. CRIMINAL LIABILITY

§ 4113. Rendering tank

The jury are instructed that if they believe from the evidence beyond a reasonable doubt that the defendant, as charged in the indictment, did suffer the carcasses of dead hogs, offal, or other noisome substances, to be collected and remain near the dwelling houses of the persons named in the indictment, to their physical prejudice or the physical discomfort of other persons in that vicinity abiding, as charged in the indictment, then they are instructed that it is no defense in this case that the defendant rendered the hogs brought to his tank as soon after they were brought there as was possible with his capacity for that work; nor is it any defense that said business, as carried on, was a benefit to a certain class of the community; nor is it a defense that parties took dead hogs to said tank, to be rendered, whether witnesses in this case or not.²¹

¹⁸ *Boyd v. City of Oskaloosa*, 161 N. W. 491, 179 Iowa, 387.

¹⁹ *Shirely v. Cedar Rapids, I. F. & N. W. Ry. Co.*, 37 N. W. 133, 74 Iowa, 169, 7 Am. St. Rep. 471.

²⁰ *Susquehanna Fertilizer Co. of Baltimore v. Malone*, 78 Md. 268, 20 A. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595.

²¹ *Seacord v. People*, 13 N. E. 194, 121 Ill. 623.

§ 4114. Dam and millpond

The jury are instructed that the erection of the dam is not in itself wrongful, nor is the millpond in itself a nuisance; if, however, by reason of natural causes, such as decaying vegetation, which has grown or been brought into the pond by the stream or its natural tributaries, or changes in the topography of the land adjacent to the creek from the operation of natural laws, the pond produces, or contributes to the production of, malaria, or noxious, unhealthy odors, to an extent which injures the health or comfort of the community in general, it would thereby become a nuisance, and the defendants indictable for maintaining it.²²

§ 4115. Obstruction of street

You are instructed that, on the other hand, the contention of the government is, in the first place, that the steps are not a part of the building, and, no matter for what period they existed, they could not change the bounds of ——— street; and, in the second place, that, even if it were true in law that the steps were a part of the building, and true in fact that they existed for a period of ——— years, so that the bounds of the street, as to the territory covered by the steps, would be thereby changed, that as a portion of this piazza was still within the limits of the street as claimed by the state, and as admitted in substance by the defense, this position on the part of the respondent would constitute no defense to this indictment. Now, gentlemen, I instruct you, as a matter of law, that if you are satisfied—and I understand it is admitted or that there is no substantial contention about it—that the bounds of ——— street can be made certain by records, as has been testified to by ———, and that a portion of the piazza was erected by the defendant within the limits of ——— street, then all the evidence introduced by the defense in this case, admitting it to be true, would constitute no defense to this indictment.

§ 4116. Necessity of proving criminal intent

The jury are instructed that, if they believe from the evidence in this case beyond a reasonable doubt that the defendant, within ——— months prior to the finding of the indictment in the case at the county of ———, did suffer or cause the carcasses of dead animals and offal and other noisome substances to be collected near the dwelling houses of the persons named in the indictment, to their prejudice, and in such manner as to interfere physically with their ordinary comfort, then the jury are instructed that it is not necessary for the people to prove a criminal intent on the part

²² State v. Holman, 10 S. E. 758,
104 N. C. 861.

²³ State v. Beal, 48 A. 124, 94 Me.
520.

of the defendant. If the act is proven beyond a reasonable doubt, as charged, the jury will be warranted in finding the defendant guilty.²⁴

§ 4117. Proximate cause

The jury are instructed that the defendants are liable only for such results as flow directly, naturally, and proximately from the pond and dam. Therefore, if you find that the pond and dam are the cause of the nuisance, you should convict the defendants; but if other causes or agencies, to which the defendants have not contributed, and which did not arise from their agency, so affected the pond and dam as to produce the cause of the sickness, then such sickness would be attributed by law to such agencies, and not to the pond or dam, and you should acquit the defendants.²⁵

The jury are instructed that, if other persons, not under the control of the defendants, plow or bring into the pond, or the lands adjacent thereto, substances which decay and produce malaria, or if such persons cut ditches into the stream above the pond, thereby bringing sand and mud into the creek, or if, having cut such ditches, they fail to keep them open, permitting them to become choked and filled up, thereby causing malaria, such result will be attributed to such persons and agencies, and not to the pond, and defendants should be acquitted.²⁶

The jury are instructed that the defendants insist, further, that the dam is not the cause of the accumulation of the sand and mud in the creek and the water in the low grounds, because the creek has not sufficient fall to convey away of its own force the sands which from natural causes and the cultivation of the land come into it. In respect to this phase of the case, if you find from the testimony that the stagnant water, sand, and mud, which produce the malaria, is caused by the natural formation of the bed of the creek, and not by the dam, nor contributed to by the dam, the malaria and sickness consequent thereupon would be attributed to such natural formation and not to the dam. But if the dam either directly causes or increases the inundation of the sand, mud, and stagnant water which produces the malaria, or the water would, if unobstructed, carry off the sand, and the dam so obstructs as to prevent its doing so, the defendants would be guilty. The law will not undertake to apportion the liability for a public wrong. The question for the jury to decide, applying principles of law, is, Does the dam and pond produce the nuisance? If so, defendants are guilty; otherwise, they should be acquitted.²⁷

²⁴ *Seacord v. People*, 13 N. E. 194, 121 Ill. 623.

²⁵ *State v. Holman*, 10 S. E. 758, 104 N. C. 861.

²⁶ *State v. Holman*, 10 S. E. 758, 104 N. C. 861.

²⁷ *State v. Holman*, 10 S. E. 758, 104 N. C. 861.

CHAPTER CCXVIII

OBSTRUCTING JUSTICE

- § 4118. Elements of offense.
4118(1). Arkansas.
4118(2). Delaware.

§ 4118. -Elements of offense

§ 4118(1). Arkansas

You are instructed that, before you can find the defendant guilty of resisting an officer, the city of ——— must prove, beyond a reasonable doubt, that ——— was an officer, and that the defendant knew it at the time and willfully and knowingly refused to submit to the officer; and, if they failed to prove these facts, you should find the defendant not guilty.¹

§ 4118(2). Delaware

You are instructed that the gist of the offense charged against the defendant is the willful and corrupt attempt to interfere with and obstruct the administration of justice. An attempt, whether successful or not, to dissuade or prevent a witness from attending or testifying upon the trial of a cause, evidenced by distinct and unequivocal acts, is indictable.²

¹ Robinson v. City of Malvern, 176 S. W. 675, 118 Ark. 423.

² State v. Curdy, 75 A. 868, 1 Boyce, 208.

CHAPTER CCXIX

OFFICERS

§ 4119. Compensation—Ex officio services for which no fee specified.

4120. Proceedings for removal—Form of verdict.

§ 4119. Compensation—Ex officio services for which no fee specified

The court charges the jury that every service the plaintiff is required by law to perform, and for which no fee or charge is specified, or that cannot be legally charged to either the plaintiff or defendant in any cause before the court, is an ex officio service, for which the plaintiff is entitled to a fair and reasonable compensation, to be paid by the county.¹

The court charges the jury that the plaintiff is entitled under the law to a fair and reasonable compensation for all ex officio service performed by him, which is required by law to be performed, not only such an amount as the commissioners' court may determine the plaintiff to be entitled to receive, but the plaintiff is entitled to receive such an amount as the jury may determine from the evidence in this case, not to exceed the amount claimed in plaintiff's complaint.²

You are instructed that whatever the proof shows the plaintiff's services, for which he is entitled to charge in this case, are reasonably worth, it is the duty of the jury to allow, regardless of the amount that the commissioners may have allowed the plaintiff for said services.³

§ 4120. Proceedings for removal—Form of verdict

You are instructed that, if you find against the defendants, or either of them, your verdict will be: "We, the jury, find that the following cause ——— is true, and is sustained by the evidence, and is true as to the defendants ———;" filling in the blanks with the cause or causes which you find from the evidence, if either, is true in point of fact, and the name of either of the defendants as to whom you find, if you do so find, such cause or causes have been sustained by the evidence before you.⁴

¹ Calhoun County v. Watson, 44 So. 702, 152 Ala. 554.

² Calhoun County v. Watson, 44 So. 702, 152 Ala. 554.

³ Calhoun County v. Watson, 44 So. 702, 152 Ala. 554.

⁴ Eberstadt v. State, 49 S. W. 654, 20 Tex. Civ. App. 164.

CHAPTER CCXX

PARENT AND CHILD

- § 4121. Right to custody of child.
 4122. Liability of parent to third person for goods furnished to, or in support of, child.
 4122(1). Illinois.
 4122(2). Michigan.
 4122(3). North Carolina.
 4123. Implication of promise by father to pay mother for caring for child.
 4124. Recovery by child from third person for supporting parent.
 4125. Liability of third person on agreement to pay daughter for taking care of mother.
 4126. Liability of parent for tort of minor child.
 4126(1). Delaware.
 4126(2). Iowa.
 4127. Ratification by parent of tort of child.
 4128. Right of parent to earnings of minor child.
 4129. Right of parent to recover for injuries to minor child.
 4130. Same—Emancipation.
 4131. Right of parent to recover from master for injuries to minor child employed in hazardous business.
 4132. Same—Consent of parent to employment.
 4133. Same—Imputed negligence.

Right to punish child in exercise of discipline, see ante, § 872.

§ 4121. Right to custody of child

The jury are instructed that the burden is on the defendants, the grandparents of the child whose custody is sought in this case, to prove that the plaintiff, her father, is disqualified or incompetent to have the care, custody, and control of his child.¹

§ 4122. Liability of parent to third person for goods furnished to, or in support of, child

§ 4122(1). Illinois

The jury are instructed that if you find from the evidence that, before the purchase of the goods mentioned in the evidence by the boy, the boy had purchased goods of plaintiff for several years and had them charged to defendant, his father, and that the latter paid for them without objection, then you may infer that the boy had authority to purchase said goods, unless you find from the evidence that notice of a change of relations of defendant to his boy was given to plaintiff.²

§ 4122(2). Michigan

You are instructed that it is claimed on the part of the plaintiff that the defendant's son, M., with the knowledge and consent of the defendant, and at his request, came to the plaintiff's boarding house and requested board, and said that his father would pay for

¹ Clayton v. Kerbey (Tex. Civ. App.) 226 S. W. 1117.

² Murphy v. Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424.

it, as he was learning the drug business and did not earn much money. It is claimed by the plaintiff that she relied upon these representations and boarded the defendant's son, and that at one time when he was sick that she nursed him and took care of him about two weeks; that he remained with her something like a year, when he began to run behind in his board bill, and shortly afterwards left the city. The plaintiff further claims that the defendant, the boy's father, afterwards came to the city of ———, and that she saw him and had a talk with him about the balance due her for the board of his son. Plaintiff further claims that in this conversation defendant admitted that he had told his son to come to ——— and select a boarding place, and that he would pay his board until he was ——— years old. On the part of the defendant it is claimed that he never agreed to pay for his board, or any part of it; that he never authorized his son to procure board from the plaintiff; and that he did not agree to pay any of the boy's board after he became ——— years of age. Now, as a matter of law, I charge you that a father is not ordinarily liable for the board furnished to his son, unless he agrees to pay the same; and I charge you that unless you find that the father told the son to pick out a good boarding house, and that he would pay his board, the father is not liable. That is, the defendant in this case is not liable. But should you find from the evidence in the case that the defendant did agree to pay his son's board, then he is liable, and the plaintiff should recover. The burden of proof to prove this agreement rests upon the plaintiff. She must satisfy your minds by a fair preponderance of evidence that, at the time this son came to her boarding house, he was authorized by the father to procure board upon the father's credit, and that she boarded the son, relying upon the father as the paymaster, and upon him alone.*

§ 4122(3). North Carolina

The court instructs the jury that the obligation rests upon a parent to maintain and support his children, and it does not make any difference whether you find that this defendant abandoned his wife and children, or did not abandon them. If he went off in good faith because he could not stay at home, and left the home of his mother-in-law, it did not relieve him of his responsibility of maintaining and providing for his children, and it was his duty to provide for them as best he could out of the maintenance and support he got. The law does not require that he should maintain and support his children in a style of life that he is not able to support them in, but that he should give them reasonable support

*McCrary v. Pratt, 101 N. W. 227, 138 Mich. 203.

and maintenance for the station of life in which they lived, provided he is able to do so.⁴

The court instructs the jury that if you find, from the greater weight of this evidence, that the defendant failed, during the years from ——— to ———, to maintain and support his children, whether he abandoned them or did not abandon them, and that the plaintiff maintained and supported the children during the ——— years, then the plaintiff would be entitled to recover of the defendant what you shall find is a reasonable amount for clothing and food, and such reasonable incidental expenses, such as medical bills, school-books, and things of that kind, that were reasonably necessary for the maintenance and comfort of those children in the station of life in which they were being reared.⁵

§ 4123. Implication of promise by father to pay mother for caring for child

I further charge you that no promise on the part of the father to pay a mother for anything she may do in the discharge of her moral duties to their offspring can be implied. The mother is as much morally bound to care for, support, nourish, and educate the child as the father, and the law will not allow her to recover for so doing simply because the father omits his duty. If the claimed marriage between those parties is a valid one, and the defendant deserted the plaintiff before the birth of the child, yet the plaintiff cannot recover for the support, care, or education of the child by her without showing an express promise so to do, made within ——— years next before the commencement of this suit; that is, therefore, ———; and consequently, gentlemen, your verdict in this case will be for the defendant.⁶

§ 4124. Recovery by child from third person for supporting parent

I charge you that the plaintiff in this case was legally bound to maintain and care for her said mother at her own expense and charge, under the statute of this state, if she was able to do so. I charge you, further, that the defendant is not legally liable to pay for the expense and maintenance of his sister, in the absence of any agreement to that effect.⁷

§ 4125. Liability of third person on agreement to pay daughter for taking care of mother

You are instructed that, if you find that the defendant was desirous of aiding in the support of his sister, and agreed with the

⁴ Howell v. Solomon, 83 S. E. 609, 167 N. C. 588.

⁵ Howell v. Solomon, 83 S. E. 609, 167 N. C. 588.

⁶ Lapworth v. Leach, 44 N. W. 333, 79 Mich. 16.

⁷ Howe v. Hyde, 50 N. W. 102, 83 Mich. 91.

plaintiff alone as an individual to pay her the charges and expenses of the support and care at her death over and above the pension the old lady received, and was receiving, then the plaintiff would be entitled to recover what such support and care was reasonably worth, considering the situation in life occupied by the old lady and the plaintiff in her lifetime.⁸

§ 4126. Liability of parent for tort of minor child

§ 4126(1). Delaware

You are instructed that, if you find that the dog was killed by the son of the defendant, either under the general or special direction of his father, then the act of killing was, in contemplation of law, the act of the defendant.⁹

§ 4126(2). Iowa

You are instructed that, as the defendant was not in the car, he would not be liable for any damages caused by any negligence in its use, unless it was then being run by some agent or servant of his; that is, some one who with his authority represented him, and was at the time being used in his service or business. Plaintiff says that it was so being run; that it was operated by defendant's son and was occupied by several members of defendant's family. As to that it is the law, and I so instruct you, that if a man owns a car which he keeps, among other things, for use as a pleasure vehicle by his family and permits his son to drive it, if his son takes the mother out for a drive in the car the son would be the agent of the father, and the car under such circumstances would be used in the father's service, the furnishing of comforts and enjoyments within his means to his wife and family being part of a father's business or service. Hence, in this case, if you find that defendant kept this car for use as a family car and permitted his son to take his wife out in it, you would be warranted in finding that on this occasion the son was his agent and was using it in his father's service. As above stated, the burden is upon the plaintiff to prove this by a preponderance of the evidence. If he has not done so you should proceed no further, but should find a verdict for defendant. If he has done so, you should proceed to the second point.¹⁰

§ 4127. Ratification by parent of tort of child

The court further instructs the jury that any proposition made by the defendant to the plaintiff, for the purpose of compromising this suit, unless his proposition was accepted by the plaintiff,

⁸ *Howe v. Hyde*, 50 N. W. 102, 88 Mich. 91.

⁹ *Harrington v. Hall*, 63 A. 875, 6 Pennewill, 72.

¹⁰ *Lemke v. Ady*, 159 N. W. 1011.

would not be a ratification of the act of the son in dogging the hog, and the jury should not take any such propositions into consideration.¹¹

§ 4128. Right of parent to earnings of minor child

The court instructs the jury that, while the father is entitled to the earnings of his minor children unless he consents to their using them, he may relinquish the right to such earnings, and that he has done so may be inferred from his conduct.¹²

§ 4129. Right of parent to recover for injuries to minor child

The court instructs the jury that if you find and believe from the evidence that plaintiff is the mother of ———, and that he is under the age of ——— years, and that the father of said ——— died in ———, and that on the ——— day of ——— the defendant was afflicted with the disease known as smallpox, and after he knew that he had such disease, and while he was so afflicted, he negligently and carelessly communicated to plaintiff's said son said disease and that her said son became sick therefrom, and as a result of having said disease he was unable to perform his usual work, and that plaintiff lost his services by reason thereof, and that at the time of the alleged communication of such disease to her son plaintiff was receiving his wages, then your verdict should be for the plaintiff.¹³

§ 4130. Same—Emancipation

You are instructed that, although the parents of a minor are entitled to the earnings of the minor until he becomes ——— years of age, still the father may emancipate the child by surrendering to him his rights whereby the father allows the child to receive for himself his earnings and forces the child to make his own living and allows him to contract for his services, and collect and use his own earnings, leaving the minor to act on his own responsibility with the same independence as though he had attained the age of ——— years. You are therefore to determine from the evidence whether or not the plaintiff had been emancipated prior to the time of the injuries alleged by him. If you believe from the evidence that the plaintiff's father prior to said time agreed with the plaintiff that the plaintiff should seek employment, contract for his services, and receive pay therefor, earning his own living and keeping all money earned by him free from the authority and control of his father, then you will find that the plaintiff in this case was emancipated.¹⁴

¹¹ Paulin v. Howser, 63 Ill. 312.

¹² Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265.

¹³ Franklin v. Butcher, 129 S. W. 428, 144 Mo. App. 660.

¹⁴ Harris Irby Cotton Co. v. Duncan, 157 P. 746, 57 Okl. 761.

§ 4131. Right of parent to recover from master for injuries to minor child employed in hazardous business

The court instructs the jury that if you believe from the evidence that the defendant the ——— Company, at the time mentioned in plaintiff's petition employed ——— to run, as a newsboy or messenger on the ——— Railway, to sell its papers and other articles on commission, and that said ——— was then a minor, and that such employment of said ——— was dangerous and hazardous for a boy of his age and experience, and that the said defendant had notice and knowledge, or should have known, that such employment was dangerous and hazardous for the said boy, and that the plaintiff was entitled to the services of said boy until he should become ——— years old, and that the said defendant had notice or knowledge, or should have known, that said ——— was a minor, and that the plaintiff was entitled to his services as hereinbefore stated; that the said defendant employed the said boy without the consent of the plaintiff, or without her acquiescence after knowledge of such employment; and if the jury further believe from the evidence that the plaintiff has been deprived of the services of said boy by reason of the personal injury inflicted upon the said boy in consequence of such employment by the said defendant—then the jury shall find for the plaintiff.¹⁵

§ 4132. Same—Consent of parent to employment

The court instructs the jury that if they believe from the evidence that the plaintiff had consented to her son's employment in the services of the defendant, the ——— Company, as news agent on a railroad train, then plaintiff is charged with having assumed all the ordinary dangers and risks of said employment, provided the injury complained of did not result from some act or neglect of said defendant, its agents or employes.¹⁶

§ 4133. Same—Imputed negligence

The court further instructs the jury that the negligence of the said ———, if you believe there was such negligence on his part, which contributed to the injury complained of, cannot be imputed to the plaintiff; and if you are satisfied from the evidence in this case that the said defendant, the ——— Company, was negligent, and that such negligence directly and approximately caused the injury complained of, then the plaintiff is entitled to recover, unless you further find from the evidence that the plaintiff was guilty of some act or acts of negligence which directly and approximately contributed to the injury to the said boy.¹⁷

¹⁵ *Union News Co. v. Morrow*, 46 S. W. 6, 20 Ky. Law Rep. 302.

¹⁶ *Union News Co. v. Morrow*, 46 S. W. 6, 20 Ky. Law Rep. 302.

¹⁷ *Union News Co. v. Morrow*, 46 S. W. 6, 20 Ky. Law Rep. 302.

CHAPTER CCXXI

PARTITION

§ 4134. Oral agreement for partition.

§ 4134. Oral agreement for partition

The jury are instructed that, if H. and Y., after having bought this land agreed upon a division of it, and if H., upon that agreement, went into possession of the west part of it, or if H. and Y. agreed upon a division by which H. was to take the west part, and after that a line was run, and agreed on dividing the west from the east side at a time when H. was holding and occupying the west part and Y. the east part, then the absolute fee-simple title vested in H. to the west part to the dividing line agreed upon, and the same kind of title vested in Y. to the east part; that is to say, if these two parties, H. and Y., agreed between them that one would take the west part and the other the east part, and a line was run, and each took possession of what he had agreed to take, then that became a conveyance of the land in law as between the parties, and if Y. had the east part under such agreement, when the line was run, then Y. took title to the east part, and if H. took the west part under that agreement, and that was the understanding at the time the division was made, and H. took possession with the knowledge and consent of Y., and Y. took the east part, then H. took an absolute title to the west part, and it became his without any deed.¹

¹Yaughn v. Harper (Ga. App.) 106 S. E. 100.

CHAPTER CCXXII

PARTNERSHIP

- § 4135. What constitutes.
 - 4135(1). Georgia.
 - 4135(2). Illinois.
 - 4135(3). Oklahoma.
 - 4135(4). Washington.
- 4136. Same—Estoppel to deny existence of relation of partnership.
 - 4136(1). Iowa.
 - 4136(2). Maryland.
- 4137. Same—Matters considered in determining issue.
- 4138. Same—General reputation as evidence of actual partnership.
- 4139. Same—Sufficiency of evidence.
- 4140. Power of partner to bind firm on contract.
 - 4140(1). Nebraska.
 - 4140(2). Virginia.
- 4141. Same—Liability for acts of partner not done in course of firm business.
- 4142. Same—Authority after firm has quit doing business in ordinary way.
- 4143. Same—Ratification.
- 4144. Right of partner to limit liability by giving notice to prospective creditors.
- 4145. Liability of firm for tort of member.
 - 4145(1). Illinois.
 - 4145(2). North Carolina.
 - 4145(3). Virginia.
- 4146. Ratification of tort of partner.
- 4147. Rights of individual creditors.
- 4148. Appropriation of assets of firm to pay individual debts.
- 4149. Liability for wrongful levy on firm property for individual debt of partner.
- 4150. Liability of retiring partner on contracts made after retirement.
 - 4150(1). Oklahoma.
 - 4150(2). Texas.
- 4151. Same—Sufficiency and effect of notice to third persons of dissolution of firm.
 - 4151(1). Illinois.
 - 4151(2). Oklahoma.
- 4152. Accounting between partners—Secret profits.
- 4153. Right of retiring partner, after dissolution of firm, to enter into competitive business.
- 4154. Limited partnership—Requisites of formation.
- 4155. Same—Necessity of record of certificate of formation.
- 4156. Action against persons as partners to recover price of interest of former partner.
- 4157. Action against partner individually—Defense that copartner should be joined.
- 4158. Action against firm on note given by partner—Recovery on implied contract.
- 4159. Right of partner to recover on claim due firm.

§ 4135. What constitutes

§ 4135(1). Georgia

The jury are instructed that, if you believe the defendants entered into business for the purpose of instructing persons in grad-

ing cotton, and, after certain expenses were paid, the net profits of the business were to be divided between the defendants, this would constitute a partnership between the defendants, and both parties would be liable for the debts of the concern.¹

§ 4135(2). *Illinois*

The court instructs the jury that, to constitute a partnership as to the partners themselves, it is only necessary that each of them contribute either capital, labor, credit, skill, and care, or two or more of these, and that all the contributions are put together into a common stock or common enterprise, to be used for the purpose of carrying on business for the common benefit.²

§ 4135(3). *Oklahoma*

The jury are instructed that, where parties enter into an agreement to engage in a business and divide the profits and share the expenses equally such an agreement, in the eyes of the law, constitutes a partnership.³

§ 4135(4). *Washington*

I charge you, further, that if J. was to furnish the labor, and Mrs. D. was to furnish the capital, and then they two were to divide the profits of the business, that that would make them partners.⁴

§ 4136. *Same—Estoppel to deny existence of relation of partnership*

§ 4136(1). *Iowa*

The jury are instructed that, if a person voluntarily and knowingly holds himself out, by his acts or language, to the public or to third persons, as the partner of another, and a third person deals with that other on the faith of an existing partnership, then the person so holding himself out will be liable as a partner to the person so dealing, notwithstanding there was, in fact, no such partnership. As applied to the case at bar, if you find from the preponderance of the evidence that the said C., deceased, represented to plaintiff's assignor, E., that he was a partner of G., and that he would be liable for goods to be sold and charged to G. for the use of the partnership, then said C. would be liable as partner, if the goods were furnished by the said E. in reliance upon such representations, regardless as to whether there was, in fact, a partnership between G. and C. or not.⁵

¹ Walls v. Atlanta Newspaper Union, 81 S. E. 868, 141 Ga. 594.

² Swannell v. Byers, 123 Ill. App. 545.

³ Cogdall v. Cottrell, 198 P. 581.

⁴ Dow v. Dempsey, 57 P. 355, 21 Wash. 86.

⁵ Crist v. Tallman, 179 N. W 522.

§ 4136(2). Maryland

The court instructs the jury should it find from the evidence in this case that the defendant, on ———, signed and delivered to the plaintiff the promissory note for \$—— sued on in this case, and should the jury further find that the said promissory note was given to and accepted by the plaintiff in payment of a subscription for that amount made by the said ———, deceased, and that upon the faith of such subscription the plaintiff had incurred obligation to third parties, and that said note is still unpaid, and if the jury shall believe from all the evidence in the case that at the time of the making of the note upon which this suit is brought, the defendant held himself out to the plaintiff or to its treasurer, ———, as a copartner in the firm of ———, and the said plaintiff or its treasurer had reasonable grounds to believe that he was such partner of the firm, which he believed so to exist, and had no knowledge to the contrary, then the plaintiff is entitled to recover against the defendant the amount of said note, with interest from the date thereof to date of verdict, less such sum or sums as the jury may find to have been paid thereon, notwithstanding the jury may find that the said defendant was not, in fact, a partner in said firm of ——— by any contract of partnership.⁶

§ 4137. Same—Matters considered in determining issue

The jury are instructed that in determining whether the plaintiffs, ——— and ———, intended to be partners and were partners in the transactions above referred to, you have the right to take into consideration, not only the agreement, if any, made between them when the transaction began, but also their acts and conduct in managing and conducting the business in which they were engaged.⁷

§ 4138. Same—General reputation as evidence of actual partnership

The jury are instructed that evidence as to the general reputation of the existence of a partnership, while admissible as it may tend to prove a belief on the part of the plaintiff that there was a partnership and his reliance on the existence of the same, will not prove that there was an actual partnership, and it cannot be considered by you for such purpose, as no one can be made a partner against his consent on the mere declarations of another that such one is connected with him in partnership against one having

⁶ Erdman v. Trustees of Eutaw Methodist Protestant Church, 99 A. 793, 129 Md. 595.

⁷ Pasche v. South St. Joseph Town-Site Co. (Mo. App.) 190 S. W. 30.

no knowledge of such declarations and not consenting to the same.⁸

§ 4139. Same—Sufficiency of evidence

The court instructs the jury that ——— was a tenant in common of the real estate in ———, and had an interest in the management of the property; that his taking part in such management, and his cutting down and disposing of the timber with the other tenants in common, did not necessarily make him a partner with them; that they are to weigh and consider the evidence derived from his acts and declarations, and if, upon a view of the whole case, they think it more probable that whatever he did and said referred solely to his interest as a tenant in common, and not to his interest as a partner, they should return their verdict for the defendant. But if they believe it more probable that his acts and sayings proved him to be a partner in the firm of ———, and did not refer solely to his interest as a tenant in common, they should find for the plaintiff.⁹

§ 4140. Power of partner to bind firm on contract

§ 4140(1). Nebraska

You are instructed that, if you find from the evidence that ——— and ——— were partners respecting the land mentioned in the evidence and the crops to be grown thereon, then, and in that event, any contract made in the line of said partnership by either of them would be binding on both, and the first transfer, made in good faith, and for a valuable consideration, by either of them, respecting the leases in controversy, would be binding on all parties concerned, and the party taking such first assignment would acquire the first and best title thereto.¹⁰

§ 4140(2). Virginia

The court instructs the jury that when a partner of a trading partnership borrows money professedly for the firm, and executes therefor a negotiable instrument in the partnership name, it binds all the partners, whether the borrowing were really for the firm or not, or whether he diverts or misapplies the funds or not, provided the lender is not a party to the intended fraud; and the burden is not on the lender to prove value or lack of knowledge of the fraud.¹¹

⁸ *Anfenson v. Banks*, 163 N. W. 608, 180 Iowa, 1066, L. R. A. 1918D, 482.

⁹ *Chase v. Stevens*, 19 N. H. 465.

¹⁰ *Ulrich v. McConaughey*, 96 N. W. 645, 69 Neb. 773.

¹¹ *Pettyjohn v. National Exchange Bank of Lynchburg*, 43 S. E. 203, 101 Va. 111.

§ 4141. Same—Liability for acts of partner not done in course of firm business

The court instructs the jury that a partnership can only exist, as between the parties themselves, in pursuance of an agreement to which the minds of all have assented; but that, when created, each partner has full power and authority to bind all the partners by his acts and contracts in relation to the business of the partnership, and as between the firm and third parties dealing with them in good faith, such acts and contracts are valid, whether his copartners do or do not assent to the same, provided the act is done within the scope of partnership business and professedly for the firm; but the relation of the partnership confers no authority on one party to bind the others except as to transactions within the scope of the partnership business. And if you believe that said F., M. & H. were partners, yet, if you believe that the partnership existing between them was entered into for the sole purpose of buying and selling cattle, then such partnership relation could not authorize either party to sign the firm name as sureties on the bond of a third party; and if you find that the bond sued on was signed by M. without the consent of said F. and H., and without authority from them, then you should find in favor of said F. and H., unless you should further find that said F. and H., after being informed that the bond was so signed by M., consented to the same.¹²

You are further instructed that a partnership, as such, may engage in a transaction outside of its regular business, if all the partners agree thereto; and, if they do so engage in other transactions, the acts of one partner, done in respect to such transaction, will bind the firm; and, if you believe from the evidence that said F., M. & H. were partners, and that the purpose of the partnership was to buy and sell cattle, yet, if you believe from the evidence that said F. and H. authorized said M. to sign the firm name to this bond sued on, then each of them so agreeing to the signing of the same would be bound by the acts of said M.¹³

§ 4142. Same—Authority after firm has quit doing business in ordinary way

The court instructs the jury that it is only while the firm of G. & V. engaged in trade—buying and selling goods in the ordinary way of merchants—that V. had the right to sign the name of the firm or the name of G. to promissory notes for debts of the firm, without authority from G. When the firm disposed of the entire stock of goods and quit buying and selling goods in the ordinary way, then and thereafter neither partner had a right, without au-

¹² Fore v. Hittson, 8 S. W. 292, 70 Tex. 517.

¹³ Fore v. Hittson, 8 S. W. 292, 70 Tex. 517.

thority from the other partner, express or implied to make or sign notes in the name of the firm or of each other in favor of one who knows the firm itself is no longer engaged in buying and selling goods in the ordinary way of merchants.¹⁴

The jury are further instructed that the firm of G. & V. and each of them had the right to collect and pay debts of the said firm after the partnership ceased to buy and sell goods, and the jury are also instructed that the mere collection and payment of partnership debts by V. or by G. & V. gave V. no right or authority to write G.'s name on the note sued on or any other notes given by V. after the said firm quit buying and selling goods.¹⁵

§ 4143. Same—Ratification

The court instructs the jury that the mere fact that a partner, after knowledge that another partner has given a note in the name of the firm in a transaction outside the scope of the partnership business, keeps silent and does not repudiate the act, does not of itself amount in law to ratification or adoption. Ratification is in the nature of an affirmative act, which in such a case cannot be established by a mere omission to avow. The partner is not bound, as a matter of law, to deny his liability until he is prosecuted.¹⁶

§ 4144. Right of partner to limit liability by giving notice to prospective creditors

You are instructed that if, on or about ———, the defendant notified the plaintiff to not further extend credit to ——— or H. & E., and that he would not thereafter be responsible for such credit, and if thereafter plaintiff extended credit to ———, either on his individual account or to the firm's account, then the defendant cannot be held liable to plaintiff for any goods sold or credit extended after such notification.¹⁷

§ 4145. Liability of firm for tort of member

§ 4145(1). Illinois

You are instructed that a fraud committed by one partner, in the course of the partnership business, binds the firm, even though the other partners have no knowledge of or participation in the fraud, and an action will lie against the firm in respect thereto.¹⁸

The jury are further instructed that the defendants now on trial are not responsible for any fraud committed upon the plaintiff by ———, in selling the interest of his copartners, the defend-

¹⁴ Seufert v. Gille, 131 S. W. 102, 230 Mo. 453, 31 L. R. A. (N. S.) 471.

¹⁵ Seufert v. Gille, 131 S. W. 102, 230 Mo. 453, 31 L. R. A. (N. S.) 471.

¹⁶ Brown v. First Nat. Bank of Temple, 130 P. 140, 35 Okl. 726.

¹⁷ St. Louis Brewing Ass'n v. Elmer, 175 S. W. 102, 189 Mo. App. 197.

¹⁸ Schwabacker v. Riddle, 84 Ill. 517.

ants, in the firm, unless they actively participated in the same, or unless, with the knowledge of such fraud committed by ———, before the signing and delivery of said notes, they permitted the said plaintiff to be deceived into the signing and delivering of the same; by the fraud of said ———, and took the same with the knowledge of such fraud.¹⁹

§ 4145(2). North Carolina

You are instructed that, if you find from the evidence that the defendant B. furnished or rented to D. his railroad on plaintiff's land, and material to build or extend said railroad to other lands in order to remove the timber over the plaintiff's land to the ——— under the contract between the defendant lumber company, defendant B., and D., and that D. negligently kept a foul right of way track with combustible matter thereon, with no spark arrester on the engine and live coals were allowed to fall out of the defendant's fire box or ash pan, on the railroad track and put out fire, which burned over the plaintiff's land to his injury, then B. would be equally liable to plaintiff with the defendant lumber company for damage, if any, done him by the fire.²⁰

You are instructed that, if the operator of said railroad negligently permitted the right of way to become foul with combustible matter, and the leaves, straw, etc., on the right of way caught fire from coals falling from the ash pan of said engine or caught from sparks of the engine and the fire burned over and damaged plaintiff's land, the defendant lumber company would be liable for said damage, notwithstanding D. was an independent contractor operating the road.²¹

§ 4145(3). Virginia

The court instructs the jury that the members of a partnership are liable for the wrongful acts of a partner while he is acting in the ordinary course of the firm's business, and if you believe from the evidence that the letter complained of in the declaration was written by one of the partners while the other partner was out of the city, and that all correspondence in reference to the business of the partnership was left in the hands of the writer of the letter, and that the said letter was written within the scope of the authority of the partner writing the letter, then you must find for the plaintiff against the defendants if you believe from the evidence that the words used in said letter were from their usual construction and common acceptance construed as insulting and tending to violence and breach of the peace.²²

¹⁹ Schwabacker v. Riddle, 84 Ill. 517.

²⁰ Mitchell v. Elizabeth River Lumber Co., 93 S. E. 464, 174 N. C. 119.

²¹ Mitchell v. Elizabeth River Lumber Co., 93 S. E. 464, 174 N. C. 119.

²² Henry Myers & Co. v. Lewis, 92 S. E. 988, 121 Va. 50.

§ 4146. Ratification of tort of partner

You are instructed that, if you find from the evidence that ——— set out the fire, which the defendants afterwards negligently permitted to spread to the property of the plaintiff and burn it, and at the time of setting out the fire the defendants ——— and ——— knew that the fire was being set out, and caused or procured it to be set out, you should answer the first and second issues in favor of the plaintiff, although you should further find from the evidence that they did not set out the fire while acting within the scope of the partnership business.²³

§ 4147. Rights of individual creditors

The court instructs the jury that a partner has no such beneficial interest in the chattels of the firm as will be bound by a general lien of an execution against him individually. His interest is subject to the paramount claims of the creditors of the firm, and a surplus only would be subject to individual debts, and then only by following statutes providing for such cases, and not by sale under execution.²⁴

§ 4148. Appropriation of assets of firm to pay individual debts

The court charges the jury that, if they find from the evidence that there was a partnership composed of A. & B., and that the property sued for was the property of said partnership, and that the property sued for was the property of said partnership at the time the mortgage under which plaintiff claimed title was executed, and that said mortgage was given by B. to secure his individual debt, the jury should find a verdict for the defendant.²⁵

§ 4149. Liability for wrongful levy on firm property for individual debt of partner

You are instructed that, under the law, partnership property cannot be sold under execution against individual members of the firm if the other members of the firm notify the officer in writing of his claims and interests. All an officer can do in such a case is to take an inventory of the property, and have it appraised, and then return the inventory and appraisal with the execution. If, instead of so doing, he proceeds to advertise and sell the property, he is a trespasser, and is liable for actual damages, or actual and exemplary damages.²⁶

You are instructed that if, in this case, you find from the proof, by a preponderance, that H. and J. were partners, or that H.

²³ Barrett v. McCrummen, 38 S. E. 286, 128 N. C. 81.

²⁴ Summers v. Heard, 50 S. W. 78, 66 Ark. 550.

²⁵ Gossett v. Morrow, 58 So. 799, 4 Ala. App. 306.

²⁶ Summers v. Heard, 50 S. W. 78, 66 Ark. 550.

and J.'s wife were partners in the property seized, and that, within _____ days after the seizure, H., in writing, notified the defendant, or his deputy making the levy, that such goods were partnership property, and that he (H.) was a joint owner and partner therein, and that defendant, or his deputy, after such notice, proceeded to advertise and sell the property, the plaintiff is entitled to recover both actual and exemplary damages.²⁷

§ 4150. Liability of retiring partner on contracts made after retirement

§ 4150(1). Oklahoma

You are instructed that, under the statutes of the state of _____, the liability of a general partner for the act of his copartner continues, even after his withdrawal from the partnership, in favor of persons who have had dealings with and given credit to the partnership during his connection with it, until they have had personal notice of his withdrawal, to the extent to which such persons part with value in good faith and in the belief that said partner is still a member of the firm.²⁸

You are instructed that if you find from the evidence that defendant was not a partner in the _____ Company, during the time covered by the transaction upon which this action is based, but had been a partner in said business operating under the same name prior thereto, and that during his connection with said partnership the plaintiff in this case had like business dealings with the same, knowing his connections therewith, that the plaintiff in this case has the right to assume that the connection of defendant with said firm continued until it had personal notice to the contrary; and you are further instructed that the burden is upon the defendant in this case to prove by a fair preponderance from the evidence that defendant had withdrawn from said partnership prior to the time covered by the transaction upon which this action is brought, and that the plaintiff had notice of that fact prior to such time.²⁹

The court instructs the jury that if they find from the evidence that, prior to the first sale of goods by the plaintiff being sued for in this action, a partnership existed between defendant and F., doing business under the firm and style of _____ Company; that F. was the active manager of said company; that he was acting within the apparent scope of his authority in ordering the goods, the purchase price of which is being sued for; and that the plaintiff extended credit on the standing of either or both of the

²⁷ Summers v. Heard, 50 S. W. 78, 66 Ark. 550.

²⁸ Peters Branch of International Shoe Co. v. Blake, 176 P. 892.

²⁹ Peters Branch of International Shoe Co. v. Blake, 176 P. 892.

partners; and you shall further find that the plaintiff had no notice of the dissolution of said firm—then the plaintiff is entitled to recover judgment against these defendants and each of them in the amount sued for, in accordance with the law as given you by the court in these instructions.³⁰

You are instructed by the court that it is for you to determine, from all the facts and circumstances in evidence in this case, as to whether or not the alleged partnership called ——— Company was dissolved by defendant selling out his interest therein to ———, and, if the said defendant did sell out, then as to whether or not the plaintiff, its traveling men or other representatives, learned of that fact. If you find from the evidence that defendant did sell out his interest in the business, and the plaintiff, its traveling men or other representatives, learned of that fact, then from and after acquiring such information the plaintiff had no right to sell goods on the credit of said defendant, and his estate would not be liable therefor.³¹

§ 4150(2). Texas

The jury are instructed that, at the dissolution of a partnership, the members thereof cannot create obligations which will bind the firm, or change the character or form of those already existing, but it devolves upon them to give actual notice to those with whom such firm has been dealing; and any act, done within the scope of the partnership, by one of the members, after its dissolution and before actual notice to those with whom such firm has been dealing, is binding upon all the members of such firm.³²

§ 4151. Same—Sufficiency and effect of notice to third persons of dissolution of firm

§ 4151(1). Illinois

The jury are instructed that, if you believe from the evidence that defendant withdrew from the firm of ——— prior to the giving by ———, the continuing member of such firm, of the note sued on to plaintiff, and that plaintiff had actual notice of such withdrawal, then the law is for the defendant.³³

You are instructed that, as to the plaintiff with whom the co-partnership had had dealings, actual notice, or its equivalent, of the dissolution or the withdrawal of any member of the firm must be shown to protect the retiring member from liability for debts subsequently contracted, and that proof of the mailing of the notice of dissolution of the partnership and of the retirement of cer-

³⁰ Peters Branch of International Shoe Co. v. Blake, 176 P. 892.

³¹ Peters Branch of International Shoe Co. v. Blake, 176 P. 892.

³² Davis v. Willis, 47 Tex. 154.

³³ Holtgreve v. Wintker, 85 Ill. 470.

tain members thereof, properly addressed to persons having had prior dealings with the firm, is *prima facie* evidence that the notices have been received by the parties to whom they were addressed; but such presumption may be rebutted by proof that the same notices were never received.³⁴

§ 4151(2). *Oklahoma*

You are instructed that, in its legal sense, notice is either actual or constructive. Notice is actual when it is directly and personally given to the party to be notified. Notice is constructive when the circumstances known to him are such as ought reasonably to have led him to inquiry, and mere rumors of the fact in the neighborhood are not notice, rendering it obligatory upon the party to investigate them.³⁵

The court instructs the jury that where a member of a partnership withdraws—if he fails to give notice of the fact—his liability continues, unless he can bring home notice to the person seeking to hold him liable, and that on retiring from a firm he can terminate all future liability for its business by giving notice to those who have been accustomed to dealing with the firm, and as to all others by publishing a notice of the dissolution of the firm in the public newspapers of the neighborhood, or the retiring partner may escape liability by proving that persons, dealing with the firm after his retirement, had actual notice of his withdrawal.³⁶

You are instructed that if the plaintiff received information from any source to the effect that defendant had sold out his interest in said alleged firm, called — Company, to —, and which information was such as to cause a reasonably prudent person to believe that it was true, or which information was such or came from such a source that if diligently pursued would have disclosed to the plaintiff the fact that defendant had in fact sold out his interest in said alleged partnership, then the plaintiff was required to act upon such information and investigate its truth, and, if it failed to do so, it is bound by all the facts which it would have learned if it had made such investigation.³⁷

You are instructed that if you believe from the evidence in this case that the alleged partnership between defendant and — was dissolved, and that after such dissolution the traveling salesman or other agents employed by the plaintiff in carrying on its business learned of such dissolution, then you are instructed that the knowledge of such traveling salesman or agents of plaintiff would

³⁴ *Philadelphia & Reading C. & I. Co. v. Kuecken*, 191 Ill. App. 161.

³⁵ *Peters Branch of International Shoe Co. v. Blake*, 176 P. 892.

³⁶ *Peters Branch of International Shoe Co. v. Blake*, 176 P. 892.

³⁷ *Peters Branch of International Shoe Co. v. Blake*, 176 P. 892.

be the knowledge of the plaintiff in this case, and that such salesman or agent or manager of the plaintiff had no right to sell such alleged firm or the said ——— any goods upon the credit of the said defendant after learning and obtaining knowledge and information of such dissolution. You are further instructed that if you believe from the evidence in this case that the traveling salesman for this plaintiff company, or its credit manager or other agents authorized to transact its business, obtained knowledge that defendant had withdrawn from such alleged firm, called ——— Company, and that thereafter the said traveling salesman, credit manager, or other agents of the plaintiffs sold goods to the said ——— Company and sought to be recovered for in this case, then your verdict should be for the defendant and against the plaintiff in this case.³⁸

§ 4152. Accounting between partners—Secret profits

The jury are instructed that in a partnership every partner is required to exercise the utmost good faith towards his copartners, and a partner is not entitled to make a secret profit out of a business transaction connected with the partnership business, but that the partners are all entitled to share equally in all profits made in any transaction connected with the firm business.³⁹

§ 4153. Right of retiring partner, after dissolution of firm, to enter into competitive business

You are instructed that, should you find from the evidence that the plaintiff and the defendant were at one time partners in the telephone business, but should you further find that the said defendant gave notice to the plaintiff that said partnership, if any there was, was dissolved in ———, then you are instructed that the said notice would be sufficient to dissolve said partnership, and unless you find that the defendant had begun the construction of a telephone exchange in the town of ———, during the existence of the partnership between the plaintiff and the defendant, or had done some act in furtherance of the construction of a telephone exchange for himself, then you are instructed that the defendant would not be liable for any damage which might have resulted to the plaintiff by reason of the defendant constructing a local telephone exchange for himself, and you will find in favor of the defendant upon this issue in the case.⁴⁰

³⁸ *Peters Branch of International Shoe Co. v. Blake*, 176 P. 892.

³⁹ *Cogdall v. Cottrell* (Okla.) 198 P. 581.

⁴⁰ *Bishop v. Riddle*, 113 S. W. 151, 51 Tex. Civ. App. 317.

§ 4154. Limited partnership—Requisites of formation

The court instructs the jury that, in order that the special partners in this case may be relieved of the ordinary liability of general partners, the names of the partners of the ———, with a designation of which were general and which were special partners, must have appeared conspicuously on the front of the place of business of said partnership during the time while said partnership was in business; and, if you shall believe from the evidence that this requirement was not substantially complied with, you shall find for the plaintiff against all the defendants.⁴¹

The court instructs the jury that the word “conspicuously” means plain to the eye, easily seen.⁴²

§ 4155. Same—Necessity of record of certificate of formation

The court instructs the jury that if they believe from the evidence that the paper offered in proof in this case as the statement and affidavit under which the ——— Company, Limited, was formed, has not been recorded in the clerk's office of ——— county, state of ———, in a separate book kept for that purpose, or that the same has not been indexed in the name of the ——— Company, Limited, then all the parties defendant are liable as general partners, and you shall find for the plaintiff.⁴³

§ 4156. Action against persons as partners to recover price of interest of former partner

You are instructed that, if you believe from the evidence that the defendants, B. and H., entered into a contract of copartnership, and, as partners, agreed to and did, purchase the interest of plaintiff, in the magazine, “———” and agreed to pay plaintiff the amount of money he had expended with reference thereto, in installments, at one and two years, and that, in pursuance to said contract, it was agreed between defendants that defendant B. should submit the agreement defendants had made to the plaintiff for his acceptance or rejection, and you shall further believe that, in pursuance to the agreement between the defendants, said agreement, or the terms thereof, was submitted to the plaintiff by defendant B., and that the plaintiff accepted same, you will find for the plaintiff the one-half of the money he has invested in the magazine, to wit, the sum of \$———, with interest thereon from

⁴¹ R. S. Oglesby Co. v. Lindsey, 72 S. E. 672, 112 Va. 767, Ann. Cas. 1913B, 913.

S. E. 672, 112 Va. 767, Ann. Cas. 1913B, 913.

⁴² R. S. Oglesby Co. v. Lindsey, 72

⁴³ R. S. Oglesby Co. v. Lindsey, 72 S. E. 672, 112 Va. 767, Ann. Cas. 1913B, 913.

——, until paid; and, unless you so believe, you will find for defendants.⁴⁴

You are instructed that, unless you believe that a partnership was entered into and existed between defendants, B. and H., at the time the contract with the plaintiff is alleged to have been made, you will find for the defendants.⁴⁵

§ 4157. Action against partner individually—Defense that co-partner should be joined

You are instructed that the plaintiff brings this action against the defendant individually. Under the issues as presented, the defendant could not avail himself of the fact, if it is a fact, that at the time plaintiff claims that the cause of action arose the defendant was in partnership with some other person, who would be jointly liable with him. In order to avail himself of this defense it would be necessary to specially set it up in his answer; and not having done so, he has waived it, and cannot now avail himself of that defense.⁴⁶

4158. Action against firm on note given by partner—Recovery on implied contract

The court instructs the jury that, if the plaintiff is entitled to recover in this action, such recovery must be by virtue of the notes sued on, and not by virtue of any contract that might be implied from the application of the proceeds of the said notes.⁴⁷

§ 4159. Right of partner to recover on claim due firm

You are instructed that, if you find that any item charged in the plaintiff's claim herein is the same or any part of any transaction had between the decedent and any firm of which plaintiff was a partner, and that such transaction was part of the firm business, the plaintiff cannot recover for the same in this action.⁴⁸

⁴⁴ *Borum v. Allen*, 84 S. W. 760, 27 Ky. Law Rep. 262. Plaintiff and B. had previously been partners in the publication of the magazine.

⁴⁵ *Borum v. Allen*, 84 S. W. 760, 27 Ky. Law Rep. 262.

⁴⁶ *Hall v. Strode*, 28 N. W. 312, 19 Neb. 658.

⁴⁷ *Pettyjohn v. National Exchange Bank of Lynchburg*, 43 S. E. 203, 101 Va. 111.

⁴⁸ *Shirts v. Rooker*, 52 N. E. 629, 21 Ind. App. 420.

CHAPTER CCXXIII

PATENTS

§ 4160. Pioneer device.

§ 4160. Pioneer device

The jury are instructed that, if you find from the evidence that plaintiff's patented device was a pioneer device, and you should further find from the evidence that the device made and used by the defendant operated on the same principle, and performed the same functions by the same means, or by analogous means or by equivalent combinations, then you are instructed that the device of the defendant would constitute an infringement on the patented device of the plaintiff. If, on the other hand, you should find from the evidence that the patented device of the plaintiff was not a pioneer device, but that it consisted merely of an improvement or improvements upon prior devices, and that all of the elements contained in the plaintiff's device were old elements, and that the claim of the plaintiff consisted merely of a combination of old elements, in such case the plaintiff would be limited to the precise device and combination shown and claimed in his patent. In this connection, you are entitled to consider the admission of the plaintiff, repeatedly made during the trial, that all of the elements contained in his patent are old; his claim being that the only new feature therein is the combination of the old elements.¹

¹ Bassett v. Erickson Const. Co. (C. C. A. Wash.) 213 F. 810, 130 C. C. A. 468.

CHAPTER CCXXIV

PAUPERS

§ 4161. Liability for support as between towns—Requisites of legal settlement.

§ 4161. Liability for support as between towns—Requisites of legal settlement

You are instructed that if, during the entire period of her ——— years residence in ———, J. C. was supported by herself or by other persons without aid or assistance from ———, then she had, within the meaning of the law, maintained herself there without becoming chargeable to the town.¹

You are instructed that it is claimed in argument that at the time J. C. went to F. her home was in R., and that her stay in F. was only a temporary one. That is a question for the jury to decide from the evidence in the case. If the jury find that she was an inhabitant of either R. or D. before she went to F., and that she continuously resided and had her home in F., and nowhere else, for ——— years, and that she maintained herself there during that time in the sense above explained, then she gained a legal settlement in F.²

You are instructed that if, when J. C. went to F., she did not have capacity to form or retain an intention as to her place of residence, or to make choice of such place, this fact of itself would not prevent her from gaining a legal settlement in that town.³

¹ Town of Ridgefield v. Town of Fairfield, 46 A. 245, 73 Conn. 47.

² Town of Ridgefield v. Town of Fairfield, 46 A. 245, 73 Conn. 47.

³ Town of Ridgefield v. Town of Fairfield, 46 A. 245, 73 Conn. 47.

CHAPTER CCXXV

PAYMENT

- § 4162. What constitutes—Payment by check.
 - 4162(1). Delaware.
 - 4162(2). Indiana.
 - 4162(3). Virginia.
- 4163. Payment by note.
- 4164. Payment by delivery of notes of third person,
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§ 4162. What constitutes—Payment by check

Effect of delivery of certificate of deposit, see post, § 5187.

§ 4162(1). Delaware

You are instructed that the plaintiff having kept in his possession the check sent to him by the defendant, from ———, up to and after the time this suit was commenced in ———, in fact until ——— of the same year, without any effort or attempt on the plaintiff's part to return the same, the law will not permit him now to come into court and object to, or question, the tender, for he is by his conduct and actions estopped from making any such claim. If he had returned the check to the defendant before this suit was commenced, then it would have been possible for the defendant before this action was brought, to pay to the plaintiff the sum of \$—— in such a way and in such form, that objection could no longer be properly made.¹

¹ Donovan v. Maloney, 84 A. 1032, 3 Boyce, 453.

§ 4162(2). *Indiana*

You are instructed that there has been a certain check introduced in the trial of this cause, purporting to have been a payment of the amount due the plaintiff, and containing words showing that it would not be paid unless indorsed. If you find from the evidence that the check was given to the plaintiff by defendant, before the agreement to accept the same and the agreement, if any, relied upon by the defendant, could become effective, the check in question must have been indorsed by the plaintiff or some one authorized by her to indorse the same, and unless the defendant shows by a fair preponderance of the evidence that such instrument, or check was accepted and indorsed by the plaintiff in full settlement of her claim, then the giving of such check would not operate as a payment of the claim in question nor as a settlement of such claim.²

§ 4162(3). *Virginia*

The court instructs the jury that the giving of a check by a debtor to his creditors for an antecedent debt is not an absolute abatement and extinguishment of that debt, in the absence of an agreement between the parties giving it that effect; it is only a means of payment, and the debt will not be extinguished unless and until the check be paid. If, therefore, at the time the plaintiff accepted the check from ———, it did not by agreement receive it in full payment and absolute discharge and satisfaction of the debt owing by him to the plaintiff, then the mere fact that said check was accepted by the plaintiff does not preclude it from maintaining this action against the railroad company.³

§ 4163. *Payment by note*

The jury are instructed that if they believe, from the evidence, that the defendants paid the plaintiff the bill in question by their note, and that the plaintiff accepted said note as payment of said bill, then such payment was satisfaction of said bill; and the fact, if the jury shall believe from the evidence it is a fact, that the plaintiff gave said note afterwards to the bookkeeper of the defendants, would not revive said account, unless it shall appear from the evidence that said bookkeeper had authority to receive said note, and also unless it further appears from the evidence that there was an agreement canceling the acceptance of said note as payment of said bill, and reviving said bill.⁴

² Federal Casualty Co. v. Chatman, 121 N. E. 296, 69 Ind. App. 67.

³ Kewanee Private Utilities Co. v.

Norfolk Southern R. Co., 88 S. E. 95, 118 Va. 628.

⁴ Kappes v. Geo. E. White Hardwood Lumber Co., 1 Ill. App. 290.

§ 4164. Payment by delivery of notes of third person**§ 4164(1). Maryland**

The jury is instructed that, if they find that the plaintiff sold to the defendant, ——— tons of acid phosphate, upon the terms expressed in the two papers, dated ———, in evidence, that one of the said papers, purporting to be signed ———, was signed by the defendant, and was, by his authority, delivered to the plaintiff, and that the other of the said papers was written and signed on behalf of the plaintiff by ———, plaintiff's bookkeeper, and delivered to the defendant, and that the said acid phosphate was subsequently delivered by the plaintiff to the defendant and accepted by him, and shall further find that the promissory note of the ——— Company, indorsed by ———, mentioned in the said papers, was, on ———, delivered by the defendant to the plaintiff, and that at the maturity thereof, and before the commencement of this suit, the said promissory note was presented for payment, and was dishonored, and notice thereof and demand of payment sent to the indorser, as stated in the notarial protest in evidence, and that the plaintiff thereupon informed the defendant of the nonpayment of the said note, and required of him to pay for the said phosphate, and that said promissory note is wholly unpaid, and that the plaintiff has offered to return the same to the defendant, then the plaintiff is entitled to a verdict in this case, unless the jury shall further find that an agreement was entered into between the plaintiff and defendant, that the plaintiff should accept the said promissory note of said company, indorsed by ———, in absolute payment for said acid phosphate, and run the risk of said note being paid, and the burden of proving such last mentioned agreement rests upon the defendant.⁵

The jury is instructed that, if the jury shall believe that the contract between the parties to the suit was substantially an agreement to exchange or trade phosphate for the promissory note of the ——— Company, indorsed by ———, offered in evidence, and nothing whatever was said or agreed between them as to recourse or nonrecourse to the defendant upon said note in case of its not being paid, then the failure of the maker and indorser of said note, or either of them, and the comparative worthlessness of said note cannot affect the defendant's liability in this action, and the plaintiff is not entitled to recover, unless the jury shall believe that the plaintiff was induced so to take said note in exchange or trade for

⁵ *Susquehanna Fertilizer Co. of Baltimore City v. Thomas H. White & Co.*, 7 A. 802, 66 Md. 444, 59 Am. Rep. 186.

said phosphate by untrue representations on the part of the defendant on which the plaintiff relied, and had a right to rely.⁶

§ 4164(2). *Michlgan*

You are instructed that it is the contention of the defendants that at the time of this transaction all matters were closed, and that the full payment of these sums as consideration for this stock was made; in other words, that they paid him \$—— in cash, and for the balance of the payments for these shares of stock gave them the notes of the paper company in the sums mentioned. In other words, that these notes were not in security for any personal promise on the part of the defendant to pay, but were given in actual payment. Now, it is well settled in this state that the giving of a promissory note for goods sold or for other valuable consideration is no payment unless it is specially agreed to be so done. In this respect, therefore, I charge you that in order for the defendant to defeat this claim they must show that the three notes were offered by the defendant and were accepted by the plaintiff as full payment for the debt primarily owing by the defendant. The giving of a note by a third person is not payment unless it is so received, and it is a question for you to determine whether it was so received. In other words, that is the main question of fact in this case. It is your province to determine whether or not the notes in question were given and received by the plaintiff and his associates upon —— as payments. In determining this question you have the right to take into consideration all the facts surrounding the transaction. There has been testimony on both sides of this proposition which it is your province to hear and determine. Testimony of the plaintiff as to his understanding, and the testimony of the defendants as to their understanding. You will also consider the subsequent acts and actions of the parties to this proceeding in determining this question, but only in so far as they relate back to the original transaction of —— . That is, you may consider the actions of the parties after the original transaction, so far as they have a bearing as to what was the understanding between the parties on the date, —— . If you find after taking into consideration all of the circumstances both at the time of the transaction and the testimony as to the actions of the parties thereafter, if you find after weighing the testimony that these notes were given as security, then manifestly the claim exists against the defendant for the balance of the purchase price. If you are, on the contrary, satisfied from the testimony and the actions of the parties thereafter and the payments and receipts of interest and all of the circumstances that enter into it,

⁶ *Susquehanna Fertilizer Co. of Baltimore City v. Thomas H. White & Co.*, 7 A. 802, 66 Md. 444, 59 Am. Rep. 186.

if you are satisfied that these notes were given as payment by the defendant to the plaintiff for the balance of the purchase price of the stock, it is your manifest duty to return a verdict of no cause of action in favor of the defendant. The mere fact the notes were not paid or that the ——— Paper Company went into insolvency and nothing was realized, does not give the plaintiffs the right to change their remedy and proceed against these defendants in a personal way. If you find that they received on ———, or shortly thereafter, these notes in payment of the balance due, the fact that nothing was realized does not change the status of the parties in any respect whatever.⁷

I charge you that in order to prove that the notes were accepted as payment, the circumstances surrounding the giving and receiving of the notes and actions of both parties at the time the notes were received and after that time may be taken into consideration. And if you find from the testimony that the plaintiff and his assignors' actions at the time the notes were given and since that time were such as to lead you to believe that he accepted the notes as payment and intended to look to the ——— Paper Company or to the statutory liability of the stockholders of that company under the laws of the state of ——— in enforcing his claim, your verdict must be for the defendant.⁸

§ 4164(3). South Dakota

The jury are instructed that, if you find from the evidence in this case that C. understood that plaintiff was to be released from his liability on the note he gave defendant, and, by reason of such understanding, C. gave the note and mortgage in evidence, this fact alone will not entitle this plaintiff to a verdict, unless you find as a fact by a fair preponderance of the evidence that the understanding to release plaintiff was mutual; that is that defendant also understood that plaintiff was to be released from his liability on said note by the giving of the C. note and mortgage. The burden of proof is on the plaintiff to show by a fair preponderance of all the evidence that it was the mutual understanding of the parties, at the time of the giving of the new note, that plaintiff was to be released from the old note.⁹

§ 4165. To whom payment made

We will say that the defendant could not discharge his liability to the plaintiff for the amount proved by the plaintiff and not denied by the defendant in this case, except by payment thereof to

⁷ *Swan v. Gregory*, 161 N. W. 933, 195 Mich. 457.

⁸ *Swan v. Gregory*, 161 N. W. 933, 195 Mich. 457.

⁹ *Grissel v. Bank of Woonsocket*, 80 N. W. 161, 12 S. D. 93.

the plaintiff, or to some person authorized by the plaintiff to receive the same; that any payment by the defendant to any person other than the plaintiff or its authorized agent, constituted such other person the agent of the defendant, and payment to such other person would not thereby discharge the defendant's liability.¹⁰

§ 4166. Presumptions as to payment

The jury is instructed that, while the defendant does not plead the statute of limitations as a legal defense to this action, nevertheless, if the jury find from the evidence that, after the time the plaintiff claims he paid the note in controversy, said defendant visited ——— on business and pleasure on several occasions, and met and conversed with plaintiff, and if you further find from the evidence that said plaintiff did not say or intimate to defendant anything concerning said note, or that he had paid the said note, or that said defendant was indebted to him in any way, and if you further find from the evidence that the plaintiff made no demand of any kind on said defendant to pay said note until ———, such facts should be considered by you in connection with all the facts given in evidence in determining wherein lies the truth of the controversy.¹¹

§ 4167. Receipt as evidence of payment

Receipt as evidence as to application of payment. see post, § 4171.

§ 4167(1). Alabama

The court charges the jury that the receipt given by ——— to ———, is not a full discharge of the debt, if they find that there was a mistake in the calculation of the interest due at time.¹²

§ 4167(2). Arkansas

The jury are instructed that when it is shown by the defendant that the note has been marked paid by the plaintiff, and the plaintiff seeks to avoid the issuance of his receipt of payment on the ground of mistake, the burden of proof is upon the plaintiff, and he must overcome this presumption of payment by a preponderance of testimony.¹³

§ 4167(3). California

You are instructed that a receipt is never conclusive; it is always open to explanation, and the purpose for which it is given may be shown.¹⁴

¹⁰ Stromberg-Carlson Telephone Mfg. Co. v. Derrickson (Del.) 84 A. 1029, 3 Boyce, 444.

¹¹ Hubenthal v. Gibbons, 150 N. W. 1067, 168 Iowa, 630. Plaintiff claimed that the note in question was paid by him as surety for defendant.

¹² Hart v. Sharpton, 27 So. 450, 124 Ala. 638.

¹³ Continental Gin Co. v. Benton, 149 S. W. 528, 104 Ark. 367.

¹⁴ Brown v. Crown Gold Milling Co., 89 P. 86, 150 Cal. 376.

§ 4167(4). Illinois

The jury are instructed that the receipt, indorsed on the back of the policy of insurance in evidence in this case, the signature to the same being admitted to be in the handwriting of the said ———, is evidence of a satisfactory character that the said ——— received the amount of money in said receipt specified, and that, to do away with its force, the testimony should be convincing, and the burden of proof to explain or contradict said receipt rests on the defendant.¹⁵

§ 4167(5). Michigan

You are instructed that, if you are satisfied that the receipt was given under the circumstances I have detailed, as claimed by claimant, then, notwithstanding the fact of its appearing to cut off from claimant any right to recover, you will cast aside the receipt, and give him such damages as you, under the instructions I have given you, determine he is entitled to.¹⁶

§ 4167(6). Missouri

You are instructed that under the law a receipt is only prima facie evidence of payment and may be explained, and although the jury may believe that plaintiff signed the receipt in evidence, if they further believe from all the evidence in the case that it was not signed by plaintiff as a receipt in full for the identical services and account sued for, the jury should disregard the receipt.¹⁷

§ 4168. Application of payments

§ 4168(1). Georgia

The jury are instructed that the general rule of law is that the oldest lien and the oldest item in an account will be first paid, the presumption being that such was the fair intention of the parties.¹⁸

§ 4168(2). Illinois

The court further instructs the jury, for the plaintiffs, that, in deciding whether payments made by defendants to plaintiffs were made on the ties or on the construction contract, the jury will take into consideration all the evidence given in regard to the payments, how they were to be applied, what they were talking about when the payments were made, and in this manner arrive at the intention of the parties paying and receiving the money.¹⁹

¹⁵ Vigus v. O'Bannon, 8 N. E. 778, 118 Ill. 334.

¹⁶ Hooker v. Van Slambrook, 86 N. W. 402, 127 Mich. 61.

¹⁷ Lipperd v. Lipperd's Estate, 163 S. W. 934, 181 Mo. App. 106.

¹⁸ Lawton v. Blitch, 10 S. E. 353, 83 Ga. 663.

¹⁹ Snell et al. v. Cottingham et al., 72 Ill. 124. This instruction does not tell the jury that application of payments can only be made by the parties.

§ 4169. Same—Right of debtor**§ 4169(1). Alabama**

You are instructed that, if plaintiff owed defendant both a book account and the mortgage debt, plaintiff had a right to have the payment of \$—— applied to either debt he chose, and if in fact he directed defendant to credit the payment of \$—— on the mortgage debt, when he made the payment, defendant had no right to apply it to the book account.²⁰

§ 4169(2). Nebraska

The court instructs the jury, as a matter of law, that a debtor has a right, in paying money or transferring property in satisfaction of his debts to a creditor to whom several and distinct debts are due, to direct to which indebtedness such a payment or transfer of property shall operate as a credit, and the creditor is bound to allow the credit for said payment or transfer of property as directed by the debtor. And should you find from a preponderance of all the evidence that the defendant directed the plaintiff to credit all purchases of property made at such defendant's sale upon the note herein in controversy, and should you further find that property was purchased thereat by said plaintiff, you are further instructed that the amounts of said purchases of property are to be allowed upon said note, even though you should find from a consideration of the evidence that said plaintiff did in fact credit the same upon other notes of defendant, and you are to allow all amounts of such purchases that you may find to have been so made herein as a credit upon the note in controversy.²¹

§ 4170. Same—Burden of proof as to application of payments

The court instructs the jury that, where the plaintiff proves, by a preponderance of the evidence, that certain sums of money have been paid to the defendant, and the defendant claims that said payment was made upon some other demand or account, which he claims he then held against plaintiff, the burden of proof is on the defendant to show by a preponderance of evidence that there then was a subsisting and unpaid debt due defendant from plaintiff upon which such payment was applied.²²

§ 4171. Same—Receipt as evidence as to application

You are instructed that the receipt for \$—— is not conclusive that the payment was directed to be made on the book account. If you believe from the evidence that plaintiff did not agree to its

²⁰ *Lynn v. Bean*, 37 So. 515, 141 Ala. 236.

²¹ *Murray v. Schneider*, 90 N. W. 206, 64 Neb. 484.

²² *Prall v. Underwood*, 79 Ill. App. 451.

being applied on the book account, but directed its application to the mortgage, then the language of the receipt does not show that the payment was made on the book account.²³

§ 4172. Recovery back of payments—Payments under mistake of fact

Right to recover back usurious payments as dependent on whether they were voluntarily made, see post, § 5125.

You are instructed that, if you believe from the evidence that, in paying the money to defendant, ——— paid it in cash, and was acting for the person, G., who called himself ———, and not for plaintiffs, and that said money was paid and received in full payment and satisfaction of a claim of defendant against said G., and for money lent said G. by defendant, without knowledge or notice by the defendant, at the time he received said money, that said G. had forged any papers to secure the money from plaintiffs, or had perpetrated any other fraud upon plaintiffs, and the defendant received said money in good faith, in full payment and discharge of said claim, then you cannot find for the plaintiffs.²⁴

You are instructed that, if you believe from the evidence that defendant received the money paid him in full payment and satisfaction of a claim he had, if you believe he had such claim against G. for money lent him, and surrendered up to said G. two notes and a mortgage, and if you further believe that he was led to believe, and did believe that, for a period of time between the time of said payment and some time in ———, his said claim had been fully paid up and satisfied, and induced by said belief he forbore during all of said time to attempt to collect or prosecute his claim, you cannot find for the plaintiffs.²⁵

§ 4173. Same—Recovery back of payments as made under duress

You are instructed that it is the claim of the plaintiff that she was induced to pay the sum of \$—— by duress, and I instruct you that duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. Mere apprehension of threats of a civil proceeding or suit based on a summons and garnishment process in a civil proceeding to enforce a claim unaccompanied by any act of hardship or oppression does not render a payment in response thereto involuntary in the sense that it can be recovered back. The question in this case is not, Did de-

²³ *Lynn v. Bean*, 37 So. 515, 141 Ala. 236.

²⁴ *Russell v. Richard & Thalheimer*, 60 So. 411, 6 Ala. App. 73. G. represented himself to be a certain land-

owner, and on such representations obtained a loan of money, both from plaintiff and defendant.

²⁵ *Russell v. Richard & Thalheimer*, 60 So. 411, 6 Ala. App. 78.

fendant have a claim he could enforce if the suit had gone forward? The question is, Did he, through Attorney ———, coerce plaintiff; that is, put her under duress so she was not able to exercise her own free will and agency and thereby was the payment rendered involuntary? If she was not deprived of her free will and agency; then the payment was voluntary, and your verdict should be no cause of action. To constitute duress it is not necessary that physical force be used. Duress is either of the person or of the property of a party, and if you believe from the evidence that, although no force was used, yet if by unlawful acts plaintiff was induced to pay over the money under circumstances which deprived her of the exercise of free will, then I instruct you that the same was such duress as entitles her to maintain this action. In determining the question of duress, sex, age, state of health, and financial condition of the plaintiff should be considered. You have a right to inquire, Is the plaintiff strong and robust or nervous and irritable, and what effect, if any, did that have? Was she under all the circumstances in that condition of mind whereby she exercised a voluntary volition, free, and not under the coercion of others.²⁸

You are instructed that the plaintiff in this case claims that the money involved was paid by her to ——— under what is known in the law as duress; that is, the circumstances were such that she was not acting voluntarily and of her own free will in paying over this money to ——— on the claim asserted against her. I instruct you, gentlemen, that if a claim is presented against a person, and that person voluntarily pays the claim, the money cannot be recovered back simply on the ground that it could not have been legally enforced had the person seen fit to contest the matter rather than pay it. So in this case, if plaintiff saw fit to pay or settle this claim as she did rather than have a lawsuit, or in preference to the notoriety and publicity which would follow a contest, and that she was acting free and of her own volition, then she cannot recover it back, and your verdict should be for the defendant. If you find from the evidence that the defendant did not do anything or say anything which tended to frighten plaintiff or give her cause to think that her person was in danger, or that her property or rights were in danger, but if, on the other hand, he only told her he had a claim for ——— and had started a suit thereon, and would have a summons served on her and garnishment served on ———, and if he did not urge her to pay or to make settlement, but, on the contrary, told her he could not advise her, and that there was no hurry in the matter, and she had better take time and get counsel

²⁸ Welch v. Beeching, 159 N. W. 486, 193 Mich. 333.

and advice, and she paid the money rather than take time and get counsel or to avoid notoriety and publicity, or the trouble and expense of a lawsuit, then she cannot claim to have been coerced, or that the payment was involuntary, and your verdict must be for the defendant.²⁷

§ 4174. Same—Recovery back of moneys as obtained under duress of threats

You are instructed that in this case certain payments of money, aggregating \$——, are admitted to have been made by the plaintiff to the defendant, and one question for you to determine is: Were such payments made while plaintiff was under duress, because of the threats either uttered by defendant or implied from his conduct? "Duress" may be defined as an unlawful restraint, intimidation or compulsion of another to such an extent and degree as to induce such other person to do or perform some act which he is not legally bound to do, contrary to his will and inclination.²⁸

You are instructed that, if you find from the evidence that the defendant obtained the sum of \$—— from the plaintiff, for which plaintiff was not indebted to defendant, and you further find that at the time of such payment, or shortly before, defendant accused plaintiff of theft, and in connection with such charge threatened to accuse him with the commission of such crime, or to cause his arrest therefor, and you further find that such threat to accuse him of crime or cause his arrest caused or induced plaintiff to fear that the defendant would accuse him of crime, or cause his arrest on such charge, and you further find that such money would not have been paid without such threat, and that it was in fact made contrary to plaintiff's will and inclinations, then I say to you the plaintiff is entitled to recover the amount so paid.²⁹

You are instructed that the defendant has admitted the receipt of \$—— from the plaintiff, and is defending this action upon the ground that he was justly entitled to that amount and more from plaintiff, and that such sum was paid to him in settlement of claim. This is an affirmative defense, and it is incumbent upon the defendant to establish it by a preponderance of the evidence, and in this connection I say to you that if you find from the evidence that the payments in question, or either of them, were extorted from plaintiff, because and by reason of threats on the part of the defendant that he would institute a prosecution against the plaintiff or cause

²⁷ Welch v. Beeching, 159 N. W. 486, 193 Mich. 338.

²⁹ Wilbur v. Blanchard, 126 P. 1069, 22 Idaho, 517.

²⁸ Wilbur v. Blanchard, 126 P. 1069, 22 Idaho, 517.

his arrest for theft, and that such threats caused plaintiff to fear that defendant would do so, and you further find that such money would not have been paid without such threats, and it was in fact paid contrary to plaintiff's will and inclinations, because of said threats, then such transaction or transactions would not be a settlement, and you will find for the plaintiff in whatever sum or sums was paid by him by reason of such threats of prosecution or arrest.³⁰

You are instructed that the defendant cannot defend this action upon the mere ground that the charge of theft which he made against plaintiff was true, or, in other words, the truth or falsity of that charge alone is wholly immaterial to this inquiry, as one is not justified in extorting money from even one guilty of crime provided you find any extortion was practiced.³¹

³⁰ Wilbur v. Blanchard, 126 P. 1069, 22 Idaho, 517.

³¹ Wilbur v. Blanchard, 126 P. 1069, 22 Idaho, 517.

CHAPTER CCXXVI

PERJURY

- § 4175. Elements of offense.
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4179(1). Delaware.
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4184. Evidence—Reputation of defendant for truth and veracity.
4185. Consideration of mental condition of defendant.
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§ 4175. Elements of offense

§ 4175(1). Delaware

You are instructed that perjury was an offense at common law, and has been described to be where a lawful oath is administered in some judicial proceeding, or in due course of justice, to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question.¹

§ 4175(2). Oklahoma

You are instructed that the statute under which this indictment is drawn reads as follows: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by the law be administered, states any material matter which he knows to be false, is guilty of perjury." Our statute further provides that it is no defense in a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not in fact affect the

¹ State v. Thomas, 78 A. 640, 2 Boyce, 20.

proceedings in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.²

You are instructed that, before the jury can convict the defendant in this case, you must find from the evidence beyond a reasonable doubt the following facts: First, that the district court of ———, was in lawful session on said ——— day of ———; second, that the grand jury in and for the ——— term of the district court of ——— county was in lawful session; third, that one ——— was then and there the lawful foreman of said grand jury; fourth, that the said grand jury was then and there investigating a charge against ———, ———, ———, and ——— for the crime of gaming by playing at craps for money in ———; fifth, that the said grand jury then and there had the lawful power, authority, and jurisdiction to inquire into said offense and return an indictment therefor; sixth, that the defendant, on or about the ———, appeared before said grand jury to testify concerning the charge against the said persons above named; seventh, that the said defendant then and there took an oath which was administered to him by the said ———, as the foreman of said grand jury, in substance, that the testimony which he, the said defendant, would give before said grand jury would be the truth, the whole truth, and nothing but the truth; eighth, that the said ——— then and there had lawful power and authority to administer said oath; ninth, that the said defendant, while so testifying before said grand jury as under oath, did state to said grand jury, in substance, that on the night when ——— came upon the said defendant, ———, ———, and ——— in a stormhouse at or near ———, he, the said defendant, did not state to ——— that he was in there trying to win a piece of money gambling; that said statements so made to said grand jury were false; that said defendant did make said statement to said ——— on said night; that said defendant then and there well knew that said statement so made by him to said grand jury was false, and it must be shown that said statement was then and there material to the matters under investigation by said grand jury. Should you find all the foregoing facts to have been proved by the evidence in this case beyond a reasonable doubt, it would be your duty to convict the defendant. Should you fail to so find, then you could not convict the defendant upon the allegations contained in the indictment, to the effect that the said defendant did willfully and contrary to his said oath testify to said grand jury, in substance, that on the occasion in question he, the defendant, was in there trying to win a piece of money gambling.³

² Coleman v. State, 118 P. 594, 6 Okl. Cr. 252.

³ Coleman v. State, 118 P. 594, 6 Okl. Cr. 252.

You are instructed that, if the jury believe from the evidence in this case beyond a reasonable doubt that the defendant, on the occasion in question, while the grand jury was investigating the charge above mentioned against the persons above named, after having been sworn by ———, foreman of said grand jury, to tell the truth, the whole truth, and nothing but the truth, did willfully and corruptly and contrary to his said oath make either of the statements above mentioned, and that said statements were then and there false, and that the defendant then and there well knew the same to be false, and that said statements were then and there material to the matters under investigation by the said grand jury, then and in that event, it would be your duty to find the defendant guilty as charged. Should you fail to so find, it would be your duty to acquit the defendant.⁴

The court will instruct the jury as a matter of law that if they believe from the evidence in this case beyond a reasonable doubt that the grand jury on the occasion in question was investigating a charge against ———, ———, ———, and ——— on a charge of gambling by playing at craps for money in said storm cellar at ———, and that the said defendant testified before said grand jury, in substance, that said persons were not in said storm cellar gambling, then this said alleged statement was material, and if the jury should find from the evidence in this case beyond a reasonable doubt that the said defendant, while so testifying before said grand jury as under oath, did state to said grand jury in substance that the said ———, ———, ———, and ——— were not in there gambling, meaning in said stormhouse, and that in truth and in fact the said ———, ———, ———, and ——— were in said stormhouse gambling, and that said defendant then and there well knew that said parties were in said stormhouse gambling, and that said defendant made said statement willfully and contrary to his said oath, and knowing the same to be false when he so made it, and that said statement was then and there material to the matters under investigation by said grand jury, then it would be your duty to find the defendant guilty as charged. Should you fail to so find beyond a reasonable doubt, you should acquit the defendant.⁵

§ 4175(3). Washington

You are instructed that, in order to convict the defendant, the jury must be satisfied beyond a reasonable doubt: First. That the action was pending in this court wherein the state of ——— was prosecuting V. upon an issue joined therein on the charge

⁴ Coleman v. State, 118 P. 504, 6 Okl. Cr. 252.

⁵ Coleman v. State, 118 P. 504, 6 Okl. Cr. 252.

of ———. Second. That this defendant upon the trial of said cause was sworn as a witness in said cause before ———, who was then and there deputy clerk of said superior court, that the evidence which he, the said defendant, would give to the court and jury in the issue joined in said cause between the state of ——— and said V. should be the truth, the whole truth, and nothing but the truth, and that he, the said ———, as such deputy clerk as aforesaid, then and there had authority and power to administer the said oath to said defendant, and that the oath was taken by said defendant before giving his alleged testimony, if you find he did so testify in said cause. Third. That after having been first sworn as a witness in said cause, he did testify to the statements or testimony contained in the information. It is not necessary, however, that they should be proved in the precise words alleged in the information. It is sufficient if they are substantially proven in language and effect as therein alleged. Fourth. That the statements so testified to by the said defendant, if you find he did so testify, were false and untrue, and that the defendant, at the time he gave such testimony, willfully gave the same, knowing the same to be false and untrue.⁶

§ 4176. Elements of false swearing

In the first place then you are instructed that our law provides that, if any person shall deliberately and willfully, under oath legally administered, make a false statement by a voluntary declaration or affidavit which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing, and shall be punished. A false statement, made through inadvertence or under agitation or by mistake, is not false swearing. No person shall be convicted of the offense of false swearing, except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the alleged false statement under oath. The term "deliberately," as used in this charge, means that the statement must have been made with deliberation and after meditation, and that it was not made hastily, through inadvertence, or by mistake. The term "willfully," as herein used, means that the statement must have been made with evil intent and legal malice and without reasonable grounds for believing it to have been lawful, and without legal justification.⁷

§ 4177. Attempt at subornation of perjury—Elements of offense

You are instructed that an attempt at subornation of perjury is an effort to induce a witness to swear falsely in a particular case.

⁶ State v. Douette, 71 P. 556, 13
Wash. 6.

⁷ Welch v. State, 157 S. W. 946, 71
Tex. Cr. R. 17.

A mere general attempt to induce another to swear falsely is not sufficient, but the attempt must have reference to such an act as would be perjury if successful.⁸

You are instructed that, to constitute subornation of perjury, which is the completed act, the party must procure the commission of the perjury by inciting, instigating or persuading the witness to commit the crime; that is, to swear falsely. But although, in order to constitute subornation of perjury, the person incited must actually take the false oath, an attempt (which is the present case), though unsuccessful, to induce a witness to give false testimony, when such an act would be perjury if successful, is indictable at common law as well as under the law of this state. Such is the law as we understand it. But to state the issue in the present case, in somewhat simpler language, we say: The question for the jury to determine is whether the defendant did attempt to induce the prosecuting witness, ———, to swear falsely in a case before the judges and jury sitting in this court. If you believe beyond a reasonable doubt that the defendant did make such an attempt your verdict should be guilty. But if you do not so believe, or if you entertain a reasonable doubt that he made such an attempt, your verdict should be not guilty.⁹

§ 4178. Necessity of showing falsity of statement of defendant

§ 4178(1). Delaware

You are instructed that, to establish the guilt of the accused it is necessary for the state to satisfy you, beyond a reasonable doubt, that the accused did testify, under oath, at the trial of ———, for the murder of ———, in the said court of ———, in this county, and that her testimony was false and was known by her to be false, at the time she gave it, as set forth in the indictment.¹⁰

§ 4178(2). Texas

You are instructed that the defendant is charged with falsely testifying before the grand jury, in substance and effect, that he did not bet at a game played with dice with ——— and ——— or any other person on the branch near his home in ———, on or about ———. The burden of proof is upon the state to prove the alleged false statement beyond a reasonable doubt, and, unless you believe beyond a reasonable doubt that the state has done so, you will acquit the defendant.¹¹

⁸ State v. Johnson (Del.) 84 A. 1040, 3 Boyce, 472.

⁹ State v. Johnson (Del.) 84 A. 1040, 3 Boyce, 472.

¹⁰ State v. Thomas, 78 A. 640, 2 Boyce, 20.

¹¹ Portwood v. State, 160 S. W. 345, 71 Tex. Cr. R. 447.

§ 4179. Intent of defendant and knowledge by him of falsity of testimony or affidavit**§ 4179(1). Delaware**

You are instructed that the charge in this case, in substance, is that upon his application to the justice of the peace for a license to marry, the prisoner at the bar made false answer to the justice as to the age of ———, his intended wife, and that the prisoner knew that the answer was false when he made it. The prisoner's defense, in substance, is that he did not know the age of ———, except as it had been told him by her, and that he believed he answered truthfully and not falsely the questions of the justice.¹²

You are instructed that, the charge being perjury, the issue is whether the defendant knowingly or willfully made a false answer in a matter and in a manner that constitute a violation of the law. If the answer was in fact untrue, in the sense of being incorrect, but was made by the prisoner without knowledge of its untruth and was made by him in good faith and in the belief of its truth, he cannot be convicted of the charge in this indictment. But if you find the prisoner knew the age of ——— to be different from that which he stated under oath and therefore either knowingly or willfully made false answer to the justice, he is guilty of perjury and your verdict should be guilty.¹³

You are instructed that knowledge is an intangible thing resting in the mind, the possession of which may be admitted by the party or be shown by proof of facts, circumstances and surroundings from which it may reasonably and rationally be inferred. It therefore devolves upon you to determine as the issue in this case, from the facts as you have heard them first, whether the prisoner did make the false answer to the justice; or, second, whether he made it willfully or with knowledge of its falsity.¹⁴

§ 4179(2). Indiana

You are instructed that a false statement, purposely made, cannot be said to have been corruptly made, if made by or through surprise, mistake, inadvertence, or while the witness was in such a state of mind on account of physical or mental suffering that he believed in good faith that such facts were in fact true, although false.¹⁵

§ 4179(3). Michigan

The jury are instructed that the question for you to determine in this case is whether the defendant testified honestly in the be-

¹² State v. Dryden, 84 A. 1037, 3 Boyce, 466.

¹³ State v. Dryden, 84 A. 1037, 3 Boyce, 466.

¹⁴ State v. Dryden, 84 A. 1037, 3 Boyce, 466.

¹⁵ Indianapolis Traction & Terminal Co. v. Henby, 97 N. E. 313, 178 Ind. 239.

lief in the truth of his statement. If you have a reasonable doubt that he testified willfully to a falsehood you should acquit him.¹⁶

§ 4179(4). Texas

You are instructed that, if you believe from the evidence in this case that the defendant did dig the well ——— feet deep for the said ———, or if you have a reasonable doubt as to whether he did dig it ——— feet deep or not, you will acquit the defendant. If you believe that the defendant dug a well ——— feet deep, and that it filled up, or if you have a reasonable doubt thereof, you will acquit the defendant. If the employés of the defendant drilled a well for ——— feet deep, the defendant would not be guilty as charged, and, if you so believe or have a reasonable doubt thereof, you will acquit the defendant. Or if you believe from the evidence beyond a reasonable doubt that the defendant made the false statement alleged in the indictment, but that the defendant had been informed by any of his employés that the said well was ——— feet deep, that the defendant believed it to be ——— feet deep at the time he made the statement, he would not be guilty and you will acquit him; or, if you have a reasonable doubt thereof, you will acquit him. Or if you believe from the evidence in this case that the statement alleged to be false was made by the defendant through mistake or under agitation, or through inadvertence, you will acquit the defendant.¹⁷

The jury are instructed that if, at the time the defendant made the affidavit set out in the indictment, he believed said ——— was ——— years of age, he would not be guilty of false swearing and should be acquitted.¹⁸

§ 4180. Materiality of false testimony

§ 4180(1). Delaware

You are instructed that, as to the materiality of the matter to which the accused is alleged to have testified under oath, it must appear either to have been directly pertinent to the issue, or point in question, in the said trial of ———, or tending to prove the issue or point in question in said trial.¹⁹

§ 4180(2). Oklahoma

You are instructed that, as to the materiality of the false statements alleged to have been made by the defendant, the true test of whether the alleged false statements of the defendant made before said grand jury were material is this: Were said statements of

¹⁶ *People v. German*, 68 N. W. 150, 110 Mich. 244.

¹⁷ *Green v. State*, 132 S. W. 806, 60 Tex. Cr. R. 530.

¹⁸ *Aguirre v. State*, 21 S. W. 256, 31 Tex. Cr. R. 519.

¹⁹ *State v. Thomas*, 78 A. 640, 2 Boyce, 20.

such a character that, if true, they could properly influence the action of the grand jury in determining whether or not an indictment should be returned against the parties under investigation? In other words, if this defendant did state to — at the time and place and under the circumstances in question, in substance, that he was in there trying to win a piece of money gambling, would that be evidence tending to show that the parties under investigation were or were not engaged in gaming in said storm cellar at said time? If it would, then said evidence was material. If it would not, then said evidence was not material. If said evidence was not material, then it makes no difference whether the same was true or false, the jury should find the defendant not guilty so far as that alleged statement is concerned.²⁰

§ 4180(3). Texas

The jury are instructed that whether the signature to the instrument, set forth in the indictment and in evidence before you, dated —, was a forgery or otherwise, was a material issue, if the same was under investigation by the grand jury. The true test as to materiality is whether the statement of the witness could have properly influenced the tribunal upon the question at issue and being investigated by it. If it tended to do so, it is material. The degree of materiality is of no importance.²¹

§ 4181. Pleading and proof

You are instructed that, where the indictment contains more than one distinct assignment of perjury upon the same testimony, as in this case, it will be sufficient if any one of them be proved; and proof of the substance is sufficient, provided it is in substance and effect the whole of what is contained in the assignment set forth in the indictment.²²

§ 4182. Necessity of showing that false statement of defendant was that alleged in indictment

You are instructed that, if you believe from the evidence that the defendant swore falsely before the grand jury, still you will not be authorized to return a verdict of guilty unless you further believe beyond a reasonable doubt that the false statement, if any, was substantially the same as set out in the indictment.²³

You are instructed that, if you believe the defendant swore falsely before the grand jury that he did not know of any gaming, or

²⁰ Coleman v. State, 118 P. 594, 6 Okl. Cr. 252.

²¹ Rahm v. State, 17 S. W. 416, 30 Tex. App. 310, 28 Am. St. Rep. 911. This instruction does not submit to the jury the determination of whether the issue concerning which the al-

leged false testimony was given, was material.

²² State v. Thomas (Del.) 78 A. 640, 2 Boyce, 20.

²³ Portwood v. State, 160 S. W. 345, 71 Tex. Cr. R. 447.

that he hadn't played at any game, or that he hadn't played at a game with dice on the branch near his home, or that he hadn't played at a game with ———, ———, or any other person, and you further believe said testimony was false, you would not be authorized to convict him unless you further believe beyond a reasonable doubt that the defendant also testified before said grand jury that he did not bet at a game played with ——— and ——— on the branch near his home in ———, on or about ———.²⁴

§ 4183. Necessity of proving precise words alleged in indictment

You are instructed that the state is not required to prove that the defendant testified before the grand jury in the precise words alleged in the indictment. Upon that point it is sufficient if the state proves beyond a reasonable doubt that the defendant in testifying before the grand jury made the statements in language, effect, and meaning substantially as they are alleged in the indictment.²⁵

§ 4184. Evidence—Reputation of defendant for truth and veracity

You are instructed that, if the jury believe from the evidence that prior to the occasion in question the defendant's reputation in the community in which he lived for truth and veracity was good, then the jury may consider that fact in determining the question of the defendant's guilt or innocence of this charge. But, if, upon a consideration of all the evidence in the case, you believe beyond a reasonable doubt that the defendant is guilty as charged, then his previous good reputation would neither justify nor excuse the offense.²⁶

§ 4185. Consideration of mental condition of defendant

The jury are instructed that you should take into consideration the mental condition of the defendant, whether failing or normal, his memory, whether good or bad, as bearing upon the question of whether he was guilty of the willful, corrupt perjury, charged against him, or the question of a reasonable doubt of his guilt.²⁷

§ 4186. Sufficiency of evidence

The jury are instructed that, in all trials for perjury and false swearing, the law requires that no person shall be convicted of perjury or false swearing, except upon the testimony of two credible witnesses, or one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statement under oath.²⁸

²⁴ Portwood v. State, 160 S. W. 345, 71 Tex. Cr. R. 447.

²⁵ Coleman v. State, 118 P. 594, 6 Okl. Cr. 252.

²⁶ Coleman v. State, 118 P. 594, 6 Okl. Cr. 252.

²⁷ Leaptrot v. State, 40 So. 616, 51 Fla. 57.

²⁸ Aguirre v. State, 21 S. W. 256, 31 Tex. Cr. R. 519.

CHAPTER CCXXVII

PHYSICIANS AND SURGEONS

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A. REGULATIONS OF PRACTICE OF MEDICINE OR DENTISTRY

§ 4187. Criminal liability for practicing without license—What constitutes practicing medicine

§ 4187(1). Delaware

You are instructed that the defendant does not contend that he had a license to practice medicine, but relies on the defense that he treated his patients personally by hypnotism and massage, without prescribing any remedies, and that such treatment is not in violation of the statute. Your inquiry, then, is: Did the defendant, for fee or reward, prescribe remedies or perform surgical operations for the cure of any bodily disease or ailment in this county within two years next before the finding of this indictment?¹

It is the duty of the court to instruct you as to the meaning of the word "prescribe" remedies, used in the statute. In medicine, to "prescribe" remedies is defined to be "to write or to give medical directions; to indicate remedies." It is not necessary that such prescription should be in writing. It may be given or indicated verbally. Any direction given to the patient for drugs, medicines, or other remedies, for the cure of bodily diseases, directing how they are to be applied to or used by the patient, is a prescription within the meaning of the statute. It would make no difference whether the direction was given by the person in charge of the patient himself or by another person, even though he be a licensed physician engaged by and under the control and direction of the defendant in that particular.²

You are instructed that personal treatment of one person by another by hypnotism or massage alone, unaccompanied by any di-

¹ State v. Lawson, 65 A. 593.

² State v. Lawson, 65 A. 593.

rection as to the use of drugs, medicines, or other remedies to be used by the patient, would not come within the term "prescribing remedies" used in the statute. When accompanied, however, by such direction as to the use of drugs, medicines, or other remedies by the patient it would come within the terms of the statute and be in violation thereof. Should you, therefore, be satisfied from the evidence, beyond a reasonable doubt, that the defendant, within ——— years next before the finding of the indictment, in this county, did, for fee and reward, either by himself or by another under his direction, engage in the business of prescribing remedies for curing bodily diseases or ailments, your verdict should be guilty. If you are not so satisfied, it should be not guilty.³

§ 4187(2). Tennessee

The jury are instructed that if the defendant made an examination of his patients, taking blood from the ear, and making a microscopic examination of the blood, and pronouncing what was wrong with him, and then treated him by putting him in the cabinet and turning the lights on him and attempting to perfect a cure in that way, that would be such treatment as comes within the purview of this statute.⁴

§ 4188. Same—What constitutes practice of dentistry

You are instructed that any person shall be understood to be practicing dentistry who shall for a fee, salary, or reward, paid directly or indirectly, either to himself or some other person, perform an operation of any kind upon the human jaws or teeth.⁵

§ 4189. Same—Collection of fee

You are instructed that it is not necessary to show that a separate fee was charged for any specific act as shown in the testimony and alleged in the information to have taken place, but it is sufficient to show that a fee was charged and collected for a series of acts in violation of any of the provisions of this law, as charged in the information, and that the act complained of was one of the series.⁶

You are also charged that the payment for services need not be shown to have been made after the services are alleged to have been performed, but it is sufficient to show that at some time within ——— year before the filing of the information a fee was paid for the services alleged to have been rendered.⁷

³ State v. Lawson, 65 A. 593.

⁴ O'Neill v. State, 90 S. W. 627, 115 Tenn. 427, 8 L. R. A. (N. S.) 762.

⁵ People v. Fortch, 110 P. 823, 13 Cal. App. 770.

⁶ State v. Brown, 79 P. 638, 37 Wash. 106.

⁷ State v. Brown, 79 P. 638, 37 Wash. 106.

§ 4190. Exceptions from prohibition against practicing medicine without a license—Clairvoyants

The court instructs the jury that although she [the defendant] be a clairvoyant, in her line of practice, she is not within the exception specified in the statute if, for the cure, prevention or alleviation of any pain, disease or sickness of those seeking treatment from the defendant, she prescribed or directed any drug or medicine, with the expectation of receiving compensation therefor.⁸

§ 4191. Proof of date of offense as alleged in indictment

You are instructed that it is not necessary that the state should show that the offense was committed upon the exact date set out in the information, but that it is sufficient to show that the offense was committed at any time within ——— year prior to the filing of the complaint or information.⁹

§ 4192. Burden of proof in prosecution for practicing without license

§ 4192(1). California

The jury are instructed that it is not necessary for the people to prove that the defendant did not have a license, whether the defendant has, or has not, or has had, a license, being a matter peculiarly within his own knowledge. The burden is therefore upon him to prove that he has, or has had, a license, if he seeks to make the possession of a license a defense.¹⁰

You are instructed that the burden was upon the defendant to prove that he either had a license from the board of dental examiners of ———, or that at the time of the passage of the act regulating dentistry, approved ———, he had the lawful right to practice dentistry in the state of ———.¹¹

§ 4192(2). Kansas

You are instructed that the statutes of ——— require that, before any person can legally practice medicine for compensation in this state, he must have attended two full courses of instructions and graduated in some respectable school of medicine, either of the United States or of some foreign country, or be able to produce a certificate of his qualification from some state or county medical society. The burden of introducing some evidence tending to prove such qualification is on the defendant.¹²

⁸ Commonwealth v. De Lon, 106 N. E. 846, 219 Mass. 217.

⁹ State v. Brown, 79 P. 638, 37 Wash. 106.

¹⁰ People v. Goscinsky, 198 P. 40.

¹¹ People v. Fortch, 110 P. 823, 13 Cal. App. 770.

¹² State v. Wilson, 64 P. 23, 62 Kan. 621, 52 L. R. A. 679.

§ 4192(3). North Dakota

I charge you, gentlemen of the jury, as a matter of law, that if you believe from the evidence beyond a reasonable doubt that the defendant, on or about ———, in ——— county, state of ———, filed and cut off teeth of horses belonging to the witness, ———, and that the defendant received and accepted pay therefor, and that the defendant did not, at that time, have a permit or certificate to practice veterinary dentistry within the state of ———, then you should find the defendant guilty. In this case it is incumbent upon the state to establish all of the material allegations of the complaint in this case to your satisfaction beyond a reasonable doubt. Before you are authorized to find the defendant guilty of the offense charged in the complaint, you must be satisfied of his guilt beyond a reasonable doubt. If you entertain a reasonable doubt as to the guilt of the defendant, it is your duty to find him not guilty.¹³

B. LIABILITY FOR NEGLIGENCE OR MALPRACTICE AND ACTIONS THEREFOR

§ 4193. Elements of cause of action

You are instructed that, in order to render a verdict in favor of the plaintiff, you must find that the defendant did not render the services for which he was employed, and did not exercise due and ordinary skill and care, such as is required of physicians. And you must also find, if you find that there was an injury, that the injury was occasioned by the lack of skill and care (the skill and care rendered by the defendant); there must be a direct connection between the two. And the court instructs you that, unless it is proven by a preponderance of the evidence that the defendant failed to exercise such reasonable, ordinary, and average learning, care, and skill, in the treatment of plaintiff's injury, then your verdict must be for the defendant.¹⁴

§ 4194. Necessity of securing consent of patient to operation

You are instructed that, no matter how skillful or careful a physician or surgeon may be, he has no right to perform a dangerous operation upon an adult person of sound mind without his consent, even if the patient has consented to another and different operation.¹⁵

You are instructed that consent to the performance of one kind of operation would not be consent to the performance of another and different operation.¹⁶

¹³ State v. Ramsey, 154 N. W. 731, 31 N. D. 626.

¹⁴ Dean v. Seeman (S. D.) 176 N. W. 649.

¹⁵ Robinson v. Crotwell, 57 So. 23, 175 Ala. 194.

¹⁶ Robinson v. Crotwell, 57 So. 23, 175 Ala. 194.

§ 4195. Degree of skill and care required in general**§ 4195(1). Alabama**

You are instructed that, if the jury believe from the evidence that the plaintiff broke his arm, and that the defendant was employed by the plaintiff's father (plaintiff being a minor) to treat and attend the same as a physician and surgeon, and entered upon and undertook such employment, and did set or dress or treat the plaintiff's said arm as a physician or surgeon, and assumed charge of the same, then the plaintiff was entitled to receive from the defendant the care, attention, and skill of an ordinarily skilled physician and surgeon. And if the jury believe that the plaintiff did not receive from the defendant such care, attention, and skill, and that in consequence of not receiving the same, and without fault on plaintiff's part, or on the part of any one else, he suffered increased pain, suffering, and injury, then the jury are instructed that the defendant is liable, and the jury will render a verdict for the plaintiff, and assess his damages found from all the evidence, not exceeding the amount claimed by the plaintiff in his complaint.¹⁷

§ 4195(2). Arkansas

You are instructed that, if the defendant failed to use reasonable care and diligence either in the diagnosis, treatment, or the giving of instructions to the plaintiff or his attendants, and that such failure resulted in the injuries to plaintiff's leg, or any of them, of which he complains, without the fault of the plaintiff, it will be your duty to find for the plaintiff, and to assess his damages at such sum as, in your opinion, taking into consideration all the evidence in the case, will justly, fairly, and reasonably compensate him for such injury or injuries.¹⁸

§ 4195(3). Michigan

I instruct you that, if a person holds himself out to the public as a physician and surgeon, he must be held to possess and exercise ordinary skill, knowledge, and care in his profession. And where an injury results from a want of ordinary skill or attention in the treatment of a case the physician or surgeon is held responsible for such injury. You should notice that I said the physician should exercise the ordinary skill, knowledge, and care required of men in his profession in his treatment. The physician is not required to possess or exercise the highest degree of care and skill known to the profession in order to relieve him from liability; only reasonable care and skill is required, that is, such care and skill as is possessed by men of his profession in general, and I will add to that

¹⁷ *Carpenter v. Walker*, 54 So. 60, 170 Ala. 659, Ann. Cas. 1912D, 863.

¹⁸ *Dunman v. Raney*, 176 S. W. 339, 118 Ark. 337. This instruction is correct as far as it goes.

at least the average degree of knowledge and skill possessed and executed by the members of his profession generally in the locality in which he practices. If defendant did not treat the plaintiff with such ordinary care and skill as I have defined to you, he would be guilty of negligence, and if damage resulted therefrom without fault or negligence on the part of the plaintiff, the plaintiff would be entitled to a verdict at your hands. Should the evidence fail to show that the defendant did not exercise ordinary care and skill in the work he did for the plaintiff, then he would not be guilty of any negligence, and your verdict should be for the defendant.¹⁹

§ 4195(4). Missouri

You are instructed that, if you find and believe from the evidence that defendant was employed to treat and set plaintiff's fractured leg, and that defendant failed to set said fracture and the broken bones of said leg in natural, normal alignment, and said broken bones in proper relation to each other, and failed to splint said broken bones and leg, and failed to apply any other method or device to cause said fractured bones to unite in normal and usual alignment, and permitted said fractured bones to remain in disalignment, and thereby grow together out of normal and proper relation to each other; and if you further find and believe from the evidence that in so doing and in thus setting and treating plaintiff's leg (if he did so set and treat same) defendant failed and neglected to exercise such reasonable skill and diligence as is ordinarily exercised and used in the practice of the profession of defendant by those who practice under like conditions, in the same or similar localities, and that as a direct result thereof plaintiff's leg became crooked, crippled, and deformed—then your verdict will be for the plaintiff.²⁰

The court instructs the jury that it is admitted that defendant as a surgeon undertook, on the ——— day of ———, to operate on the plaintiff and remove a fibroid tumor and remove the uterus, and the court instructs you that in performing this operation it became and was his duty to exercise reasonable skill and care, as an ordinarily skillful and careful surgeon is accustomed to exercise and use in like surgical operations under like circumstances.²¹

The court instructs the jury that the employment of defendant to perform the surgical operation mentioned in the evidence on plaintiff's wife, was not for the exercise of extraordinary skill and care by defendant in the matter of said operation and preparation

¹⁹ *Wilk v. Black*, 154 N. W. 561, 188 Mich. 478. No reversible error.

²⁰ *Wojciechowski v. Coryell* (App.) 217 S. W. 638.

²¹ *Krinnard v. Westerman*, 279 Mo.

680, 216 S. W. 938. In this case an objection that the standard of care should have been restricted to the locality of the defendant was overruled.

therefor, and the use and application of the hot water bag mentioned in the evidence; defendant was only required to exercise reasonable skill and care (that is, such skill and care as an ordinarily skillful and careful surgeon is accustomed to exercise and use in like surgical operations, under like circumstances); and if defendant exercised and used such skill and care in said operation and in the preparation therefor, and in the use of the hot water bag mentioned in the evidence, then the plaintiff cannot recover, although during the performance of said operation the wife of the plaintiff was burned by the hot water bag, mentioned in the evidence, which caused the injuries out of which this suit grows.²²

The court instructs the jury that the defendant was not bound to exercise extraordinary diligence or care in treating the plaintiff, but only reasonable care. Defendant is not responsible for errors of judgment or for mistake in matters of doubt or uncertainty in the treatment of plaintiff, if you find from the evidence that defendant in the treatment of plaintiff exercised and used such reasonable or ordinary care as would ordinarily be exercised and used by a physician or surgeon of average skill and knowledge in this city in treating the ailment for which plaintiff was treated by defendant, at the time when the services of defendant were rendered to the plaintiff, as shown by the evidence, and, if you believe from the evidence that defendant used such reasonable care in treatment of plaintiff, then you should find your verdict for defendant on the plaintiff's alleged cause of action.²³

The court instructs the jury that, where one holds himself out to the public as a physician and surgeon, the law implies a promise and duty on his part that he will use reasonable skill and diligence in the treatment of those who employ him.²⁴

The court instructs the jury that if you believe from the evidence that plaintiff employed defendant to set and heal the dislocation of plaintiff's shoulder, and that defendant negligently, carelessly, and unskillfully treated and managed said dislocation, and that said dislocation was not set, placed, or reduced, and through such negligence plaintiff's shoulder has become permanently injured, lamed, and disfigured, then you will find for the plaintiff in a sum not to exceed ——— dollars.²⁵

The court instructs the jury that the only question in this case for your determination is whether the defendant, when called to see plaintiff on ———, properly reduced and treated the dislocated shoulder of plaintiff, and gave her proper and necessary directions and instructions for the care of same. If he did, then he cannot

²² Reeves v. Lutz, 177 S. W. 764, 191 Mo. App. 550.

²³ Hales v. Raines, 130 S. W. 425, 146 Mo. App. 232.

²⁴ Hales v. Raines, 130 S. W. 425, 146 Mo. App. 232.

²⁵ Wheeler v. Bowles, 63 S. W. 675, 163 Mo. 398.

be held liable for any injury resulting from any redislocation of said shoulder that may have afterwards occurred. On the other hand, if, when called to see plaintiff on said date, he failed to reduce and properly treat said dislocated shoulder and give proper and necessary directions for the care of same, or failed to exercise such care and skill as is used by the average members of his profession under like conditions and circumstances in attempting to so reduce and treat said dislocation, then you should find the issues for plaintiff, according to the rule given in instruction No. ²⁶

§ 4195(5). North Carolina

You are instructed that, if defendant did not, at the time of treating the plaintiff, possess the learning and skill ordinarily possessed by members of the dental profession, and by improper treatment the plaintiff was injured, the defendant would be liable for such damage as the plaintiff sustained by reason thereof, and the jury should answer the first issue.²⁷

You are instructed that the degree of learning and skill which the physician and surgeon holds himself out to possess is that degree which is ordinarily possessed by the profession, as it exists at the time or contemporaneous with himself, and not as it may have existed at some time in the past; and the physician and surgeon must, in general, be held to apply in his practice what is thus settled in his profession.²⁸

§ 4195(6). Oregon

The court instructs the jury that the degree of care and skill and diligence required of physicians and surgeons is that care, skill, and diligence which is ordinarily possessed by the average of the members of the profession in good standing in similar localities; regard being had to the state of medical science at that time.²⁹

The court instructs the jury that the care and skill that a surgeon would use in the practice of his profession should be proportionate to the character of the injury he treats, within the limits of ordinary skill and knowledge, and in the light of the advanced state of the science at the time of treatment; and if, under the evidence in this case, under the rule of law as I have given the same to you, it should appear by the preponderance of the evidence that the defendants, undertaking the care and treatment of plaintiff's arm, did not give to him the ordinary skill and knowledge which is possessed by the average of the profession making a specialty of sur-

²⁶ *Wheeler v. Bowles*, 63 S. W. 675, 163 Mo. 398.

²⁷ *McCracken v. Smathers*, 29 S. E. 354, 122 N. C. 799.

²⁸ *McCracken v. Smathers*, 29 S. E. 354, 122 N. C. 799.

²⁹ *Beadle v. Paine*, 80 P. 903, 46 Or. 424.

gery, then the plaintiff would be entitled to recover some damages at your hands; in case you should find that he had suffered any damages traceable to the fact of the neglect or unskillful treatment on the part of the defendants in the treatment of his arm.³⁰

§ 4195(7). *Washington*

You are instructed that, where a physician undertakes the treatment of a patient and subsequently performs an operation, not only must he use reasonable and ordinary care and skill in its performance, but also in the subsequent treatment of the case. It is his duty to give the patient such attention after the operation as the necessity of the case demands, taking into consideration the duty he owes to the patient as regards such care, and if you find from the evidence that the defendants or either of them performed an operation upon the plaintiff and did not thereafter use such reasonable care and skill in subsequent treatment as the plaintiff should expect from the defendants or each of them, or such care as is imposed upon physicians holding themselves out as specialists in ailments such as contracted for by the plaintiff, and if you further find from the evidence that, because of such failure to use reasonable care and skill in the subsequent treatment of the plaintiff, the plaintiff was permanently injured or suffered pain, injury, and damage, then you will find for the plaintiff in such sum as you deem just and proper, following the instructions of the court in this regard. The terms "careless" and "negligent," as used in these instructions, do not imply lack of skill or capacity, but simply a disregard of ordinary prudence and care which one has a right to expect from persons holding themselves forth as physicians specially fitted to cure certain ailments, and although you may believe the defendants to have possessed all the qualifications necessary to competent and skillful physicians and surgeons as specialists, yet if it has been proven that they, or either of them, were careless and negligent in treating the plaintiff, and that through such carelessness and negligence plaintiff has been permanently injured, or that pain, suffering, or injury has been brought about through such carelessness and negligence, then the mere fact that the defendants or either of them may have been competent and skillful constitutes no defense to this action.³¹

§ 4196. *Duty of physician to effect a cure*

See, also, post, § 4213.

§ 4196(1). *Alabama*

You are instructed that, unless it is so provided by an express contract, a physician or surgeon does not warrant that he will effect

³⁰ *Beadle v. Paine*, 80 P. 903, 46 Or. 424.

³¹ *Williams v. Wurdemann*, 128 P. 639, 71 Wash. 390.

a cure, or that he will restore the patient to the same condition as before the necessity for treatment arose, or that the result of the treatment will be successful.³²

§ 4196(2). Missouri

The court instructs the jury that in determining this case they are to consider that the defendant did not warrant a cure, but his contract, as implied in law, was that he possessed that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession; that he would use reasonable and ordinary care and diligence in the treatment of the case; and that he would use his best judgment, in all matters of doubt, as to the proper course of treatment. The defendant is not responsible in damages for want of success, unless it is shown from the evidence to result from the want of ordinary skill and learning, and such as is ordinarily possessed by others of his profession, acting under like circumstances, or from want of ordinary care and attention. The employment of the defendant by plaintiff was not for extraordinary diligence and care, and defendant cannot be made responsible in damages for errors in judgment, or mere mistakes in matters of doubt or uncertainty, provided he exercised and used in the treatment of the plaintiff such reasonable skill and diligence as is ordinarily exercised and used in the practice of the profession of defendant by those who practice under like conditions.³³

§ 4196(3). New Hampshire

The court instructs the jury that, if you find that the defendants possessed such skill and learning as is ordinarily possessed by physicians practicing in the same line in similar localities, and that in treating and diagnosing the plaintiff's case they used ordinary care in exercising such learning and skill, notwithstanding you find that the arm might have been saved, your verdict should be for the defendants.³⁴

§ 4197. Discretion of physician as to method of treatment

The court instructs the jury that a physician or surgeon is not bound to use any particular method of treatment, and if among physicians and surgeons of ordinary skill and learning more than one method of treatment is recognized as proper, it is not negligence for the defendants to adopt either of such methods; and the fact that some other method of treatment existed, or some other physician or surgeon testified in this case that he might or would

³² *Barfield v. South Highlands Infirmary*, 68 So. 30, 191 Ala. 553, Ann. Cas. 1916C, 1097.

³³ *Wheeler v. Bowles*, 63 S. W. 675, 163 Mo. 398.

³⁴ *McBride v. Hucksins*, 81 A. 528, 76 N. H. 206.

have used or advised the other or different method, does not even tend to establish negligence or improper examination or treatment on the part of the defendants; nor would it be an act of negligence or impropriety for the defendants not to have adopted such method, so testified to by such other physician or surgeon herein.³⁵

§ 4198. Liability for error of judgment

You are instructed that a physician or surgeon possessing the requisite qualifications and applying his skill and judgment with ordinary care and diligence to the diagnosis and treatment of the patient is not liable for an honest mistake or error of judgment in making a diagnosis or prescribing a mode of treatment, where there is ground for reasonable doubt as to the practice to be pursued.³⁶

§ 4199. Liability of competent physician for carelessness

The court instructs the jury that the terms "careless" and "negligent," as used in these instructions, do not imply lack of skill or capacity, but simply a disregard of ordinary prudence, and, although you may believe the defendant to have possessed all the qualifications necessary to a competent and skillful physician and surgeon, yet, if it has been proven that he was careless and negligent in reducing the dislocation of plaintiff's shoulder, and that through such carelessness and negligence plaintiff's shoulder has been permanently injured, lamed, and disfigured, then the mere fact that the defendant may have been competent and skillful constitutes no defense to this action.³⁷

§ 4200. Negligence in carrying out proper method of treating patient

§ 4200(1). Alabama

The court instructs the jury that, even though the defendant exercised due care, skill, and diligence in the selection of a method of anchoring the drainage tube, yet, if the jury are further reasonably satisfied from the evidence that he did not carry out such method with due care, then such failure would be negligence.³⁸

§ 4200(2). Washington

You are instructed that there is no difference of opinion among the expert physicians and surgeons who have testified in this case as to the manner of examination and application of tests in a case of such an injury as the plaintiff claims to have received. The

³⁵ *Schumacher v. Murray Hospital*, 193 P. 397, 58 Mont. 447.

³⁶ *Barfield v. South Highlands Infirmary*, 68 So. 30, 191 Ala. 553, Ann. Cas. 1916C, 1097.

³⁷ *Wheeler v. Bowles*, 63 S. W. 675, 163 Mo. 398.

³⁸ *Talley v. Whitlock*, 73 So. 976, 199 Ala. 28.

physicians who have testified have all agreed to the nature, extent, and method of such preliminary examination. The defendant claims to have used these tests and to have made such examination; and whether he did or did not do so is the question of fact to be determined by you from the testimony in the cause and under the same rules as the other testimony is to be considered and as herein set out for your guidance.³⁹

§ 4201. Leaving foreign matter in body after operation

The court instructs the jury that if they believe from the evidence that the defendant believed, and had reasonable grounds to believe, that the condition of the decedent was such that further delay in exploring for pads and sponges, or in closing the operation, would endanger her safety, the defendant was not negligent in then leaving the pad or sponge in the decedent's abdomen, and they cannot find for plaintiff on that ground.⁴⁰

§ 4202. Negligence in using X-ray machine

The court instructs the jury that, if you believe from the evidence in this case that it is proper for the purpose of diagnosis for a physician to use an X-ray machine for the purpose of taking pictures, and that when proper instrumentalities and proper care are used the burning of the patient is not a necessary result of the taking of said X-ray pictures, then the fact that the patient was severely burned by X-ray while such pictures were being taken is a circumstance that may be taken into consideration in determining the question of the physician's skill and carefulness, or the want of it in taking such picture. And in this case, if you believe from the evidence that it was proper for the defendant in diagnosing the plaintiff's case to use an X-ray machine to take pictures of plaintiff's kidney, and that in the taking of such pictures the burning of plaintiff was not necessary, but did result, then that fact may be considered by you in determining whether or not the defendant's use of said X-ray was negligent, careless or unskillful.⁴¹

§ 4203. Duty to furnish proper facilities for operation

You are instructed that, if a physician or surgeon has taken charge of a patient, and undertaken for reward to furnish hospital and apparatus for the operation, it is his duty to exercise proper care and diligence to furnish reasonably prudent and proper facilities, and he may be liable for any failure so to do, even though he is otherwise careful and competent.⁴²

³⁹ *Hoffman v. Watkins*, 155 P. 159, 89 Wash. 661.

⁴⁰ *Barnett's Adm'r v. Brand*, 177 S. W. 461, 165 Ky. 616.

⁴¹ *George v. Shannon*, 142 P. 967, 92 Kan. 801, Ann. Cas. 1916B, 338.

⁴² *Robinson v. Crotwell*, 57 So. 23, 175 Ala. 194.

§ 4204. Liability for complications ensuing after dismissal of patient

You are instructed that, if the shoulder joint of the plaintiff slipped out of place (that is, was redislocated) after being properly set and treated by defendant when called upon to treat her for dislocation of the shoulder, as charged, and after the patient was dismissed, then the plaintiff cannot recover herein, and the verdict must be for defendant.⁴³

§ 4205. Degree of skill and care required in practicing particular system of treating diseases

The court instructs the jurors that where persons hold themselves out to the public as practicing a method or system of treating diseases, or ailments of or injuries to the human body, the law implies a promise or duty on their part to use reasonable skill and care in the matter of said treatment.⁴⁴

§ 4206. Same—Care required in practicing osteopathy

The court instructs the jurors that if at the time when plaintiff was suffering from bodily injuries received from the fall from the ladder on the band stand referred to in the evidence defendants were holding themselves out to the public at ———, as practicing a method or system (known as osteopathy) of treating diseases and ailments of or injuries to the human body, and if the defendants undertook to treat plaintiff for the bodily injuries theretofore received in said fall, and did not use reasonable skill and care in the matter of said treatment, and in treating plaintiff for said injuries caused by the said fall from the ladder on the band stand defendants did so violently, unskillfully, and negligently manipulate, handle, and deal with plaintiff's body that defendants did fracture and break plaintiff's left thigh bone in one or more places, or if defendants, after so breaking or fracturing plaintiff's thigh bone, if such was the case, did negligently and unskillfully treat said fracture or fractures, and did by said negligence and unskillfulness cause or permit the fractured parts of said thigh bone to join and unite together in a faulty, misshapen, and malformed manner, then the jurors will find the issues for the plaintiff, and assess his damages as indicated in other instructions given in the case.⁴⁵

§ 4207. Liability of magnetic healer

The court instructs the jury that if you shall believe from the evidence that L. was the agent, servant, or employé of defendants,

⁴³ *Wheeler v. Bowles*, 63 S. W. 675, 163 Mo. 398.

⁴⁵ *Robertson v. Wenger*, 110 S. W. 663, 131 Mo. App. 224.

⁴⁴ *Robertson v. Wenger*, 110 S. W. 663, 131 Mo. App. 224.

and that, as such agent, servant, or employé, said L. rendered treatment to plaintiff, then it was his duty to treat her with ordinary care and skill; and if you shall believe from the evidence that while he was treating her, as the agent, servant, or employé of defendants, he violently bruised, bent, twisted, or wrenched plaintiff's back or spine, and that such treatment was improper, and not such as an ordinary, careful, and skillful man would have given the plaintiff under the circumstances, you will find that defendants' treatment of the plaintiff by said L., as their agent, servant, and employé, was careless, negligent, and unskillful.⁴⁶

§ 4208. Degree of skill and care required from specialists

§ 4208(1). New Jersey

You are instructed that defendant acted as a specialist. As such he was bound to have that degree of skill and knowledge ordinarily possessed by specialists. Defendant as a specialist in this case was bound to have a greater degree of skill and knowledge in the performance of the operation than that which a physician in regular practice is bound to have and exercise.⁴⁷

§ 4208(2). Oregon

The court instructs the jury that specialists in the practice of surgery are bound to bring to the discharge of their duty in the treatment of plaintiff's arm, as such specialists, that degree of care, skill, and knowledge which is ordinarily possessed by practitioners devoting special attention and study to the same branch in similar localities, having regard to the present state of medical science.⁴⁸

The court instructs the jury that a physician or surgeon making a specialty of the practice of surgery is not bound to use any greater skill, care, or diligence in the treatment of the case than a specialist in the same general locality in which said physician or surgeon resides and practices his profession or in similar localities.⁴⁹

§ 4209. Contributory negligence of patient

You are instructed that it was the duty of the defendant, after undertaking plaintiff's care during confinement and the delivery of her child, to use reasonable diligence to inform himself of the nature and extent of any lacerations or injuries which she may have sustained in giving birth to the child, to give proper attention and care to such injuries as is reasonably required in such cases, and to inform her of the nature and extent of her injuries, if such in-

⁴⁶ Longan v. Weltmer, 79 S. W. 655, 180 Mo. 322, 64 L. R. A. 969, 103 Am. St. Rep. 573.

⁴⁷ Coleman v. Wilson, 88 A. 1059, 85 N. J. Law, 203, Ann. Cas. 1915D, 1122.

⁴⁸ Beadle v. Paine, 80 P. 903, 46 Or. 424. The court says this instruction was proper, or at least such as the appellant considered proper.

⁴⁹ Beadle v. Paine, 80 P. 903, 46 Or. 424.

formation was reasonably necessary, in order to enable her or to induce her to take proper action on her part. The defendant cannot be heard to charge her with contributory negligence in not having proper attention given to her injuries, if the jury believe from the evidence that, by the exercise of reasonable diligence he could and should have informed himself of the nature and extent of her injuries, and that he negligently left her in ignorance of their extent or seriousness, or that, with reasonable opportunity to have such information on his part, he encouraged her to believe a surgical operation unnecessary, and by reason thereof she was influenced to have nothing done. But if the jury believe from the evidence that the defendant did reasonably inform himself of the nature and extent of the plaintiff's alleged injuries, and that he did inform her thereof, and suggested and advised what should be done for their treatment, and the plaintiff failed, neglected, and refused to follow his advice, then you would be justified in finding that the plaintiff, to that extent, by her negligence, contributed to her said injury.⁵⁰

§ 4210. Duty of patient to follow directions of physician

§ 4210(1). Kansas

The court instructs the jury that a physician is not released from liability for the burning of a patient by the use of the X-ray by the fact that the patient quit the treatment of the physician after said patient was burned by the use of said X-ray, and before said physician was willing that such patient should do so, or that said patient neglected to follow the instructions of the physician as to the use and care of the affected parts.⁵¹

§ 4210(2). Michigan

You are instructed that when a patient goes to a doctor and accepts the professional skill of a doctor, it is the duty of the patient to follow the advice of the doctor, and if he fails to follow the advice of the doctor and something untoward happens to the patient which would not have happened or which was not the result of the doctor's negligence at all, if something untoward happens to the boy, in such a case as that the doctor would not be liable. It is the duty of the plaintiff to show you by a fair preponderance of the evidence that the injury, if any, to his arm, was not caused by any fault on his part after the arm was set. The burden rests upon the plaintiff all along through.⁵²

⁵⁰ *Yard v. Gibbons*, 149 P. 422, 95 Kan. 802.

⁵¹ *George v. Shannon*, 142 P. 967, 92 Kan. 801, Ann. Cas. 1916B, 338.

⁵² *Wilk v. Black*, 154 N. W. 561, 188 Mich. 475.

§ 4211. Burden of proof

The court instructs the jury that the burden of proving that the defendant was careless and negligent in his treatment of the plaintiff is placed upon her, and, before she can recover herein, she must establish such facts by a preponderance of testimony, and, in the absence of such preponderance, you will find the issues for the defendant.⁵³

The burden is upon the defendant to prove to the reasonable satisfaction of the jury, by the preponderance of the evidence, the defense of contributory negligence set up and pleaded in his answer; and, if he has failed to so prove and satisfy the jury, the finding must be for the plaintiff on the issue of contributory negligence.⁵⁴

§ 4212. Presumption of consent of patient to operation

You are instructed that, if a patient voluntarily submits to an operation, her consent thereto will be presumed.⁵⁵

§ 4213. Inferences from lack of success**§ 4213(1). Alabama**

The court charges the jury that the jury cannot draw the conclusion of unskillfulness or negligence simply because the treatment was not successful.⁵⁶

§ 4213(2). Wisconsin

The court instructs the jury that a physician and surgeon is not an insurer or guarantor of a cure. If the treatment in this case was such as physicians or surgeons of ordinary knowledge and skill of the same school of medicine, and practicing in the same vicinity, would have exercised under the same or similar circumstances, then the fact that a bad result followed from the treatment, if you find that that was the fact, is not in itself alone sufficient to charge the defendants or either of them with negligence.⁵⁷

§ 4214. Admissions in pleadings

The court instructs the jury that it is admitted by the pleadings that defendant is a physician and surgeon, that plaintiff's shoulder was dislocated, and that plaintiff employed defendant to set and heal the said dislocation.⁵⁸

⁵³ Wheeler v. Bowles, 63 S. W. 675, 163 Mo. 398.

⁵⁴ Wheeler v. Bowles, 63 S. W. 675, 163 Mo. 398.

⁵⁵ Barfield v. South Highlands Infirmary, 68 So. 30, 191 Ala. 553, Ann. Cas. 1916C, 1097.

⁵⁶ Hamrick v. Shipp, 52 So. 932, 169 Ala. 171.

⁵⁷ De Bruine v. Voskull, 169 N. W. 288, 168 Wis. 104.

⁵⁸ Wheeler v. Bowles, 63 S. W. 675, 163 Mo. 398.

§ 4215. Matters considered in determining issue as to unskillfulness

The court instructs the jury that if they believe from the evidence that the injuries of which the plaintiff complains were the direct and proximate result of X-ray burns inflicted upon him by the defendant in treating his legs and ankles, and if they further believe from the evidence that when proper instrumentalities and proper care are used in the application of the X-ray treatment of such cases as that of the plaintiff, such burns as were inflicted upon the plaintiff's legs and ankles and the injuries resulting therefrom are not a natural and probable result thereof, then the fact that the plaintiff was so burned, and that said injuries did result therefrom, may be taken into consideration by you, along with all the other facts and circumstances proven in the case, in determining whether the defendant possessed the knowledge, skill, and judgment which the law required of him when he so treated the plaintiff's legs and ankles, and whether, in the application of his knowledge, skill, and judgment, he measured up to the standard required of him by law in treating him.⁵⁹

§ 4216. Sufficiency of evidence**§ 4216(1). Missouri**

The court instructs the jury that proof of negligence need not be by direct testimony, but may be inferred by the jury from all the facts and circumstances in evidence in the case.⁶⁰

§ 4216(2). Virginia

The court instructs the jury that the fact that after the plaintiff was treated with the X-ray by the defendant ulcers appeared on his legs does not, of itself, alone entitle the plaintiff to recover; and the jury are instructed that they shall find for the defendant, unless the plaintiff has shown by a preponderance of the evidence that the ulcers were caused by the negligence of the defendant, or his lack of skill, or his failure to apply the same.⁶¹

§ 4217. Damages**§ 4217(1). Arkansas**

You are instructed that, in assessing damages, you may take into consideration plaintiff's loss of time, if any, resulting from defendant's negligence, his loss of earning power, if any, the bodily pain and suffering which he has been compelled to endure, and mental anguish, if any, which have resulted from such negligence,

⁵⁹ *Hunter v. Burroughs*, 96 S. E. 360, 123 Va. 113.

⁶⁰ *Wheeler v. Bowles*, 63 S. W. 675, 163 Mo. 398.

⁶¹ *Hunter v. Burroughs*, 96 S. E. 360, 123 Va. 113.

and any future suffering or inconvenience which he must suffer by reason of such negligence, if any.⁶²

§ 4217(2). **California**

You are instructed that, if you find from the evidence that defendant carelessly or unskillfully advised plaintiff not to consult a surgeon or secure medical treatment after her jaw was injured by defendant, if you find the same was carelessly and negligently injured by defendant, and that plaintiff relied thereon, and did not consult a physician or surgeon for a number of weeks after such injury, and that by reason of such delay plaintiff's injuries were aggravated and made worse, and that it was more difficult or impossible to treat or cure such injuries of plaintiff, and that thereby such injuries became and are permanent and cannot be cured, and the same has affected the general health of plaintiff, and she has become and is sick and disordered and unable to work or perform labor, or support herself by her own labor and work as she did prior to such injuries, if you find that she did so work and support herself before she was injured by defendant, then I instruct you that you may take all such matters into consideration in fixing the damage incurred by plaintiff by such acts.⁶³

§ 4217(3). **Missouri**

The court instructs the jury that, if you find for plaintiff under the other instructions given, because of the hole cut, punctured, or torn in the bladder (if you find that said bladder was so cut, punctured, or torn), and the loss of the left ureter and left kidney (if you find that ureter and kidney were lost), or because of either, then you will assess the damages as follows: First. In such sum as you find will be reasonable compensation to her for the mental and physical pain and suffering you find she has endured, if any, and that you believe she will in the future endure, if any, as a result thereof, including what suffering she endured, if any, or may endure in the future, if any, in necessary operations she has had performed, or may hereafter be required to have performed, as a result of the negligence of the defendant (if you find he was negligent under the other instructions given), and including any permanent impairment or disability, if any, to plaintiff that you may believe will follow, and directly caused thereby. Second. In such sum as you find from the evidence will compensate plaintiff for money, if any, she has reasonably and necessarily expended, or expenses, if any, she has reasonably and necessarily incurred for medicines, nurses, railroad fares, hotel, hospitals, and surgeons' fees in endeavoring to remedy her physical condition, which you

⁶² Dunman v. Raney, 176 S. W. 339, 118 Ark. 337.

⁶³ Mernin v. Cory, 79 P. 174, 145 Cal. 573.

find resulted from the negligence of the defendant (if you find he was negligent under the other instructions given you), if you find defendant liable under the other instructions given.⁶⁴

The jury are instructed that, in estimating the amount of damages they should not take into account the injury and pain of body and mind, or any impairment of plaintiff's strength or earning power due to the breaking of the arm, and that the defendant, if found negligent, is only to be held in damages for any increased injury and pain of body and mind, or impairment of the use of the arm occasioned by defendant's negligence in his manner of treating the same.⁶⁵

The court instructs the jury, if you find for the plaintiff, you should, in estimating his damages, consider his physical condition before and since receiving the injuries for which he sues, as shown by the evidence, the physical pain and mental anguish, if any, suffered by him and resulting from the injuries received, his loss of time, and such damages, if any, as you may, from the evidence, find it is reasonably certain he will suffer in the future therefrom, and you will find a verdict for such sum as in your judgment will, under the evidence, really compensate him for such injuries, including compensation for such reasonable amounts, if any, as the evidence shows he has expended for medicine and medical treatment.⁶⁶

The court instructs the jury that the services of the wife belong wholly to her husband, and if you believe from the evidence that plaintiff is a married woman, having a living husband, then, in estimating her damages, if any you find she has sustained, you will not take into consideration her loss of time or service as a result of her injury, if any.⁶⁷

§ 4217(4). Nebraska

You are instructed that if you find, from a preponderance of the evidence and the instructions of the court, that the plaintiff is entitled to recover, then in fixing the amount of damages you should take into account the present and future loss of the plaintiff's leg, if any such loss has been proved, as well as compensation for the pain and suffering endured by the plaintiff in consequence of the want of skill, care, and diligence of the defendant, as shown by a preponderance of the evidence, and charged in the petition, if you find from a preponderance of the evidence such loss and suffering was caused by the negligence of the defendant in not properly caring for and treating such injury.⁶⁸

⁶⁴ *Krinard v. Westerman*, 279 Mo. 680, 216 S. W. 938.

⁶⁵ *Fowler v. Burris*, 171 S. W. 620, 186 Mo. App. 847.

⁶⁶ *Hales v. Raines*, 130 S. W. 425, 146 Mo. App. 232.

⁶⁷ *Wheeler v. Bowles*, 63 S. W. 675, 163 Mo. 398.

⁶⁸ *Lelsenring v. La Croix*, 94 N. W. 1009, 68 Neb. 803.

§ 4217(5). North Carolina

The court instructs the jury that in fixing the damage they may take into consideration the injury the plaintiff sustained by the unskillful treatment of the case. Of such would be the pain, loss of time, suffering, loss of teeth, and increased delay in effecting a cure, and probability of permanent injury, necessarily consequent upon the injury sustained by the maltreatment.⁶⁹

§ 4218. Duty of patient to lessen bad results of negligence of physician

You are instructed that, even though you should believe, from the evidence, that plaintiff's limb might have been straightened by being broken again and reset, yet if the evidence showed that, by reason of the want of ordinary care and skill on the part of defendants, the limb was permitted or caused to be crooked, and that ordinary skill and care on their part would have avoided the injury, the refusal of plaintiff to have her limb rebroken and reset was no defense to any injury caused by appellants' want of ordinary skill or care.⁷⁰

§ 4219. Recovery on counterclaim for services rendered

You are instructed that you will determine the amount, if anything, due the defendant on his counterclaim, and, after deducting the lesser from the greater amount, you will return your verdict for the difference, if any, in favor of the plaintiff or defendant, as you find the fact to be. If you find nothing due either party, you will simply return a verdict in favor of the defendant.⁷¹

C. COMPENSATION FOR SERVICES**§ 4220. Right of action by consulting physician against patient**

You are instructed that, if a physician, at the request of an attending physician, renders surgical services to a patient, even if there be an agreement between the attending physician and the patient that he, the attending physician, shall pay the expense of the surgical services of the consulting physician, the latter, being ignorant of such agreement, is entitled to recover, under an implied contract, from the party to whom and for whom such services were rendered, what the same are reasonably worth.⁷²

⁶⁹ *McCracken v. Smathers*, 29 S. E. 354, 122 N. C. 799.

⁷⁰ *Morris v. Despain*, 104 Ill. App. 452.

⁷¹ *Whitesell v. Hill*, 70 N. W. 750, 101 Iowa, 629, 37 L. R. A. 830.

⁷² *Garrey v. Stadler*, 30 N. W. 787, 67 Wis. 512, 58 Am. Rep. 877.

CHAPTER CCXXVIII

PLEDGES

- § 4221. Title to property pledged.
 4222. Priority as between purchaser and pledgee of note.
 4223. Diligence required from pledgee in enforcing or realizing on collateral.
 4223(1). Idaho.
 4223(2). Illinois.
 4224. Conversion by pledgee—Refusal to surrender pledge except on payment of other debts than those secured.

§ 4221. Title to property pledged

You are instructed that, if you believe from the evidence that plaintiffs borrowed from the ——— Bank the money to pay for the scrip in question and deposited the scrip so bought with the bank as security for the money borrowed, then this scrip was the absolute property of the plaintiffs, subject to the lien of the bank on the scrip for payment of the money borrowed, and if you further believe from the evidence that the bank delivered the scrip to A. or permitted him to take it and sell it as his own, then the bank cannot defeat this suit for the value of the scrip by claiming that it lent the money to A, and A. paid the bank the money borrowed, and A. sold the scrip, but such action on the part of the bank would be a legal conversion of the scrip, and the bank is liable to plaintiffs for the value of the scrip.¹

You are instructed that, if you believe from the evidence that plaintiffs borrowed the money from the ——— Bank to pay for the scrip in question, and pledged or hypothecated the scrip to the bank to secure payment of the money borrowed, then the scrip so pledged was the absolute property of the plaintiffs, subject to the payment of the debt, and the bank is bound to account to the plaintiffs for it, regardless of any claim J. or any one else may have made to the ownership of the scrip, and, if the bank without plaintiff's consent let J. have it and sell it as his own, then the bank is liable to the plaintiffs for the value of the scrip.²

§ 4222. Priority as between purchaser and pledgee of note

The jury are instructed that, if they believe, from the evidence in the cause, the defendant and Mrs. S., the payee in the note mentioned in the evidence, had an agreement that defendant should negotiate said note, and with the proceeds pay off \$—— to himself and a note belonging to B., and that said B.'s note was assign-

¹ Hamburg Bank v. George & Butler, 123 S. W. 654, 92 Ark. 472.

² Hamburg Bank v. George & Butler, 123 S. W. 654, 92 Ark. 472.

ed to defendant, by agreement with Mrs. S., with such an understanding, and L., attorney for defendant, notified plaintiff thereof before he purchased the note, then the verdict should be for the defendant, if the jury further believe from the evidence the amount of said claims exceeded, or even equaled in value, the said note.³

The jury are instructed that, if the jury believe from the evidence in the cause that Mrs. S. was in debt to defendant in the sum of \$——, and to B. in the sum of \$——, and that said Mrs. S. instructed defendant to hold said note until collected or negotiated, and to pay off said claims with the proceeds thereof, and that defendant, agreed thereto with said Mrs. S. and B., and that plaintiff had notice of said claims and agreement with Mrs. S. before he purchased said note, then the verdict should be for the defendant; provided the jury believe from the evidence that the claims of defendant and B. exceed or was equal in value to the said note.⁴

The jury are instructed that, although the jury may believe, from the evidence in the cause, that defendant may have had an agreement with Mrs. S. to negotiate the note in question, and with the proceeds to pay off claims to defendant and B., the verdict should be for the plaintiff, unless the jury further believe from the evidence that plaintiff had notice of said agreement before his purchase of the note in question.⁵

§ 4223. Diligence required from pledgee in enforcing, or realizing on, collateral

§ 4223(1). Idaho

You are instructed that, in the handling of securities placed with it, the plaintiff was required to exercise only ordinary diligence, and before you will be justified in finding for the defendant on his affirmative defense, or on his counterclaim, it must be established by the evidence that the plaintiff was grossly negligent in handling such securities, and that, if it had used reasonable diligence, it could have collected the amounts due on said collaterals, and, unless you find that through the gross negligence of the plaintiff the defendant was, in fact, damaged, then the defendant has failed to establish his affirmative defense and counterclaim.⁶

§ 4223(2). Illinois

The jury are instructed that if they believe from the evidence that \$—— was borrowed, and the individual note of W. was given therefor, and further believe that a credit was given to said

³ Brown v. Bowen, 2 S. W. 398, 90 Mo. 184.

⁴ Brown v. Bowen, 2 S. W. 398, 90 Mo. 184.

⁵ Brown v. Bowen, 2 S. W. 398, 90 Mo. 184.

⁶ Exchange State Bank v. Taber, 145 P. 1090, 26 Idaho, 723.

W. on the ——— Times Company's books for said amount, yet if the jury believe from the evidence that the said money was borrowed for the said ——— Times Company, and was used in its business by its officers having the power and right to control and manage its business affairs, and that by the direction of its said officers it received the full benefit and use of the identical money borrowed, then the indebtedness was in fact the indebtedness of the ——— Times Company, and it was lawful for the said ——— Times Company to execute its note therefor, and, when executed and delivered, the same would constitute a valid, legal obligation of said company; and it was lawful for said company, by and with the consent of the holder of the said individual note of the said W., to deliver its said note to take up, retire, satisfy, and pay the said individual note of the said W. given to evidence the indebtedness for said money; and, if said company knowingly and in good faith did so deliver its said note to the holder of said individual note of the said W., the failure of the said company to charge the account on its books of the said W., with the amount of said note would not of itself invalidate said company's note, or render it accommodation paper.⁷

The jury are further instructed that, if they believe from the evidence that said ——— Times note was a valid obligation of the said ——— Times Company, and collectible, and was held by said ——— Bank or said K. as collateral, then it was the duty of the said bank or of the said K., if the jury believe the said principal note had been sold by the said bank to the said K., to hold the said note of the ——— Times Company until the maturity of the principal note, and then apply the proceeds thereof to the payment of the said principal note, and pay the residue to the plaintiff; and in such case, although the jury may believe from the evidence that the said ——— Times note was of greater value than the note originally deposited as collateral, yet such increase in value, if any, inured to the benefit of said P. and his assigns, and said ——— Bank or said K. were bound to treat the same as if it had been originally deposited by said P. as collateral to said principal note of \$———; and if the jury believe from the evidence that said ——— Bank or the said K., if the said principal note had been sold to him, did not exercise ordinary and reasonable care and diligence in retaining and attempting to collect said ——— Times note, and in delivering the same up to the said W. and receiving the note of the said W. in lieu thereof, if they did so

⁷ Union Nat. Bank of Chicago v. Post, 61 N. E. 507, 192 Ill. 385. This and the following instruction were

not expressly approved; certain specific objections being overruled.

deliver up the same, and that loss occurred to the plaintiff by reason thereof, then the defendants, or such one or more of them who participated in such exchange, would be liable to the plaintiff for such loss, and the same may be recovered in this suit. The amount of care and diligence which constitutes ordinary care and diligence, as above set forth, is that care and diligence which an ordinarily prudent man usually exercises in his own affairs.⁸

§ 4224. Conversion by pledgee—Refusal to surrender pledge except on payment of other debts than those secured

The court charges you that if you find from the evidence that plaintiff went to the defendant bank prior to ———, for the purpose of ascertaining the exact amount necessary to redeem the collaterals set forth and described in the declaration, and prepared to then pay such indebtedness and redeem said collaterals, and the bank declined to consider his offer unless he would not only pay the sum for which said collaterals were pledged, but would also pay the individual debts of B., for which said collaterals were not pledged, and declined to release said collaterals unless the undorsed notes of B. were also paid, then the court charges you that this was, in law, a conversion of said collaterals by the bank, and entitled the owners of the collaterals, at their election, to sue for the value of the same.⁹

⁸ Union Nat. Bank of Chicago v. Post, 61 N. E. 507, 192 Ill. 385.

⁹ Memphis City Bank v. Smith, 75 S. W. 1065, 110 Tenn. 337.

CHAPTER CCXXIX

POST OFFICE

§ 4225. Criminal liability for transmitting obscene matter.

§ 4225. Criminal liability for transmitting obscene matter

The jury are instructed that what are obscene, lascivious, lewd, or indecent publications is largely a question of your own conscience and your own opinion; but, before this can be said of such literature, it must come up to this point: That it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. It is your duty to ascertain, in the first place, if such publications are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world.¹

¹ Dunlop v. U. S., 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

CHAPTER CCXXX

PRINCIPAL AND AGENT

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 - 4247(6). South Carolina.

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See, also, Attorney and Client; Brokers; Factors.

A. EXISTENCE OF RELATION

§ 4226. Estoppel to deny relationship—Holding out as agent

§ 4226(1). Illinois

You are instructed that, if a corporation knowingly and voluntarily permits a person to hold himself out to the world as its agent,

said corporation will be bound as principal to those dealing with such person and acting upon the faith that such agency exists; and this is true irrespective of whether or not an agency in fact exists.¹

You are instructed that, if a person knowingly and voluntarily permits another to hold himself out to the world as his agent, he will be held to adopt his acts and be bound as principal to the person who gives credit to the one acting as such agent.²

The jury are instructed that, if you believe from the evidence that in the winter of ——— the defendants knew that H. was acting as their agent, and was buying stocks of goods in their name and operating the ——— mine in their name and for their benefit, and that they voluntarily permitted him to do so, and if you further believe from the evidence that the said H. was so acting, and made the contract alleged in plaintiff's declaration, then the defendants would be bound thereby, whether the said H. was in fact their agent at the time or not.³

§ 4226(2). Missouri

The court further instructs you that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith, and in the exercise of reasonable prudence, and the principal will not be permitted to deny that such other was not his agent authorized to do the act that he assumed to do, provided that act was within the real or apparent scope of the presumed authority.⁴

§ 4226(3). North Carolina

The court instructs the jury that, if the jury shall find as a fact that the business did not belong to the defendant, W., but in fact was conducted by ——— as his own, then the defendant would not be chargeable with the value of said goods, unless you should find further as a fact that the defendant by his acts and conduct reasonably led the plaintiffs to believe that the business was his,

¹ Italian-Swiss Agricultural Colony v. Pease, 62 N. E. 317, 194 Ill. 98.

² Swannell v. Byers, 123 Ill. App. 545.

³ Swannell v. Byers, 123 Ill. App. 545.

⁴ Muth v. St. Lou's Trust Co., 67 S. W. 978, 94 Mo. App. 94.

or that his credit was behind the same, and they made the sale in question relying upon this belief.⁵

The court instructs the jury that, if defendant so acted as to induce plaintiffs to believe that J. was his agent, he is liable for all his acts in the same manner as if he was actually his agent, and he would, in that event, be estopped from denying the existence of the agency. The court charges you, if you find by the greater weight of the testimony that the defendant knew goods were being ordered in his name by J., and the plaintiffs shipped the goods upon the credit of defendant to defendant himself, and defendant ordered them turned over to J., then defendant would be liable for such shipments, and you will answer the issue "Yes," and the value of the goods shipped.⁶

§ 4226(4). Texas

You are instructed that the matter of ——— being the agent of defendants, is a question of fact for you to determine from the testimony, and in aid of your investigation you are instructed that an agent may be created by long acquiescence on the part of the principal, with knowledge of his acts as agent for said principal, as well as by express appointment, and that if by express agreement it is so arranged between parties that one shall be advertised as the agent, but that another shall actually do the business, and this third person does transact the business, and becomes known as the agent of the principal by transacting his said business, then the said third person is his agent, and the principal is estopped from denying it as to those who have acquired rights against said principal because of the acts of said agent.⁷

§ 4226(5). Virginia

The court instructs the jury that if they believe from the evidence that A. represented himself to be the "correspondent" of defendant, that this representation was made with the knowledge of defendant, and without objection on their part; that A. used in his office a quotation board furnished him by defendant containing in conspicuous letters the name and address of defendant; that defendant installed at their own expense a private telegraph wire connecting the office of A. with their principal office in ———; that defendant furnished over this private wire to A. during the business hours of the Stock Exchange continuous market quotations on stocks, bonds, grain, and cotton, which were immediately posted on the said quotation board for the information of

⁵ Metzger Bros. v. Whitehurst, 60 S. E. 907, 147 N. C. 171.

⁶ Metzger Bros. v. Whitehurst, 60 S. E. 907, 147 N. C. 171.

⁷ Planters' Mutual Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.

patrons resorting to A.'s office to trade; that over said private wire defendant also caused to be transmitted their daily market letters; that customers resorting to A.'s office, and desiring to trade in any one of the different stocks or commodities whose quotations were posted, gave a verbal or written order to buy or sell certain cotton, grain, or stocks, and that such order was thereupon transmitted by the said A. in his own name over the said private wire to the office of the said defendant at ———, and executed by them; that immediately thereupon confirmation was wired back by defendant which consummated the deal; that customers trading at A.'s office were designated by a certain number which was used by A. in transmitting the order and by defendant in confirming the same; that A. did not participate in the loss nor the profit incurred in the trades of the customers, but received as compensation a fixed sum whether the trade resulted in a profit to defendant or to the customer; that said compensation was the compensation received from said defendant and none other; that the said A. deposited the margins received by him from customers to the credit of defendant in a local bank; that an account in the name of defendant was regularly run in said local bank, and that the said defendant drew out the money to their credit in said account directly; that said A. drew on said defendant through said local bank for sums due to him or to said customers, which said drafts were paid by defendant—then the jury will be warranted in finding that the said A. was the agent of the said defendant so far as the rights of the plaintiff here are affected, notwithstanding the fact the relations between the said defendant and said A. are expressly disclaimed by them to be those of principal and agent, and even though as between themselves such relation did not in fact exist.⁸

§ 4227. Ratification

Ratification by corporation of contract of agent, see ante, § 1909.

§ 4227(1). Georgia

The jury are instructed that, in order for the act of ——— to be binding on the plaintiff as their agent, the act must have been by authority of the plaintiff, or must have afterwards been ratified by the company with a full knowledge of all the facts. A suit instituted and continued after a full knowledge of all the facts would amount to a ratification.⁹

You are instructed that, if you shall believe from the evidence that F. by virtue of his being the architect and supervisor of the buildings, went to the plaintiff to purchase these bricks in the name

⁸ McIntyre v. Smyth, 62 S. E. 930, 108 Va. 736.

⁹ Dolvin v. American Harrow Co., 62 S. E. 198, 131 Ga. 300.

of R., and that the plaintiff refused to credit R., not knowing him, but, as defendant was the owner of the property, they would be willing to credit defendant, and then F. told them to charge them to defendant, unless defendant refused to have it done; that he would inform him, and, if he did not send them word that defendant had refused to carry out the contract that he had made—refused to be liable for it—then they might deliver the brick. Now, if you believe from the evidence, that F., before the delivery of any of the brick, informed defendant of all the circumstances that occurred between him and the plaintiff, and defendant assented to that, and the bricks were afterwards delivered, that would make defendant, in the law, the original contractor; that he contracted the debt originally himself; that that credit was extended to him. But if, on the other hand, you do not believe there was a statement made of all the circumstances connected with it, of the manner in which this was brought about, to defendant, or that defendant did not assent to it—did not assent to the arrangement which F. had made—then, of course, it would follow that he would not be liable. That is simply a question of evidence for you to decide, applying the law I have given you in charge to the evidence.¹⁰

§ 4227(2). **Kansas**

You are instructed that, if you find that after the signing of the alleged contract of warranty by the ——— Company, by A., agent, the plaintiffs inclosed a copy of said contract in a letter to the ——— Company, addressed to that company, at ———, and that said letter and contract were received by that company, and that the letter of the plaintiffs to the said company informed them of the nature of the transactions, and if you find that the ——— Company replied to said letter, and referred the plaintiffs to A. as their agent, then you are instructed that the ——— Company thereby ratified the act of A. in signing said contract as their agent.¹¹

§ 4227(3). **Maryland**

The jury are instructed that, if the jury believe from the evidence that R., the landlord, authorized ——— his agent, to rent the house in question for but one year, but that said agent rented it for two years, as alleged by the defendant's witnesses, and that the defendant held the same for two years, and that during the second year of said tenancy R. treated the defendant as his tenant by receiving the rent originally agreed upon, then the jury

¹⁰ *Crockett v. Chattahoochee Brick Co.*, 21 S. E. 42, 95 Ga. 540.

¹¹ *Isaacs v. Jackson Motor Co.*, 193 Pac. 1081, 108 Kan. 17.

may infer that the landlord ratified the contract for the two years' lease, and may find for the defendant.¹²

§ 4227(4). *Missouri*

The court instructs the jury that if you find and believe from the evidence that on the ——— day of ———, plaintiff delivered to J. the ——— head of cattle mentioned in evidence, upon the representation of said J. that he was buying the same for the defendant, ———, and that said defendant would pay for same before title thereto would or should pass to him; that said cattle were shipped to and received by the said defendant; that said defendant did not pay for said cattle upon receipt thereof, but neglected and refused so to do; that said defendant knew the terms and conditions of said shipment, including the price agreed to be paid therefor, or was thereafter informed of the terms and conditions under which said cattle were delivered for shipment as aforesaid and the price to be paid therefor; that after being so informed and knowing that said cattle were not paid for, and of the representations, if any, so made to plaintiff by said J., the defendant retained possession of said cattle claiming title thereto—then defendant cannot deny the agency of J. in said transaction, and became and is bound by the terms and conditions under which said cattle were shipped, and your verdict should be for plaintiff for the full amount of the contract price of said cattle, if any is proven, not to exceed the sum of \$——, to which you may add interest thereon at the rate of ——— per cent. per annum from ———.¹³

The jury are instructed that, in bringing the action upon these notes the ——— Bank and this plaintiff, its receiver, adopts and ratifies all the acts of its officers or agents by which the notes in question came into the bank; that is, when this plaintiff seeks to recover upon these notes from this defendant, it is bound by what the evidence in this case shows to be the facts connected with the transaction.¹⁴

§ 4227(5). *Nebraska*

The jury are instructed that a principal cannot accept such parts of an agent's contracts as are beneficial to him, and disclaim such as are to his disadvantage, but must accept or reject all; and if he retains the benefits of the agent's bargain he must complete the contract on his part.¹⁵

§ 4227(6). *North Carolina*

The jury are instructed that, if you should find by the greater weight of the evidence that ———, as agent of the defendant,

¹² Reynolds v. Davison, 34 Md. 662.

¹³ Cowan v. Young, 220 S. W. 869,
282 Mo. 36.

¹⁴ Chicago Title Trust Co. v. Brady,

65 S. W. 303, 165 Mo. 197.

¹⁵ Walker v. Hagerty, 46 N. W. 221,
30 Neb. 120.

procured the lapsing of the policy as alleged in the complaint, which I have mentioned to you, by fraud and false representations, then the defendant cannot retain the benefits of such conduct of ———, and be relieved from the consequences of such fraudulent means by which such lapsing was obtained, if you find that to be the fact.¹⁶

The jury are instructed that, although the identical lumber in controversy came into possession of defendant and was appropriated by him, he would not be liable to plaintiff for its value, unless he had authorized ——— to buy on his credit, or accepted and appropriated the lumber with notice of the fact that ——— had bought it on defendant's credit.¹⁷

§ 4227(7). South Carolina

You are instructed that if R. was not her agent when he first did these acts, but she afterwards had knowledge of them, and ratified and confirmed and approved of his acts, then she would be as much bound as if he had been her agent in the first instance, or as if she had bought these goods herself. If the testimony in this case satisfies you that plaintiffs did not sell these goods to defendant, Mrs. ———, or that R., without any authority from his mother, or without any knowledge on her part, ordered these goods in his mother's name, and she knew nothing of it, and did not authorize him to do it, then your verdict would be for defendant Mrs. ———, unless you are satisfied by the preponderance of the evidence in the case that while he was not her agent in the first instance, yet afterwards the knowledge was brought to defendant Mrs. ———, of what he had done—that he had ordered these goods in her name, and that they had been shipped to her, and she received the goods knowing these things, and continued to receive the goods that were shipped to her—then she would be liable. Or if, after the whole thing was over, she ratified or affirmed or confirmed and admitted as her own what her son R. had done, then she would be liable. If they sold and delivered them to Mrs. ——— herself, then she is liable. If they sold them to R. and Mrs. ——— afterwards ratified, approved, or confirmed what her son had done—recognized his agency after the whole thing was over, but knew nothing of it until it was done—then your verdict would be for the plaintiff. But if R. bought the goods from plaintiffs, and imposed upon them, and used his mother's name to do it, without her knowledge or consent or authority, and she did not afterwards acquiesce in what

¹⁶ *Combs v. Jefferson Standard Life Ins. Co.*, 106 S. E. 826, 181 N. C. 218.

¹⁷ *Brittain v. Westall*, 49 S. E. 54, 137 N. C. 30.

he had done in the premises, then your verdict would be for the defendant.¹⁸

§ 4227(8). Texas

You are instructed that, if you find from the evidence that defendant (meaning C.) borrowed money from plaintiff for the benefit of defendants, without authority from defendants, either express or implied, and if defendants, knowing that such money had been borrowed, ratified and acquiesced in the act of C., or knowing such money to be borrowed, accepted the benefit of it, then they would be held bound by the act of C., as much as if they had authorized it before it was done.¹⁹

You are instructed that it is not necessary for plaintiff to show any express authority in C. to borrow money to render defendants liable. If money was borrowed by C. in the general course and conduct of the business, and defendants knew this fact and acquiesced in it, and the note sued on was given for money borrowed of plaintiff, by C. for the business, and the money was in good faith used in the business, and plaintiff had no knowledge of any want of express authority on C.'s part to borrow money, then you will find for plaintiff.²⁰

4227(9). Washington

You are instructed that, if the salesman did not have authority to accept unconditionally an order and agree to deliver the goods for the prices therein mentioned, but if he did do it, and if his acts were known to B., and B. knew that he was pretending to sell the goods, that he was agreeing to sell the goods at that price, or if B. authorized him, then or at any time previous thereto, to make an agreement with or to sell goods, or to arrange with W. for the sale of goods, then that became the principal's (B.'s) contract, binding on B. If an agent makes a contract, pretending to sell goods, and the agent has, in fact, exceeded his authority, and knowledge of that fact comes to the principal, and the principal then has reason to believe that the agent has exceeded his authority, it is his duty then, in good faith, to advise the person who supposed he had made the contract with the agent that the contract was not the contract of the principal—that the agent had exceeded his authority. Good faith and fair dealing in business require a man to speak out when he has knowledge of facts, the keeping of which will work to the injury, probably, of the other party. So if the principal has knowledge that his agent has pretended to make a

¹⁸ Wagener v. Kirven, 34 S. E. 18, 56 S. C. 126.

¹⁹ Collins & Douglas v. Cooper, 65 Tex. 460.

²⁰ Collins & Douglas v. Cooper, 65 Tex. 460.

contract, which in fact he had no authority to make, and knows that the purchaser is relying upon that as a contract of the principal, and he for an unreasonable length of time did not speak out and advise the purchaser timely of the real facts, when good faith requires that he should, then he may be considered as having ratified and adopted the agent's contract.²¹

§ 4228. Revocation of authority—Necessity of notice to third persons

§ 4228(1). Kansas

The jury are instructed that the law makes a principal liable on contracts made after the revocation of the authority of an agent between the agent and third persons, who have theretofore dealt with the agent as such or who had knowledge of such agency prior to its revocation; unless notice of such revocation of agency was given to such third persons; but this rule does not apply to persons who are not shown by the evidence to have had knowledge of the agency, or previous dealings with the agent as such, and no notice of revocation of the agency is necessary to be given to such persons.²²

§ 4228(2). Michigan

You are instructed that, where one has constituted and accredited another as his agent to carry on business, the authority of the agent to bind his principal continues even after actual revocation of such authority, until notice of the revocation is given, and, as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. And it is said that the case of such an agency is analogous to that of partnership, and the notice of revocation of the agency is governed by the same rules as notice of dissolution of partnership; that is, as to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditors, or at least that the credit should have been given under circumstances from which notice can be inferred.²³

§ 4229. Presumption of continuance of authority

The jury are instructed that, the agency of the said ——— to write checks upon the defendant being conceded by the parties, it is presumed to have continued, unless the contrary is shown by a preponderance of the evidence, and the burden of proof is upon the defendant to show by a preponderance of the evidence that the agency

²¹ Waldron Co. v. Beattie Mfg. Co., 194 P. 557.

²² Key v. Thomas Lyons Co., 198 P. 928, 109 Kan. 281.

²³ Tousignant v. Shafer Iron Co., 55 N. W. 681, 96 Mich. 87.

and authority of the said ——— to write checks on the defendant was terminated prior to the time the check sued on was issued and delivered by the said ——— to the plaintiff, if you find that it was so issued and delivered.²⁴

§ 4230. Matters considered on question of agency

As to whether or not N. was the agent of defendant, as the plaintiff claims, and acting for him, that is a question of fact which you are to determine from all the facts and circumstances in the case. The fact that N. says that he was not the agent is not binding upon plaintiff. It is for you to say from the testimony whether N. was in fact acting for defendant, either as agent or employé, and in passing upon this question it is your duty to take into consideration the instructions that defendant gave to N. relative to the horse delivered at the time, if you find that he gave any instructions along that line. On the question of agency, you have a right to consider whether there is any testimony to show ratification—that is, the acceptance or acquiescence by defendant in what N. did; that is, Did defendant consent to the action in his behalf by N.? You have also a right in passing upon this question to consider whether there was an original authority; that is, whether defendant brought N. there for the purpose of assisting him in taking charge of the horse in the yard, as has been testified to by the plaintiff. You have also the right to consider whether defendant held out to the world, and to ———, that N. was his agent, to do the things N. did; that is, to take charge of and break the horse or take charge of the horse for defendant from the time the rope was given him in the yard there, as well as all other facts and circumstances in the case.²⁵

§ 4231. Sufficiency of evidence of agency

§ 4231(1). Illinois

The jury are instructed that, should they believe from the evidence that H. had signed several notes for C. as security, H. signing his own name to such notes, this fact alone does not show authority in C. to sign H.'s name to other notes.²⁶

§ 4231(2). Michigan

You are instructed that in this case the burden of proof rests upon the plaintiff to establish his claim by a preponderance of the evidence. If you are satisfied by a preponderance of the evidence that ——— was acting for and in behalf of the defendant, his father, and as his father's general agent in making this con-

²⁴ Key v. Thomas Lyons Co., 198 P. 928, 109 Kan. 281.

²⁵ Kendrick v. Hochradel, 132 N. W. 521, 167 Mich. 179.

²⁶ Hefner v. Palmer, 67 Ill. 161.

tract with the plaintiff, then your verdict should be against ——— for the amount you may ascertain under the evidence and the instructions I have given you to be the plaintiff's damages. If you are not satisfied that he was such agent, then your verdict will be no cause of action against ———, but your verdict will be against the son for a like amount alone.²⁷

You are instructed that on the subject of agency you will take into consideration all the facts and circumstances in the case, the relation of the parties, what they did, their usual course of dealings, what was done with the proceeds, what instructions were given, if any, the conduct of the parties generally, and the nature of the transaction. If you find that the son had general authority from the defendant, his father, to make a contract like the one in question to sell apples, the product of the defendant's farm, then it would follow that the father would be bound by the acts of his son in making such a contract. It is immaterial in this case whether the memorandum was signed by the son alone, or by his father, or whether the son signed his father's name by him as agent. Earnest money was paid, \$———, on the making of this memorandum; a part of the contract was carried out; ——— bushels of apples were delivered. You have heard the testimony in the case as to what was done by both defendants, ——— and his father, ———, in carrying out this contract, and what was done with the proceeds of the apples that were actually delivered. From all of these facts and circumstances, you are to say whether the son had general authority to make the contract. If you find that he had, then defendant is liable in this action for the acts of his agent. Of course, if you should find that the son had no authority from his father to make this contract, then the son would be responsible himself for a failure on his part to perform it.²⁸

§ 4231(3). Virginia

You are instructed that the question as to whether or not one is agent for another, with power to bind his principal where the interest of outside parties is involved, is one to be determined, not alone by the actual contract between the parties as to whom it is sought to establish the relation of principal and agent, but that is to be considered together with all the facts and circumstances which in addition bear thereon. The question of agency in this case is to be determined by the jury from all the evidence relating to the transaction of the business and all the facts and circumstances connected with the same, both as between ——— and

²⁷ Hecht v. Ebers, 155 N. W. 463, 189 Mich. 573.

²⁸ Hecht v. Ebers, 155 N. W. 463, 189 Mich. 573.

———, and between said ——— and said ——— and parties dealing with them.²⁹

B. EXTENT OF AUTHORITY OF AGENT

Assumpsit as remedy for false representation of authority to act as agent, see, ante, § 934.

Authority of agent to bind principal by receiving bribe, see ante, § 1203.

§ 4232. Duty of third person to ascertain authority of agent

The court instructs the jury that it is a rule of law that a person dealing with one known to be an agent, or claiming to be such, is bound at his peril to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent authority.³⁰

§ 4233. Authority to sell

You are instructed that, if you find from the evidence that defendants purchased from L., and that L. was the agent of the person entitled to the possession of the shells, whether plaintiffs or ———, the balance of shells remaining on bank of ——— river at ———, and further find that L. was at the time acting within the scope or apparent scope of his authority as such agent, and that it was agreed between the parties at the time that such shells, while at said place, were the property of defendants, you will find for defendants.³¹

You are instructed that, if you find from the evidence that L. had no authority from plaintiffs or ———, the person or persons entitled to the possession of the shells, to dispose of the shells in controversy, and that defendants had knowledge of such limitations of authority, or if you find from the evidence that L. was authorized by plaintiffs or ——— to weigh the shells at ———, and to sell and deliver such shells according to such weight to defendants, and that L. was only authorized to make sale under such condition, and that such fact was known to defendants, you should find for plaintiffs.³²

§ 4234. Authority to sell as including power to employ brokers

The jury are instructed that, if the defendant wrote to his son to sell the property and use his discretion as to price, and that no further or other authority was given in reference to the sale or employment of brokers, then the son had no authority to employ the plaintiffs and bind the defendant to pay their commissions.³³

²⁹ McIntyre v. Smyth, 62 S. E. 930, 108 Va. 736.

³⁰ Meyers v. Johnson, 186 Ill. App. 37.

³¹ Harvey Chalmers & Son v. J. R. & J. A. Bowen, 164 S. W. 1131, 112 Ark. 63.

³² Harvey Chalmers & Son v. J. R. & J. A. Bowen, 164 S. W. 1131, 112 Ark. 63.

³³ Doggett v. Greene, 98 N. E. 219, 254 Ill. 134, Ann. Cas. 1913B, 1166. This is correct, in the absence of any evidence of anything, such as an established custom, to qualify the rule.

§ 4235. Authority to sell as including power to warrant

See, also, post, § 4248.

The jury are instructed that, if you believe from the evidence that T. was the general selling agent of defendant, but you still further believe from the evidence that T. was not expressly authorized to warrant the soundness of an article sold, then you must find for defendant, unless you further believe from the evidence that under the common usage of the trade in which defendant was engaged authority to sell implied authority to warrant the fitness of an article sold for the use intended.³⁴

§ 4236. Limitation of power to sell to sales for cash

You are instructed that the testimony in this case shows without dispute that the authority of the said P., as agent of this defendant company, was to sell orders for railway tickets for cash only, and if you find that the said P. in the month of ———, issued to the plaintiff herein an order for railway tickets, and such order was given to the plaintiff, not for cash, but as security for a debt, and that the order involved in this action and introduced in evidence in this case was issued to take up the first order aforesaid, then you are instructed to find that the issue of the second order was without authority, and does not bind the defendant company. An agent of a corporation, having power to sell prepaid coupon ticket orders belonging to his employer, for cash, has no authority to bind his company by a transaction in which he deposits the orders of the said company as security for his own debts, and, if he does so deposit said orders, the action on his part is without legal authority, and the company he represents is not bound by his action. And it is the duty of a person dealing with such an agent to know that the agent in so transacting business is acting within the authority conferred upon him by his principal.³⁵

§ 4237. Authority of selling agent with respect to collection of price**§ 4237(1). Arkansas**

The jury are instructed that a principal is bound by the acts of his agent coming within the scope of his direct or implied authority, and the agent is authorized to do all things which are necessary, proper, usual, and reasonable to be done in order to perfect the purpose for which the agency was created; and in this case, if you find from the evidence that plaintiff shipped a carload of horses and mules to ——— and turned them over to his brother, as his agent, to sell, and that said brother, in order to effect the sale

³⁴ Wait v. Borne, 7 N. Y. St. R. 113.

³⁵ Albright v. Atchison, T. & S. F. Ry. Co., 115 N. W. 219, 137 Iowa, 631.

of said stock, employed one W. to assist him, and that plaintiff knew of his employment, and did not object thereto, and that said W. sold the stock to the defendant, then the jury are instructed that plaintiff is bound by the action of his brother in employing W. and in the sale of the stock by W.; and, even if the jury should find that W. only had power to sell and not to receive the money, but that this limitation was not known to defendant, still the plaintiff will be bound by the action of W. in receiving and accepting the money, and if the defendant in good faith bought the stock and paid the money to W., he was not bound to see that W. paid the money over to plaintiff.³⁶

Gentlemen of the jury, under the law it is the duty of the court to construe the contract in evidence, and the court construes said contract as follows: The intention and meaning of said contract is that the said W. was to sell the stock in question and receive the money and to pay the money over to plaintiff; and the court further construes said contract to mean that whoever purchased said stock was authorized under said contract to pay money to said W., and it was not the duty of such purchaser to see that the money was paid over to plaintiff by W.³⁷

You are instructed that an agent employed to take orders for the purchase of the goods of his principal, the goods not being in his possession, and to be delivered by his principal upon his approving a sale at the prices and upon the terms proposed in the order, to the party giving it, has not authority to receive the price for the goods when so sold and delivered; and such payment by the purchaser to the agent soliciting such order will not discharge the purchaser from his liability to the principal, unless there is a known usage of trade or course of business to justify him in making it, or unless the principal is shown to have actually received the money so paid by the purchaser to the agent.³⁸

You are instructed that, when an agent has authority to collect bills for goods sold by his principal, through him or otherwise, he cannot receive anything other than money in payment, unless expressly or impliedly empowered to do so by the principal; and, when not so empowered, the receipt of checks or anything else than money in payment is not binding upon the principal, unless he ratifies his acts in so accepting and receiving something else than money, when advised thereof.³⁹

The jury are instructed that an agent, known to be such, who has

³⁶ *Jarvis v. Pague*, 208 S. W. 601, 137 Ark. 475.

³⁷ *Jarvis v. Pague*, 208 S. W. 601, 137 Ark. 475.

³⁸ *Crenshaw v. A. F. Shapleigh*

Hardware Co., 100 S. W. 882, 82 Ark. 182.

³⁹ *Crenshaw v. A. F. Shapleigh Hardware Co.*, 100 S. W. 882, 82 Ark. 182.

express authority to collect bills from the debtors of his principal for goods sold, through him or otherwise, cannot accept in part or full payment of such bills the satisfaction of his own debts, without the express or implied assent of his principal, and the fact of his agency does not imply assent.⁴⁰

§ 4237(2). Missouri

The jury are instructed that, if the court finds that P. was a canvassing book agent, obtaining subscriptions for the plaintiff for books published by him and sold by subscription, and that said P. was restricted by the terms of his employment from collecting for any books or parts of books except such as were delivered by him, and they further find that said canvassing agent never had possession of the parts and works for which this suit is brought, and did not deliver the same to the defendant, then it declares the law to be that his employment as canvassing agent gave him no authority to collect the money for which this suit is brought, and it devolves upon the defendant to show that he had such authority.⁴¹

§ 4238. Same—Power to receive moneys in advance of approval of sale by principal

You are instructed that an agent so employed to take orders for the purchase of the goods of his principal not in his possession, the goods to be delivered by the principal upon his approval of the price and terms proposed in the order, in no event, without express authority, can receive money from the parties giving the orders in advance of such approval, and thereby bind his principal. In such case the sale is incomplete, and the purchaser, in intrusting the agent with the money in advance of his purchase, to be applied when completed, makes him his agent, and if the money is not paid by the agent to his principal it is the purchaser's loss, and no payment has been made.⁴²

§ 4239. Authority to authorize cutting of timber

You are instructed that, if you find from the evidence that M. was plaintiff's agent and was in charge of his land, and had authority to cut timber on said land, and that he authorized and told the defendant that he could cut said timber, and, that acting from this authority, he cut same, then your verdict should be for the defendant.⁴³

⁴⁰ Crenshaw v. A. F. Shapleigh Hardware Co., 100 S. W. 882, 82 Ark. 182.

⁴¹ Chambers v. Short, 79 Mo. 204.

⁴² Crenshaw v. A. F. Shapleigh Hardware Co., 100 S. W. 882, 82 Ark. 182.

⁴³ Lancaster v. Case, 197 S. W. 24, 130 Ark. 171.

§ 4240. Power to borrow money

You are instructed that, if you find that C. was an agent of defendants, but that express authority was not given to him, as such agent, to borrow money for defendants, then you may look to the contract between them as it may be shown, by the evidence, the nature and character of the business in which C. was employed to act as agent, and all the transactions between them, and ascertain whether or not it is to be fairly implied as contemplated by them or embraced in the scope of his employment as agreed on between them, that he should have such powers to borrow money to be used in such business.⁴⁴

§ 4241. Authority to sign notes

The jury are instructed that, even should the jury believe, from the evidence in this case, that C. and H. had money in bank standing to the credit of one of them, and that each had authority from the other to check in the other's name on such money, from that fact alone, it does not follow that H. gave C. authority to sign his (H.'s) name to promissory notes.⁴⁵

§ 4242. Power to indorse check

You are instructed, members of the jury, that a "check" is a negotiable instrument, and that the title to a check or negotiable instrument is transferable by indorsement and delivery. By "indorsement" I mean the signature on the back of the check, signed by the payee, by himself or by some authorized agent. A proper indorsement of the check by the payee personally or by his authorized agent, accompanied with delivery thereof, transfers absolute title in and to that check to the person receiving the same, who thereupon becomes the holder and owner of the check.⁴⁶

You are instructed that title to the check in question in this case was in the plaintiff, and remained in the plaintiff until, by some act of plaintiff or its authorized agent, the title passed to another. If you find from the evidence that ——— as agent of the plaintiff, without real or apparent authority from plaintiff, indorsed the check in question in the form shown by the check, such indorsement and the delivery of the check to the defendant had no effect on the title of the plaintiff.⁴⁷

You are instructed that it is the law that a limited authority to indorse checks for deposit or collection only does not carry with it authority generally to assign or transfer title to the check from

⁴⁴ Collins & Douglas v. Cooper, 65 Tex. 460.

⁴⁵ Hefner v. Palmer, 67 Ill. 161.

⁴⁶ J. L. Mott Iron Works v. Metro-

politan Bank, 156 Pac. 864, 90 Wash. 655.

⁴⁷ J. L. Mott Iron Works v. Metropolitan Bank, 156 P. 864, 90 Wash. 655.

the payee. Hence an indorsement on the back of the check of the payee's name by his agent may be for the limited powers only of depositing the check with the bank so that the bank can collect it, or such indorsement may be for the general purpose of transferring the title to the check. If the authority of ——— was limited to indorsing for deposit only to plaintiff's credit, and if the bank knew of that fact, then the bank had no right to place it to the credit of any person except that of the plaintiff; but if ——— had authority to indorse generally, not only for deposit but likewise for the purpose of negotiating or transferring title to said check, then the bank would have a right dependent on the facts and the rule hereafter stated, to treat the check thus indorsed as having been transferred or assigned by plaintiff to ——— as ———'s personal property, to be controlled as ——— might direct.⁴⁸

§ 4243. Authority to draw draft

The court instructs the jury that if you believe from the evidence in the case that F. drew the drafts described in plaintiff's petition in this case, and delivered the same to the plaintiff bank, and that plaintiff bank paid to said F. the amount of said drafts, or placed the amount thereof to his credit and permitted him to check the same out in payment for produce; and if you further believe from the evidence in the case that, at the time of drawing said drafts and delivering the same to plaintiff bank, the said F. was acting as agent for defendant in buying produce and drawing said drafts; or if you believe from the evidence in the case that the defendant held out said F. to plaintiff's cashier as his agent, and as being authorized to purchase produce for him and draw drafts for money with which to pay for the same—then your verdict will be for plaintiff on both the ——— and ——— counts of the petition.⁴⁹

§ 4244. Authority to employ attorney

You are instructed that if you believe from the evidence that S. was in charge of the litigation of the defendant company, in the state of ———, and if you further find from the evidence that the said S. was the attorney for the defendant in the action brought on behalf of that company in the ——— court to foreclose the trust deed on the property of the ———, and if you further find from the evidence that said S. employed the plaintiffs to perform services, to recover for which this action was brought, then I instruct

⁴⁸ *J. L. Mott Iron Works v. Metropolitan Bank*, 156 P. 864, 90 Wash. 655.

⁴⁹ *Farmers' Bank of Dearborn v. Fudge*, 82 S. W. 1112, 109 Mo. App. 186.

you, as a matter of law, that said S. had authority to employ the plaintiffs to perform such services as they did perform, and that the defendant became, and now is, liable to the plaintiffs for the reasonable value of such services, if you believe from the evidence such services were an incident to services which said S. was directed to do in and about the foreclosure of said trust deed.⁵⁰

§ 4245. Authority to settle or compromise claim

§ 4245(1). Oklahoma

You are instructed that if you find and believe by a preponderance of the evidence that the plaintiff had authorized the defendant to make a settlement of the difference as to the division of the commission between him and the said —, for the procuring of an application to defendant for a loan, without specifying the terms and conditions thereof, and while the said dispute was pending, and prior to any action on the part of the defendant company toward effecting said settlement in pursuance of said authority, if any, the said plaintiff notified said company, and specified terms and conditions in said notice as to the amount upon which he would accept said settlement, any settlement made by defendant after said notice, contrary to the terms and conditions in said notice, would not be binding upon the plaintiff, and you should find for the plaintiff, unless said settlement so made was expressly or impliedly accepted or ratified by said plaintiff, in which event you should return a verdict for the defendant.⁵¹

§ 4245(2). Texas

You are instructed that if you should find from the evidence that, at the time said implements were invoiced by H., if they were so invoiced, the said invoice was made for the purpose of a final settlement, and that a settlement was had, and you further find that H. was acting for said company, with the express authority from said company to settle said note, and did in fact effect a settlement with T., then you will find for defendants T. and —; but should you find that H. only had authority to collect cash on said note and there was no settlement, then you will find for the plaintiff.⁵²

§ 4246. Authority to modify contract

Authority of agent of city to change terms of contract, see ante, § 3890.

Authority of insurance agent to waive conditions of policy, see ante, § 2525.

The jury are instructed that it is a question of fact presented to you as to whether or not O., as agent for plaintiff, was authorized

⁵⁰ Fowler v. Iowa Land Co., 99 N. W. 1095, 18 S. D. 131.

⁵¹ Deming Inv. Co. v. McLaughlin, 118 P. 380, 30 Okl. 20.

⁵² Lemond v. Smith (Civ. App.) 149 S. W. 751.

to suggest and request changes or modifications in the construction of the boat ———, or to suggest and request how parts of same should be constructed in points where the contract was silent, and if you believe from the evidence that O. was the agent of plaintiff, clothed in such authority, then his acts in making suggestions and requests would have the same legal effect as if they were made by the plaintiff himself; and in this connection, if you believe from the evidence that the plaintiff requested any changes or modifications in the parts of said boat, or requested that certain parts should be made in a certain way or of material heavier than that required under the contract, or that his agent, O., made such suggestions and requests (if you find that said O. was such agent), then plaintiff could not be heard to object to any such modifications, changes, or parts as he or his agent either suggested or requested. However, if you believe from the evidence that the said O. was not authorized as the agent of said plaintiff to make suggestions and requests for modifications or changes in said boat, or as to the construction of parts of same, then you are instructed that the plaintiff would not be bound by such suggestions or requests of O., if any, unless the plaintiff afterwards knew of and approved the same, in which event his approval would amount to a ratification, and would have the same legal effect as though he had in the first instance authorized such requests or suggestions for changes or modifications.⁵³

§ 4247. Apparent authority of agent

§ 4247(1). United States

The jury are instructed that the principal is bound to third persons for the acts of his general agent within the scope of his apparent authority, even though such acts are not reported by the agent to the principal. If you find from the evidence that ——— and ——— were held out by defendant to be its general agents, plaintiff had a right to assume that such agents would promptly communicate with their principal all dealings entered into between plaintiff and such agents, assuming to act on behalf of defendant, if you find that plaintiff had any dealings with said ——— and ——— as general agents of defendant.⁵⁴

§ 4247(2). Kentucky

The court instructs the jury that if they believe from the evidence that, at the time the contract sued on was executed, A. was the authorized agent of the defendant and had power and

⁵³ *Marine Iron Works v. Wiess* (C. O. A. Tex.) 148 F. 145, 78 C. C. A. 279.

⁵⁴ *Ætna Indemnity Co. v. Ladd* (Or.) 135 Fed. 636, 68 C. C. A. 274.

authority to sign and execute the same, or if they believe from the evidence that the defendant by its acts and conduct held said A. out as its authorized agent in such a way as to induce a reasonably prudent person to believe that he was its authorized agent with power and authority to execute such contracts as the one herein sued on, and that plaintiff relied upon the representations of defendant and its holding out of A. as its agent, then they will find for the plaintiff such sum in damages as they may believe from the evidence will fairly and reasonably compensate them for the loss, if any, sustained by them on account of the failure of the defendant to comply with said contract in delivering the cars or automobiles mentioned in this case, not exceeding in all the sum of \$——, the amount claimed in the petition; but unless you so believe from the evidence that the said A. was the authorized agent of the defendant, as defined to you herein, to make and execute said contract, you will find for the defendant.⁵⁵

§ 4247(3). Missouri

The court instructs the jury that one who deals with an agent is put upon inquiry as to the extent of the agent's authority, and assumes the risk of the agent having authority to bind his principal in the transaction in which they are engaged; but if the principal has held out the agent as having authority to transact the business, or knowingly permitted the agent to so act, the agent will be conclusively presumed to have the authority, whether it has actually been conferred upon him or not.⁵⁶

§ 4247(4). Nebraska

You are instructed that ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency; and in this case, if the jury believe from the evidence that J. had the apparent authority to contract for the payment by the defendant bank of the freight on the threshing outfit, purchased by ——, then the plaintiff is bound by the acts of said J., and if you believe that the defendant by a preponderance of the evidence has established the making of said contract to pay said freight and retain the same out of the collections, made by it for plaintiff, then your verdict will be for the defendant.⁵⁷

⁵⁵ Studebaker Corporation of America v. Dodds & Runge, 171 S. W. 167, 161 Ky. 542.

⁵⁶ Muth v. St. Louis Trust Co., 67 S. W. 978, 94 Mo. App. 94.

⁵⁷ Northwest Thresher Co. v. Eddyville State Bank, 114 N. W. 291, 80 Neb. 377.

§ 4247(5). Oregon

I have instructed you, if you find from the evidence in this case that the agent S. was not acting within the actual scope of his authority, but was acting within the apparent scope of his authority and made the representations claimed, and if they were false under the rules which I have just given you, then the defendants would be entitled to a verdict.⁵⁸

You are instructed that the principal is often bound by the acts of his agent in excess of his authority; but two important facts must be clearly established to create such a liability: (1) The principal must have held the agent out to the public in other instances as possessing sufficient authority to embrace the particular act in question, or knowingly have acquiesced in the agent's assertion of the requisite authority; and (2) the party dealing with such agent must have had reason to believe, and must have believed, that the agent possessed the necessary authority.⁵⁹

§ 4247(6). South Carolina

You are instructed that, if the management of its account with the ——— Bank by its agent was done with the knowledge and consent of the defendant company, and if it was conducted in such a manner as to lead a man of ordinary caution and prudence to believe that the agent had authority to obtain credit to buy, or to buy on credit, and if the agent referred the plaintiff to the officers of the bank to ascertain whether the check alleged to have been given him was good, and would be paid, and if the officers of the bank, relying on the previous course of dealing between the defendant and the bank through the defendant's agent, were led to believe, and did believe, that the defendant's agent had authority to give such a check, and if a person of ordinary caution and prudence in business would, from the past dealings between the defendant and the bank, have been warranted in so believing, then the defendant would be bound by the acts of its agent within the apparent authority which such course would have indicated.⁶⁰

§ 4248. Apparent authority to give warranty

You are instructed that, if you believe from the evidence that plaintiff's agent, ———, in selling the fish mentioned in the evidence to the defendant had no actual authority to warrant that such fish would stand shipment and would arrive at ——— in good, sound, merchantable condition; yet if you further believe from the evidence that the said agent had authority to sell said fish,

⁵⁸ *Frayn v. Pennington*, 182 P. 556, 93 Or. 187.

⁵⁹ *Baker v. Seaward*, 127 P. 961, 63 Or. 350.

⁶⁰ *Welch v. Clifton Mfg. Co.*, 33 S. E. 739, 55 S. C. 568.

and that it was usual in the business of buying and selling fish as conducted in —— to give such a warranty, then you are instructed that defendant was entitled to assume that such agent had power to give such a warranty, in the absence of any knowledge to the contrary.⁶¹

§ 4249. Secret limitations upon authority

§ 4249(1). United States

The jury are instructed that, where a person is by the principal held out to be the general agent of the principal, third persons acting in good faith are justified in relying upon the apparent authority of such agent, notwithstanding secret instructions and restrictions in point of fact placed by the principal upon such authority.⁶²

§ 4249(2). Texas

You are instructed that, if you should find that C. borrowed money from plaintiff, claiming to act as agent of defendants, and if such act of borrowing was within the usual and ordinary scope or purview of the business in which C. was employed, and which he was authorized by defendants to conduct and carry on, and plaintiff loaned the money to C. for the benefit of defendants, then defendants would be bound for such money, even if, by the private contract between defendants and C., he was not authorized to borrow money, unless plaintiff knew he was not so authorized when he loaned the money.⁶³

You are instructed that a principal is liable for the acts of his agents done within the scope of his employment. A general agent, notwithstanding private instructions, may, within the limits of his agency, bind his principal, unless the person dealing with the agent knew of the instructions.⁶⁴

§ 4249(3). Virginia

The court instructs the jury that if they believe from the evidence that the plaintiffs' fertilizers were first introduced into this community for sale.——, and the spring of ——, and further believe that it was the custom or usage of the farmers of this section not to buy any fertilizer when first introduced, upon the analysis thereof, but to require a warranty that the said fertilizer be as good as any other fertilizer on the market, dollar for dollar, as crop-producing, and if they further believe that S., the agent of plaintiff, warranted the fertilizers which he sold to the defendant,

⁶¹ Pickert v. Marston, 32 N. W. 550, 68 Wis. 465, 60 Am. St. Rep. 876.

⁶² Etna Indemnity Co. v. Ladd (C. C. A. Or.) 135 Fed. 636, 68 C. C. A. 274.

⁶³ Collins & Douglas v. Cooper, 65 Tex. 460.

⁶⁴ Planters' Mutual Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.

as alleged in his plea, then they are instructed that the plaintiffs are bound by such warranty, although they may further believe that he was restricted from making such warranty by any contract entered into between the plaintiffs and said S., unless they further find from the evidence that the said written restriction was known to the said defendant at the time he made the said purchases.⁶⁵

§ 4249(4). *Washington*

You are instructed that, when the plaintiff put its agent in charge of its business, it could not shut its eyes to his acts and escape liability therefor by secret instructions limiting his authority, if it did so. It is under a duty to use reasonable care to oversee how he conducts himself with reference to its business and all of his acts with reference thereto can be shown, whether actual knowledge of each particular act can be brought home to the principal or not.⁶⁶

§ 4250. *Authority of special agent*

§ 4250(1). *Ohio*

The jury are instructed that, if you find from the evidence that, in the contract and arrangement which resulted in the giving of the note in suit, the business between plaintiff and defendant was done by S., and that S. had no authority as a general agent from said defendant, beyond that resulting from their relation as general partners in the manufacture of ———, but only an authority to do that particular business, he (S.) would be, as far as this case is concerned, a special agent of defendant in that business, and so far as the jury find from the evidence that he (S.), in doing it, exceeded the authority and instructions given him by defendant, the latter would not be bound.⁶⁷

§ 4250(2). *Texas*

You are instructed that a particular agent (by which is meant one authorized to do one or more special things) binds his principal only so far as he pursues his authority. The rule is, as to the public, that the authority of a general agent may be regarded by them as measured by the usual extent of his general employment; but, as to acts of particular or special agents, the rule is different. A principal may well say to one who dealt with an agent for a particular purpose (special agent), "It was your business to first ascertain for yourself the character and extent of his agency."⁶⁸

⁶⁵ *Reese v. Bates*, 26 S. E. 865, 94 Va. 321.

⁶⁶ *J. L. Mott Iron Works v. Metropolitan Bank*, 156 P. 864, 90 Wash. 655.

⁶⁷ *Lytle v. Boyer*, 33 Ohio St. 506.

⁶⁸ *Planters' Mutual Ins. Co. v. Lyons, Lindenthal & Co.*, 38 Tex. 253.

C. RIGHTS AND LIABILITIES AS TO THIRD PERSONS

§ 4251. Effect of representations of agent as binding on principal

§ 4251(1). Alabama

The jury are instructed that if they believe from the evidence that ——— was superintendent of defendants' business, then defendants are bound by his acts and declarations done or made within the line and scope of his authority as such superintendent.⁶⁹

The jury are instructed that, in order to show the authority of ——— to bind defendants by particular acts or declarations, it is not necessary to show that defendants specifically authorized said ——— to do those particular acts; but such acts and declarations, if made in the line and scope of such general authority as may have been conferred on him by defendants, would be binding on them.⁷⁰

§ 4251(2). Kansas

You are instructed that there is a clause attached to this contract upon which some evidence has been offered and reads as follows: "All promises and agreements are stated herein; verbal agreements with salesmen not authorized." You are instructed that, if you find and believe from the fair weight of the evidence in this case that the plaintiff's salesman, ———, in fact made any false, fraudulent, or untrue representations to the defendants in order to procure this contract, then that particular clause of the contract to which I have just directed your attention would not be a bar to the defense offered by the defendants in this case, and for the reason that a principal may not send an agent out among the public for the purpose of soliciting contracts, and after a contract has been obtained or procured because of false and fraudulent representations, the principal will not be permitted to accept the contract, and at the same time avoid the effect of such fraudulent statements so made to procure it, by having that clause incorporated in the contract; fraud cannot be overcome by such a clause.⁷¹

§ 4251(3). Missouri

The court instructs the jury that if they believe from the evidence that the witness, ———, was the agent of defendant alone in making the trade between plaintiff and defendant, or was the

⁶⁹ Tutwiler v. McCarty, 25 So. 828, 121 Ala. 356.

⁷⁰ Tutwiler v. McCarty, 25 So. 828, 121 Ala. 356.

⁷¹ Outcault Advertising Co. v. Smalley, 168 P. 677, 101 Kan. 645.

agent of both plaintiff and defendant then the representations and statements made by ——— to plaintiff while acting on behalf of the defendant were binding on the defendant. And if the jury believe from the evidence that the acts and statements of ——— to plaintiff, if any, to induce him not to go to ——— to examine the land were made for and on behalf of defendant, then the defendant would be bound thereby.⁷²

§ 4251(4). Virginia

The court instructs the jury that if they believe from the evidence that, before and at the time of closing the said transaction, H. was in the employ of the defendant, to be paid, and that he was thereafter paid, a consideration by the defendant for his services in relation to the said transaction, and that such relationship existing between the said H. and the said defendant was unknown to the plaintiff, and not ascertained by him until long after consummating the said deal, that then, any representations made by the said H. to the said plaintiff, prior to and at the time of the closing of the said transaction, in relation to the said ——— property, were made as the agent and in behalf of the said defendant, and that the defendant is bound by the same, to the same extent as if made by himself.⁷³

§ 4252. Effect of notice to agent

§ 4252(1). Texas

You are instructed that the undisputed evidence in this case shows that L. was the agent for defendant in the purchase of said property, and that if said L. and ———, or either of them, knew before the execution of said deed of ——— and wife to L. that the wife was compelled to sign said deed through fear of her husband, or at the time said deed was signed by her the notary failed to fully explain said deed, if he did, or failed to take her acknowledgment as required by statute, if he did, as has been heretofore explained to you in the main charge, then and in that event you are instructed that the knowledge of said facts by ——— and L. would be binding on defendant.⁷⁴

§ 4252(2). Washington

The jury are instructed that the fact that the miller of the plaintiff mill company was around the work and saw how it was being done, and the fact that he may have undertaken to direct how it should be done, would not charge plaintiff with notice, unless the miller was authorized by plaintiff to look after the work, and was

⁷² Adams v. Barber, 139 S. W. 489, 157 Mo. App. 370.

⁷³ Cerriglio v. Pettit, 75 S. E. 303, 113 Va. 533.

⁷⁴ London v. Crow, 102 S. W. 177, 46 Tex. Civ. App. 190.

held out as its agent for that purpose, and whether he was so authorized and so held out is for you to determine from all the evidence in the case.⁷⁵

§ 4253. Liability of principal for torts of agent

§ 4253(1). Alabama

The court charges the jury that the defendant in this cause, the ——— Company, is not responsible for the acts of its agent, ———, willfully and intentionally done, and done beyond the range of his employment or duty, and without the command or authorization of the defendant.⁷⁶

§ 4253(2). Michigan

You are instructed that, when an agent makes material representations to a jobber as an inducement for the latter to enter into an agreement, and which is entered into in reliance thereon, and the person making such representations claims and so states to the jobber that he makes such representations in good faith, and upon an estimate which he believes to be reliable, and such agent then has another estimate which he believes, if communicated to the jobber, would prevent the execution of such a contract, and for this reason does not communicate to him, in so withholding such estimate, he is committing a fraud for which his principal will be liable.⁷⁷

§ 4254. Liability of agent for false representations—Scienter

You are instructed that it is not sufficient to show that the representation was made, and made to induce the sale, and that said statement was in fact untrue. It must further appear that the defendant knew said statement was untrue when he made it, or he must have asserted that he had actual knowledge, or intended to convey the impression that he had actual knowledge, of the truth of the statement made, although conscious that he had no such knowledge. It is admitted that defendant was the agent of ———, and so acted in the transaction. It is also admitted that plaintiff knew that defendant was acting for ———, and not for himself. Under these circumstances, a mere assertion or representation concerning the said land would be presumed to be made for and on behalf of the principal, and the agent would not be liable for any such assertion or representation, concerning said land, unless such agent, in making such statement, knew at the time he was making it that the statement was false and untrue, or that he made such

⁷⁵ Novelty Mill Co. v. Heinyerling, 81 P. 742, 39 Wash. 244.

⁷⁶ Sweeny v. Blenville Water Supply Co., 25 So. 575, 121 Ala. 454.

⁷⁷ Busch v. Wilcox, 46 N. W. 940, 82 Mich. 315.

representation assuming and asserting that he had personal knowledge when in fact he had not.⁷⁸

§ 4255. Liability of agent for false representations as to his authority

The jury are instructed that, if the president of the —— company, who by the constitution and by-laws had the power to make contracts on its behalf, ordered the defendant to procure the work to be done for compensation for which this suit is brought, and defendant understood that he was to order the work done upon the credit of the said company, he was authorized to bind the company, and plaintiff could recover from defendant. But if, when defendant received such instructions from the president, he understood he was to order the work upon the credit of the ——, and not upon the credit of the said company, and he represented to plaintiff that he had authority to order this work for said company, the plaintiff is entitled to recover by reason of the false representation by defendant as to his authority.⁷⁹

§ 4256. Undisclosed principal—Liability of agent

The court instructs the jury that it is a rule of law that an agent who enters into a contract in his own name, without disclosing the identity of his principal, renders himself personally liable, even though the third person knows that he is acting as an agent, unless it affirmatively appears that it was the mutual intention of the parties to the agreement that the agent should not be bound.⁸⁰

The court instructs the jury that, in order to avoid personal liability, it was the duty of defendant to disclose to plaintiff that defendant was acting in a representative capacity, and also to disclose to plaintiff the identity of his principal. But, if plaintiff knew the identity of the principal, defendant then did not owe any duty of disclosing the identity of his principal.⁸¹

§ 4257. Liability of husband acting for wife

Gentlemen, if you believe from the evidence that the defendant had charge of the work of putting in the foundation and erecting the building upon the lot in question, and had the care of the premises to which the sidewalk belonged, and that the planks of the sidewalk were removed, although by some persons other than the defendant, and without his direction, but were removed for the purpose of hauling material upon the lot for the construction of

⁷⁸ Riley v. Bell, 95 N. W. 170, 120 Iowa, 618.

⁷⁹ New York Bank Note Co. v. McKeige, 31 App. Div. 188, 52 N. Y. S. 597.

⁸⁰ Frank v. Woodcock, 143 P. 1105, 72 Or. 446.

⁸¹ Frank v. Woodcock, 143 P. 1105, 72 Or. 446.

the building, and that the defendant had control of the sidewalk, and knew that the opening through it was used for hauling building material upon the lot, and that the sidewalk was in fact out of repair, and in a dangerous condition at the time the accident occurred, and if you further find that the defendant was guilty of negligence in permitting it to be and remain open and out of repair, and in a dangerous condition, and in consequence thereof the plaintiff was injured without fault on her part, then I instruct you that the defendant would be liable, although the title to the property was in his wife, and the defendant was acting for her in the erection of the building.⁸²

§ 4258. Effect of statute requiring agent to disclose name of principal by advertising sign

The court instructs the jury that, although they believe from the evidence in this case that Mrs. ——— was the owner of the stock of goods and the business conducted at ——— street, and that defendants knew this, yet if such business was conducted by her husband, the execution debtor as agent for his wife, the plaintiff, and he failed to disclose his principal, by a sign, in letters easily to be read, placed conspicuously at his said house where said business was conducted, or by notice published for two weeks in a newspaper, and the property levied on by the defendants was acquired by the husband in such business, then they must find for the defendants.⁸³

The court instructs the jury that though they may believe from the evidence that the plaintiff, Mrs. B., did not instruct or authorize her husband, G. B., to have her licenses transferred to G. B., agent, or to have her business advertised as that of G. B., agent, yet if they further believe from the evidence that after her said husband had had her licenses so transferred, and had so advertised the business, the plaintiff, Mrs. B., knew of her husband's action in those respects, and did not correct or repudiate them, then by her silence and acquiescence, after having knowledge of her husband's said acts, she ratified them, and made them just as binding on her as if she had authorized them in advance.⁸⁴

§ 4259. Rights of principal against third person colluding with agent to defraud principal

The jury are instructed that, if the jury believe from the evidence that by a combination between the defendant and ——— goods were shipped from the store and warehouse of the plaintiff, and that by a system of false invoices they were placed at greatly

⁸² *Ellis v. McNaughton*, 42 N. W. 1113, 76 Mich. 237, 15 Am. St. Rep. 308.

⁸³ *Hoge v. Turner*, 32 S. E. 291, 96 Va. 624.

⁸⁴ *Hoge v. Turner*, 32 S. E. 291, 96 Va. 624.

reduced values, and that the defendant, with the knowledge of these facts, or with the knowledge of sufficient facts to have put him, as a reasonable person, upon notice of fraud involved in it, received and used said goods and did not pay the full and actual value of the goods, then the jury will find for the plaintiff in a sum equal to the difference between the amount paid by defendant and their real value.⁸⁵

§ 4260. Liability of third person to undisclosed principal

You are instructed that, if you find from the evidence that the ——— Produce Company loaded the car of apples in controversy at ———, and took bill of lading subject to their own order, and that the car was shipped ———, to ———, and if you further find that defendant accepted an order from plaintiff for a car of apples on ———, and that under some agreement between said Produce Company and said defendant the said car was diverted from its route by the order of defendant and was shipped and sold to said plaintiff, who took and paid for said car, and that said shippers, ——— Produce Company, intended that said defendant should take and sell the same, then you are instructed that said Produce Company cannot recover on their interplea against plaintiff.⁸⁶

§ 4261. Burden of proof

The court instructs the jury as a matter of law that, before H. can be bound by the acts of his son, it must be shown by the defendant, by competent evidence, that H. authorized his son to act for him and in his behalf in executing the special agreement relied upon by the defendant.⁸⁷

The court instructs the jury as a matter of law that, before a principal can be bound by the acts of his agent, it must be shown by the party asserting such agency that the principal authorized such agent to act for him and in his behalf, and that such agent carried out the business of his principal and within the scope of his authority as such agent; otherwise, the principal is not bound by the acts of the agent.⁸⁸

D. RIGHTS AND LIABILITIES INTER SE

§ 4262. Liability of agent to principal—Breach of trust

You are instructed that, when the defendants entered into the contract which has been offered in evidence they assumed a relation

⁸⁵ Crenshaw v. A. F. Shapleigh Hardware Co., 100 S. W. 882, 82 Ark. 182.

⁸⁶ C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305, 138 Ark. 500.

⁸⁷ Meyers v. Johnson, 186 Ill. App. 37.

⁸⁸ Meyers v. Johnson, 186 Ill. App. 37.

of trust and confidence to the plaintiffs, and it was their duty to hold the sales of the fertilizers which they received from the plaintiffs in trust for the payment of the note which they gave to the plaintiffs; and if the jury shall find that they have failed or refused to discharge said trust and confidence, or have applied said sales to other uses, or appropriated them to their own use, then the jury will answer the fourth issue, "Yes."⁸⁹

The court instructs the jury that, if the jury shall find that the defendants were in strained circumstances, which soon ended in insolvency, and the jury shall further find that while they were in those strained circumstances they appropriated the property intrusted to them by the plaintiffs to their own use, then the law presumes that their intent was fraudulent in thus appropriating it, and they cannot be heard to say that they had no intent by such appropriation to defraud the plaintiffs.⁹⁰

§ 4263. Same—Fraud of agent in connection with investments

You are instructed that if you find from the evidence that the defendant was acting for the plaintiff in making the loan for her, then she was justified in relying upon his representations as to the character of the security he was to obtain for her, and in accepting the security furnished by him as in everything corresponding to her instructions. You are further instructed that she was not required to examine the records to discover whether or not the mortgage obtained for her was a first mortgage, or to take any action until she had reason to believe, from knowledge or information coming to her, that her instructions had been violated.⁹¹

§ 4264. Duty of agent to account to principal for secret profits

The court further instructs the jury that, if an agent makes any profits in the case of his agency, by any concealed management in either buying or selling, or other transaction on account of his principal, the profits will belong exclusively to the principal.⁹²

The court further instructs the jury, for the plaintiff, that a party cannot take upon himself diverse interests, and that, when the defendant received and accepted the power of attorney from the plaintiff, he became, to all intents and purposes, the agent of plaintiff, and that in whatsoever transactions he had with ——— after the date of that instrument, in reference to the same transaction, defendant was acting in that capacity, and as such must account to his principal, plaintiff, for whatever funds are left in his hands after ——— is paid belong to plaintiff.⁹³

⁸⁹ Boykin v. Maddrey, 19 S. E. 106, 114 N. C. 89.

⁹⁰ Boykin v. Maddrey, 19 S. E. 106, 114 N. C. 89.

⁹¹ Faust v. Hosford, 93 N. W. 58, 119 Iowa, 97.

⁹² Cottom v. Holliday, 59 Ill. 176.

⁹³ Cottom v. Holliday, 59 Ill. 176.

§ 4265. Compensation of agent**§ 4265(1). Virginia**

The court instructs the jury that the defendants had no right as a matter of law to terminate any contract they may have made with the plaintiff, as long as the obligations of the parties under the contract continued, without the assent of the plaintiff. The parties to a contract may terminate it by mutual consent.⁹⁴

The court instructs the jury that, if they believe from the evidence that the defendants entered into a contract with the plaintiff for the payment to the plaintiff of \$—— per horse upon all the horses which they should sell through him, and that the contract embraced no other undertaking on the part of the plaintiff, and that the plaintiff did bring the defendants and K. together, and as a result thereof a sale of —— horses was made by defendants to K., and that no reduction of the said amount per horse was agreed to by the plaintiff at any period while said horses were being sold, and that said contract was not by mutual consent terminated by the parties before all of the said horses were sold, then they should find for the plaintiff and fix his damages at \$—— per horse on the number of horses sold, after deducting the —— horses included in the first three shipments on which the commission was paid.⁹⁵

The court instructs the jury that, since there is no evidence that the contract entered into between the plaintiff and defendants for the payment of a commission to the plaintiff on all horses sold to K. or —— was in any way dependent or conditioned on the profits or losses made or sustained by the defendants from said sales, the jury are instructed that, if they believe from the evidence and the instructions of the court that the plaintiff made a contract with the defendants, which the defendants have violated and the plaintiff is entitled to recover, then the fact of such profits or losses by the defendants would not lessen the plaintiff's right of recovery.⁹⁶

§ 4265(2). Washington

You are instructed that, if you find from a fair preponderance of the evidence that the plaintiff was negotiating a sale of the two trucks to ——, and that said sale was practically consummated and was thereafter consummated, and the trucks sold and delivered, it did not rest within the power of the defendant to announce to the plaintiff that it would allow him a —— per cent. commission upon

⁹⁴ Smyth Bros.-McCleary-McClellan Co. v. Beresford, 104 S. E. 371, 128 Va. 137.

⁹⁵ Smyth Bros.-McCleary-McClellan

Co. v. Beresford, 104 S. E. 371, 128 Va. 137.

⁹⁶ Smyth Bros.-McCleary-McClellan Co. v. Beresford, 104 S. E. 371, 128 Va. 137.

said sales, unless the plaintiff agreed to it. The plaintiff would have the right, notwithstanding any statement of the defendant made after plaintiff had negotiated the sale that it would only allow him ——— per cent. upon the sales of those two certain trucks, to proceed and bring about the consummation of said sale and insist upon the payment of the commission under the terms of the written contract, unless plaintiff agreed to take a less commission than that as set forth in said written agreement.⁹⁷

§ 4266. Same—Abandonment of contract by agent

The jury are instructed that, if the jury believe from the evidence that the defendants notified the plaintiff in ———, of their intention to terminate the \$——— contract then existing between them and the plaintiff, as substantially embodied in the letter of ———, and the jury believe that the terms of said letter were a part of the contract, and that the plaintiff acquiesced in and consented to a change in said contract from \$——— per horse to \$——— per horse, but leaving all the other elements of the original contract undisturbed, then if the jury further believe from the evidence that the plaintiff voluntarily abandoned said modified contract and failed to render the services which he had promised to perform and was not prevented or excused by the defendants from performing said personal services, then they should find for the defendants.⁹⁸

§ 4267. Same—Prevention by principal of performance by agent

The court instructs the jury that, even though they may believe from the evidence that the plaintiff agreed as a part of his contract, in consideration of the payment of so much on each horse sold, to perform some additional specified and definite services besides producing a purchaser, yet if the defendants while the contract was in force notified the plaintiff that they would proceed no further in the execution of the contract between the plaintiff and the defendants, and thereby prevented the plaintiff from performing such services, then the plaintiff had a right to accept the situation, terminate all relations with the defendants, and sue for the breach of the contract and recover as damages the amount agreed upon in the contract on all horses sold to the said K.⁹⁹

The court instructs the jury that the burden of proving his case is upon the plaintiff, and that he must prove it by a preponderance of evidence in order to entitle him to recover. The preponderance

⁹⁷ McLean v. Commercial Motors Co., 194 P. 792.

⁹⁸ Smyth Bros.-McCleary-McClellan Co. v. Beresford, 104 S. E. 371, 128 Va. 137.

⁹⁹ Smyth Bros.-McCleary-McClellan Co. v. Beresford, 104 S. E. 371, 128 Va. 137.

of the evidence does not necessarily mean a greater number of witnesses. It is the greater weight of all the evidence before the jury.¹

§ 4268. Same—Entire or severable contract

The jury are instructed that, if the jury believe from the evidence that the contract between the plaintiff and the defendants was that the plaintiff would in consideration of a certain sum per head not only secure an offer or offers from foreign governments to purchase defendants' horses, but that plaintiff would also assist and co-operate with the defendants in the inspection of said horses and in securing their approval by the agents of the purchaser or purchasers and render personal services in assisting about the shipping and protecting defendants in their territory, then the court instructs the jury that said contract was an entire one and is not severable; and if the jury believe from the evidence that the plaintiff refused or failed to take part in the inspection and securing the approval by the agents of the purchaser of the horses sold by the defendants after ———, and to render said services, but voluntarily left the country and abandoned said contract without being prevented or excused by the defendants from further assisting in said matters connected with sales of horses which might be made by defendants, then the plaintiff violated the contract on his part and cannot recover.²

§ 4269. Same—Right of subagent against principal

You are instructed that it is further incumbent upon plaintiff to show by the preponderance of the evidence, or from all of the facts and circumstances disclosed by the proof, that the said L. not only was agent for the sale of ——— lands belonging to the defendant, but that he also was authorized by the defendant to employ subagents for the defendant himself, and to whom the defendant would be liable for commissions earned under contracts made with such subagents.³

You are instructed that, if you find from the evidence and under the law as given you by the court in these instructions that said L. was in fact the agent of the defendant for the sale or exchange of ——— lands, then said L., under the law, would be authorized to employ subagents to assist him in making such sale or exchange. This fact, however, of itself, would not be sufficient to entitle the plaintiff, even though said L. was the agent of the defendant, and even though plaintiff was employed by said L. to furnish said L. customers for the sale or exchange of ——— land, to recover

¹ Smyth Bros.-McCleary-McClellan Co. v. Beresford, 104 S. E. 371, 128 Va. 137.

² Smyth Bros.-McCleary-McClellan

Co. v. Beresford, 104 S. E. 371, 128 Va. 137.

³ Lenhart v. Bean, 161 N. W. 464, 181 Iowa, 85.

against defendant a commission for so furnishing such customers. Before the plaintiff would be entitled to recover against the defendant any commission on account of having furnished a customer under a contract with said L., the burden is upon him to establish by the preponderance of the evidence, not only that said L. was the agent of the defendant, and that said L. employed plaintiff to furnish customers for said ——— lands owned by the defendant, and that he did in fact furnish customers to whom ——— lands belonging to defendant were traded or exchanged for ——— county lands owned by ———, but he must further show that the contract or agreement between himself and said L. was in substance and to the effect that the defendant, and not L., should pay such commission to plaintiff, or that after the transaction had been completed the defendant was advised of such transaction, and that he thereby ratified or agreed to pay such commission.⁴

You are instructed that the mere fact that an agent has authority to employ a subagent to assist in making sale or exchange of lands, would not necessarily without more carry with it implied authority to bind the principal, to pay commission to such subagent. The law is that where a party is employed as an agent to sell or exchange real estate, he may employ a subagent to assist him in making such sale, but there would be no implied authority to render the principal liable for commission to such subagent, and without any showing to the contrary the subagent would be required to look to the agent for his commission, and before the subagent can recover against a principal for commissions claimed to have been earned in making sale or exchange of lands, it is incumbent upon such subagent to show by the facts and circumstances disclosed by the proof that such agent had authority, not only to employ a subagent such as is implied by law, but that he was authorized by the principal himself to bind the principal to pay the subagent the commission for the services rendered by him in making sale or exchange of lands; or else that after having made such sale or exchange the principal agreed to pay such subagent the commission for his services.⁵

§ 4270. Same—Right of agent as against subagent

The court instructs the jury that if they believe from the evidence that the truck in question was sold to the ——— Company and delivered to the railroad company before the cancellation of the contract, to be carried by said railroad company to the ——— Company in ———, such delivery to the railroad company constituted the delivery contemplated and required by the contract between

⁴ Lenhart v. Bean, 161 N. W. 464, 181 Iowa, 85.

⁵ Lenhart v. Bean, 161 N. W. 464, 181 Iowa, 85.

the plaintiff and the defendant, and the jury must find for the plaintiff a sum equal to ——— per cent. of the price paid by the ——— Company for the truck in question, which was \$———, with interest from the date of the sale of said truck. If the jury believe from the evidence that the letter dated ———, from the defendant to the plaintiff, was written solely for the purpose of depriving the plaintiff of commissions they had earned on the sale of the truck in question, then they are instructed that this constitutes fraud on the part of the defendant, and they must therefore find for the plaintiff.⁶

§ 4271. Right to act for parties having adverse interests and to receive compensation from both

The jury are instructed that an agent, in the ordinary acceptance of the term, cannot be the agent of two parties, having adverse interests, without the consent of both; because when he is intrusted with a discretion in buying or selling, he must exercise that discretion and judgment for the benefit of the person employing him. But where he is not invested with a discretion by one of the parties, but his instructions are fixed and determined by the one, he may then, without any violation of his duties, receive an employment from the other party having adverse interests, and negotiate the affair between the parties to a conclusion; because, as to one of them, he cannot change the terms of the proposal, and, therefore, he may act for another, in accepting the terms so fixed and determined. In such a case, his engagement is in a manner twofold, and in this capacity he may bring about the sale or exchange desired by both parties, and claim a compensation from each.⁷

The jury are instructed that, if you shall find from the evidence, that J., as agent of the plaintiff, agreed with the defendants, that they should take and sell for plaintiff certain of the lots, then being offered for sale by plaintiff, for a certain and definite price fixed and agreed upon by and between the defendants and said J., for which the defendants were to take and receive an agreed commission, viz., ——— per cent. on the purchase price, and that this agreement was made within the scope of J.'s authority, as agent of the plaintiff, and that defendants have sold said lots for the agreed price, and have fully accounted to plaintiff for the proceeds received therefor, less the stipulated commission, then they are not liable to plaintiff in this action, although they may have received from the purchasers of said lots a sum for conducting the negotiations, re-

⁶ Eastern Motor Sales Corporation v. Apperson-Lee Motor Co., 85 S. E. 479, 117 Va. 495.

⁷ Alexander v. Northwestern Christian University, 57 Ind. 466.

ceiving and paying out the notes and money, and superintending the transactions, and receiving the deeds and other papers for them.⁸

§ 4272. Burden of proof in action by principal for accounting

You are instructed that, if you believe from the evidence that defendants loaded in cars for shipment to plaintiff, and such cars were carried to plaintiff by the railroad company, all of the wheat bought by defendants with the plaintiffs' checks, then you shall find a verdict in favor of defendants. In this connection you are further instructed that it does not devolve upon defendants to account for any shortage of the wheat, if there was any. It devolves upon the plaintiffs to prove by the greater weight or preponderance of the evidence that there was a shortage of wheat, and that defendants embezzled or converted the same in the manner and as defined in these instructions.⁹

§ 4273. Presumption of fraud where transaction between principal and agent for benefit of agent

The court instructs the jury that, when one is the general agent of another, and has entire management of his affairs, so as in effect to be as much his guardian as the regularly appointed guardian of an infant, a presumption of fraud as a matter of law, arises from a transaction between the agent and his principal for the former's benefit, and it will be decisive of the issue in favor of the principal unless it is rebutted.¹⁰

The court instructs the jury that, if you find from the evidence that ——— was the general agent of the plaintiff and her mother in the management of this property at the time he procured the deed to be executed, then the law presumes that the transaction was fraudulent, and unless the defendants have satisfied you, from all their evidence, by the greater weight of the evidence, that the transaction was open, fair and honest, it would be the duty of the jury to answer the issue "Yes."¹¹

The court instructs the jury that, if the jury find by the greater weight of the evidence that ———, at the time he procured the deed from the plaintiff and her mother, was the general agent of the plaintiff and her mother, in the management of their property and affairs, and that they relied upon him for his advice in their business transactions, and that this relationship existed at the time he procured the deed, then the law presumes that the deed was obtained fraudulently, and the burden would be on the defendants to show

⁸ *Alexander v. Northwestern Christian University*, 57 Ind. 466.

⁹ *R. C. Stone Milling Co. v. McWilliams*, 98 S. W. 828, 121 Mo. App. 319.

¹⁰ *Smith v. Moore*, 62 S. E. 892, 149 N. C. 185.

¹¹ *Smith v. Moore*, 62 S. E. 892, 149 N. C. 185.

that —— obtained the deed fairly; and, unless the defendants have satisfied you that the deed was obtained fairly by the greater weight of the evidence, it would be your duty to answer the issue "Yes," because, when such an agent deals with his principal in a transaction by which he is to be benefited, and the transaction is questioned by his principal, the fiduciary relationship being established, the law puts the burden on such agent to show there was no fraud, and if you find, by the greater weight of the evidence, that ——, at the time he procured the deed, was such general agent, then the burden is on the defendants to satisfy you by the greater weight of the evidence that the deed was obtained fairly, and, unless you are so satisfied, you should answer the issue "Yes," even though you should be of the opinion that the plaintiff has not shown that any fraud was committed.¹²

¹² Smith v. Moore, 62 S. E. 892, 149 N. C. 185.

CHAPTER CCXXXI

PRINCIPAL AND SURETY

- § 4274. Who are sureties.
- 4275. Consideration for contract of suretyship.
- 4276. Release of surety by change in obligations of principal contract.
- 4277. Conditions precedent to enforcing liability of surety—Notice of default of principal.
- 4278. Defense of satisfaction of original note and forgery of surety's name to new note.
- 4279. Enforcement of claim against alleged principal on account of payment of debt by surety.

See, also, Guaranty; Indemnity.

§ 4274. Who are sureties

You are instructed that if you shall find, by a preponderance of the evidence, that the defendant C., at the time of the execution of said note, signed it at the request of the defendant B., and that he received no part of the consideration of said note, either for his own use or for the use of the partnership between the defendants, then it will be your duty to find that said C. was originally a surety only on the said note.¹

You are instructed that, on the other hand, if you find from the evidence that the defendant C. received any part of the consideration of said note for his own use, or find from the evidence that the money, or any part of it, for which said note was given, was used by the defendants for the benefit of the copartnership then existing between them, or that the money was borrowed by them for that purpose, then, in either case, the defendant C. was not a surety only on said note, and you should so find.²

§ 4275. Consideration for contract of suretyship

The jury are instructed that, if a party sign a note as surety for another, in consideration that the principal shall receive the benefit thereof, such consideration is a valid one in law, and the signer thereby becomes liable to the lender as the principal; and in this case it is immaterial how much, if any, benefit the defendant received from signing said note, provided he signed it in consideration that his ——— should receive credit for the amount of the same, and that his ———, by reason thereof, did receive such credit.³

¹ *Parmateer v. Bass*, 84 N. W. 965, 113 Iowa, 68.

² *Parmateer v. Bass*, 84 N. W. 965, 113 Iowa, 68.

³ *Broadwell v. Sanderson*, 29 Ill. App. 384.

§ 4276. Release of surety by change in obligations of principal contract

You are instructed that, if you believe from the evidence that there were any material alterations in the contract of lease, or that plaintiff failed to comply with any of the terms of said lease, without the consent of the defendant, then your verdict must be for the defendant.⁴

You are instructed that if you believe from the evidence that any material change was made in said contract of lease between the plaintiff and the ———, or that any new agreements were entered into between the said plaintiff and said ——— without the consent of the defendant, then the defendant is released and your verdict must be for him.⁵

You are further instructed that, if any material changes or alterations were made in said contract without the consent of said defendant, this would release the said defendant, even though said changes or alterations might be for the benefit of said defendant.⁶

**§ 4277. Conditions precedent to enforcing liability of surety—
Notice of default of principal**

In another part of their answer, the defendants plead that no timely notice of the default of ——— was given to the sureties upon this bond by the plaintiff. But defendants do not plead that they suffered any loss by reason of not getting notice of the default. You are instructed that you need not consider the evidence as to whether any notice of the default was given. Whether this bond sued upon be properly called a surety bond or a guaranty bond, it guaranteed the faithful performance of the contract and the punctual payments to be made by ———. And the signers of such a bond are liable to the guarantee immediately upon the default of the principal, and without demand or notice.⁷

§ 4278. Defense of satisfaction of original note and forgery of surety's name to new note

The court instructs the jury that, in order to make good the defense set up in the fifth count of his answer, the defendant must prove by a preponderance of the evidence that he received knowledge of the surrender and delivery of the original note as explained in the sixth instruction above as paid; that he believed the same was actually paid and satisfied, and plaintiff had so declared in some manner by its action in surrendering it to the maker as paid and satisfied; that he relied upon such facts and was misled there-

⁴ Berman v. Shelby, 125 S. W. 124, 93 Ark. 472.

⁵ Berman v. Shelby, 125 S. W. 124, 93 Ark. 472.

⁶ Berman v. Shelby, 125 S. W. 124, 93 Ark. 472.

⁷ Chicago Crayon Co. v. Rogers, 119 Pac. 630, 30 Okl. 299.

by and lulled into security, so that he took no thought or action for his own protection or to indemnify himself against said maker; that said maker was in such solvent condition that he could by commencing action at law or otherwise have prevented loss to himself, and that he would have done so had he not been so misled and lulled into security by reliance upon the knowledge he thus gained of the surrender and satisfaction of said note; that since said surrender and delivery of said original note the said maker has become in an insolvent condition, so that defendant could not thus take steps to protect himself from loss, and that he has remained in such insolvent condition. If he has so proved all such facts, your verdict must be for the defendant, otherwise his defense must fail as to this count.⁸

The court instructs the jury that ordinarily a creditor owes a surety no act of diligence. The obligation to see that the debt is paid or that the principal maker pays the note rests upon the surety, and not upon the payee or owner of the note. So in this case it was the duty of the defendant to see that the said \$—— note was paid, and not a duty resting upon the plaintiff, and the mere fact that the plaintiff was lenient with the principal maker, or, if it remained inactive and took no steps to collect it, these facts would not release the defendant. Now, would the surrender of said note to the principal, ——, as paid upon the execution and delivery of a note for a larger amount to plaintiff operate as a release or discharge of the defendant from the liability on the original note, if such surrender thereof was procured by fraud and forgery unknown to the plaintiff? To operate as a release of the defendant by such facts, knowledge thereof must have been conveyed to him in such a way and time as to mislead him and cause him to change the position he would otherwise have taken to his detriment, or to quiet him into a feeling of security, and prevent him from taking action against the maker in time to prevent loss to himself.⁹

The court instructs the jury that, in order to make good the defense set out in the seventh count of his answer, explained in the seventh instruction herein, the facts essential to be proved by the defendant by a preponderance of the evidence are: That after the plaintiff knew as a fact, or believed, after learning that defendant claimed that he did not sign the new note, that his signature there-to was not genuine, it voluntarily and knowingly retained the same in the condition it was then left, and treated and considered it still as a payment and complete satisfaction of the old note. If the defendant

⁸ *Reints & De Buhr v. Uhlenhopp*,
128 N. W. 400, 149 Iowa, 284.

⁹ *Reints & De Buhr v. Uhlenhopp*,
128 N. W. 400, 149 Iowa, 284.

has so proved such facts, your verdict must be for the defendant; otherwise he must fail in this defense. The mere fact that the defendant denied his signature or claimed to plaintiff that he did not sign the new note, or that plaintiff began this suit on the new note, would not be sufficient to establish this defense, as the plaintiff would not be compelled to take defendant's word alone as establishing the truth, unless it be believed it to be true, and it would have a right to sue any or all of the makers or sureties together or separately, and to test the question of the genuineness of the defendant's signature by action at law on the new note without waiving any right it might have upon the old note against any of the makers or sureties thereon.¹⁰

§ 4279. Enforcement of claim against alleged principal on account of payment of debt by surety

You are instructed that you shall find for the defendant, unless you shall believe from the evidence that the defendant, H., and S. as principals, and the plaintiffs, as sureties for the said H. and S., executed the two notes named in the petition, and shall further believe from the evidence that said plaintiffs, as such sureties, if you shall from the evidence believe they were sureties, paid said notes, in which event you will find for the plaintiffs the sum of \$—— with interest from ——, subject to a credit of \$—— on ——, and \$—— on ——.¹¹

You are instructed that if, however, you shall believe from the evidence that the defendant, H., signed said notes as an accommodation maker for plaintiff, you will find for the defendant.¹²

¹⁰ *Reints & De Buhr v. Uhlenhopp*, 128 N. W. 400, 149 Iowa, 284.

¹¹ *Asher & Hensley v. Howard*, 110 S. W. 895, 33 Ky. Law Rep. 696.

¹² *Asher & Hensley v. Howard*, 110 S. W. 895, 33 Ky. Law Rep. 696.

CHAPTER CCXXXII

PROSTITUTION

§ 4280. Pandering.

4281. Procuring females to enter house of prostitution.

4282. Liability of husband for procuring wife to enter house of prostitution.

4283. Harboring girl under age of consent for purpose of prostitution—Belief of defendant as to age.

4284. Liability for accepting earnings of prostitute.

4285. Presumptions.

§ 4280. Pandering

The court instructs the jury that this is a prosecution for the violation of a statute prohibiting any one from inducing or persuading any female to have sexual intercourse with men other than the one holding out such inducements, and that if you believe from the evidence that the accused procured and induced the complaining witness to go to a brothel to have carnal intercourse with men other than himself he is guilty, although he may not have had in mind any particular man or men at the time he took her to such brothel.¹

§ 4281. Procuring females to enter house of prostitution

You are instructed that if you believe from the evidence that the defendant procured a place for said ——— in a house of prostitution, and the prosecution has failed to prove that she became an inmate of any such house, then I further charge you that it is your duty to acquit the defendant.²

§ 4282. Liability of husband for procuring wife to enter house of prostitution

See, also, post, § 4285.

You are charged that the state is bound to show beyond a reasonable doubt that the place where ——— was taken was a place where prostitution was allowed and encouraged, and if you have a reasonable doubt as to this house being a place where prostitution was allowed or encouraged, then you will find the defendant not guilty, and so say by your verdict.³

§ 4283. Harboring girl under age of consent for purpose of prostitution—Belief of defendant as to age

The court instructs the jury that if you should believe, from the testimony in this case, that this young girl was under ——— years

¹ Stevens v. State, 14 N. E. 251, 112 Ind. 433.

² People v. Matsicura, 124 P. 882, 19 Cal. App. 75.

³ Eppison v. State, 198 S. W. 948, 82 Tex. Cr. R. 364.

of age—it does not matter what she represented—at the time she entered this house, that she did enter it, and it was the house of this defendant, and that she was there harbored for sexual intercourse, and that she there indulged in it, in this county, then all the requirements of this indictment would be met, and your verdict should be guilty.⁴

§ 4284. Liability for accepting earnings of prostitute

You are instructed that the crime of accepting the earnings of a prostitute is not committed by the acceptance of the earnings of a prostitute in exchange for food, clothing, or shelter, but is only committed by the acceptance of such earnings as a gratuity, or with the intent to aid, assist or abet in her prostitution.⁵

You are instructed that, if you believe from the evidence beyond a reasonable doubt that ———, who is mentioned in the information, was during the period mentioned in the information a prostitute, and that the defendant, knowing her to be such and he himself or in partnership with ——— was in charge of rooms and did enter into arrangement with the said ——— for her to use any such room or rooms for the purpose of holding intercourse with men, and to pay the said defendant, or the said partnership, if one existed, the sum of ———, or any other amount, for the use of such rooms for every man that she occupied such room with, then you are instructed that such sum received for the use of such rooms would be money received as the earnings of a prostitute, and you should find the defendant guilty as charged in the information.⁶

§ 4285. Presumptions

You are instructed that if you find from the evidence, beyond all reasonable doubt and to a moral certainty, that the defendant in this case was a married man, that his wife resided in a house of prostitution, and that this said defendant knew that she was residing therein, it is still your duty to permit no presumption of law from these facts to be raised against this defendant, and, if no other facts are established in this case except the foregoing, it is your duty under the law to acquit this defendant.⁷

⁴ *Brown v. State* (Del.) 74 A. 836, 7 Pen. 159, 25 L. R. A. (N. S.) 661.

⁵ *State v. Columbus*, 133 P. 455, 74 Wash. 290.

⁶ *State v. Columbus*, 133 P. 455, 74 Wash. 290.

⁷ *People v. Conness*, 88 P. 821, 150 Cal. 114.

CHAPTER CCXXXIII

PUBLIC LANDS

§ 4286. Priority of right of purchase of state school lands—Necessity of residence on land.

4287. Respective rights of owners of undivided interests in headright certificate.

§ 4286. Priority of right of purchase of state school lands—Necessity of residence on land

You are instructed that, bearing in mind the foregoing instructions, if you believe from a preponderance of the testimony that the defendant, at any time prior to the — day of —, in good faith, actually settled upon half section No. —, in controversy, with a bona fide intention of purchasing it and making his home thereon, and you further believe from a preponderance of the evidence that he was an actual settler in good faith and actually residing upon said half section — at the time he made his application to purchase the same on the — day of —, and that he made such application to purchase in good faith for the purpose of making the land his home, and you further find and believe from the evidence that B. had not been and was not an actual settler upon said half section No. —, in good faith, with the bona fide intention of making it his home at the time he made his application to purchase the same from the state on the — day of —, you will find for the defendant and return your verdict accordingly.¹

The jury are instructed that, if you do not find that plaintiff was an actual bona fide settler on said land on the — day of —, or if you find that he was such a settler, but do not find that his abandonment, if any, was temporary and caused by a well-grounded fear of death or serious bodily injury, you will return a verdict for defendant on the whole case.²

§ 4287. Respective rights of owners of undivided interests in headright certificate

You are instructed that the said conveyance from the R. heirs to J., under which defendant claims, is sufficient in form to authorize the said J. to claim and to hold, as against the said R. heirs, an interest in any lands then located in — county; but the same did not by its terms bind said J. to accept or adopt any survey which may have been made, if any was made, without the

¹ Patrick v. Barnes (Tex. Civ. App.) 163 S. W. 408. This instruction was sustained as against the objection that it authorized a verdict for defendant without a finding that he had actually settled upon, and was

in good faith residing upon, the land in controversy as a home at and prior to the time he made his application.

² Jones v. Wright (Tex. Civ. App.) 81 S. W. 509.

authority of said R. heirs, and which they had neither ratified nor accepted. But in this connection you are instructed that if the said heirs of R. had authorized the location of the said surveys, or had become aware of the fact that they had been made for them, if they were so made, and ratified the same, or accepted the benefits thereof, then such authorization, ratification, or acceptance, if any, would bind the said J., whether or not the deed so stated; or if said J. was aware of the fact of such former surveys in ——— county, and, at the time he took conveyance from the said R. heirs, intended to accept and take a part interest in said surveys, then he became bound by such locations as he was aware of, and accepted or took the benefit of; or if said J. at any time after he bought of the R. heirs ratified the acts of the parties making the locations in said county, or accepted the benefits thereof, then said J. became bound by the same; and if he became bound, either at the time he bought it or afterwards, prior to his sale to defendant, S., then the defendant was likewise bound by the said locations in said county.³

The jury are instructed that, if the jury find that the heirs of said R. owned one-half of said land certificate at the time they executed the deed to J. dated ———, but that they did not procure or consent to the said locations in R. county, and if they further find that the said R. heirs knew that valid locations had been made by said certificate in R. county, and with that knowledge executed said deed to said J., intending thereby to convey the said land located in R. county, then J. did not have the right to locate the land in controversy in T. county for his separate use; and, if the jury so find, they will find for the plaintiffs for one-half of the land in controversy.³

The jury are instructed that, if they find that at the time of the execution of said deed by the R. heirs to J. the said R. heirs did not know of the locations theretofore made under said R. certificate in R. county, but that said J. did actually know of the prior valid locations in R. county, and that with such knowledge he prepared or caused to be prepared the deed to himself from said R. heirs, conveying to him (J.) one-half interest in the said R. county locations, intending to take a one-half interest therein, then such acts by J. would be in law a ratification by him of the said R. county locations, and he could not thereafter repudiate said R. county locations, and locate his undivided interest in the certificate, and the locations in T. county would inure to the benefit of the owners of the C. interest in the certificate equally with him; and, if the jury so find, they will find for the plaintiffs for one-half the land in controversy.³

³ *Estell v. Kirby* (Tex. Civ. App.) 48 S. W. 8.

CHAPTER CCXXXIV

RAILROADS

A. LOCATION OF TRACKS, BUILDINGS, ETC.

- § 4288. Contract with city as to location.

B. CONSTRUCTION AND MAINTENANCE

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 - 4327(2). Missouri.
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- 4328. Same—Effect of signs warning pedestrians to keep off track.
- 4329. Duty towards trespassers on track.
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- 4343. Using railroad track as footpath to place of work.
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- 4345. Running in front of train to save property.
- 4346. Care required of one riding on car to avoid injury from car on another track.
- 4347. Care required from intoxicated person.
 - 4347(1). Illinois.
 - 4347(2). Missouri.
- 4348. Care required from children.
 - 4348(1). Maryland.
 - 4348(2). Missouri.
 - 4348(3). Montana.
 - 4348(4). Virginia.
- 4349. Care required from parent to prevent child from going on track.
- 4350. Effect of contributory negligence.
 - 4350(1). Illinois.
 - 4350(2). Kentucky.
 - 4350(3). Missouri.
- 4351. Leaving horse unfastened as proximate cause of injury to driver.
- 4352. Doctrine of last clear chance.
 - 4352(1). United States.
 - 4352(2). Alabama.
 - 4352(3). Arkansas.
 - 4352(4). Idaho.
 - 4352(5). Kentucky.
 - 4352(6). Minnesota.
 - 4352(7). Missouri.
 - 4352(8). Texas.
 - 4352(9). Virginia.
- 4353. Comparative negligence.

3. Evidence

- 4354. Presumptions and burden of proof.
 - 4354(1). Alabama.
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 - 4354(3). Michigan.
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4354(5). Missouri.

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- § 4355. Burden of proof as to keeping lookout.
- 4356. Burden of proof with respect to contributory negligence.
- 4357. Matters considered in determining issues.
- 4358. Sufficiency of evidence that engineer saw person injured.

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- 4359. In general.
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 - 4359(2). Kentucky.
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- 4360. Injury to shipper of stock while loading it.
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 - 4364(1). United States.
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- 4366. Elements of cause of action in general.
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- 4367. Duty to keep crossing in good condition.
 - 4367(1). Arkansas.
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 - 4367(3). North Carolina.
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- 4368. Permitting obstructions shutting off view of track.
 - 4368(1). Kansas.
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- 4369. Duties in management of train, locomotive, or cars on approaching crossing.
 - 4369(1). Arkansas.
 - 4369(2). Connecticut.
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- 4370. Reciprocal duties of railroad company and traveler on approaching crossing.
- 4371. Right of way as between automobile and interurban car.
- 4372. Duty of railroad company to keep lookout.
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 - 4372(3). Georgia.
 - 4372(4). Kentucky.
 - 4372(5). Texas.
- 4373. Duty of railroad company to give warning of approach to crossing.
 - 4373(1). Arkansas.

- 4373(2). Connecticut.
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- 4373(6). Ohio.
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- 4373(8). Texas.
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- § 4374. Same—Duty to signal as dependent on whether crossing is over a public highway.
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- 4376. Speed as evidence of negligence.
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 - 4376(2). Connecticut.
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- 4377. Same—Violation of ordinance.
 - 4377(1). United States.
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 - 4377(3). Indiana.
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- 4378. Duty to stop car or engine.
 - 4378(1). Kentucky.
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- 4379. Duty to have watchman or flagman.
- 4380. Same—Ability of watchman.
- 4381. Duty of flagman to give warning.
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- 4383. Circumstances increasing diligence required to prevent accidents.
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 - 4384(1). Arkansas.
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 - 4385(1). United States.
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- 4386. Same—Care required as dependent on whether country open or settled up.
 - 4386(1). Michigan.
 - 4386(2). Missouri.
- 4387. Same—Rate of speed as dependent upon whether view of traveler obstructed.
- 4388. Blocking street as negligence.
- 4389. Care required where crossing blockaded.
- 4390. Sudden movement of freight cars by pushing other cars against them.
- 4391. Right to assume that persons near track will keep out of danger.
 - 4391(1). California.
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- 4392. Duty as to persons discovered standing on track.
- 4393. Duty to avoid frightening persons.
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- 4395. Injury to child by sudden movement of cars at crossing.

- § 4396. Acts in emergencies.
- 4397. Unavoidable accidents.
 - 4397(1). Texas.
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- 4398. Proximate cause as essential element of cause of action.
 - 4398(1). Arkansas.
 - 4398(2). Illinois.
 - 4398(3). Kentucky.
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 - 4398(5). South Carolina.
 - 4398(6). Virginia.

2. Crossings Other than Public Crossings

- 4399. Duty to discover persons at customary crossing.
 - 4399(1). United States.
 - 4399(2). Arkansas.
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 - 4399(4). Texas.
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- 4400. Precautions to be observed on approaching private or farm crossing.
 - 4400(1). United States.
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3. Contributory Negligence

- 4401. Duty, in general, of traveler approaching crossing.
 - 4401(1). United States.
 - 4401(2). Alabama.
 - 4401(3). Illinois.
 - 4401(4). Kentucky.
 - 4401(5). Missouri.
 - 4401(6). New York.
 - 4401(7). Oklahoma.
 - 4401(8). Texas.
 - 4401(9). Virginia.
- 4402. Duty to stop, look and listen.
 - 4402(1). United States.
 - 4402(2). Arizona.
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 - 4402(4). Delaware.
 - 4402(5). Illinois.
 - 4402(6). Indiana.
 - 4402(7). Iowa.
 - 4402(8). Maryland.
 - 4402(9). Michigan.
 - 4402(10). Missouri.
 - 4402(11). New York.
 - 4402(12). Pennsylvania.
 - 4402(13). Tennessee.
 - 4402(14). Texas.
 - 4402(15). Utah.
 - 4402(16). Virginia.
- 4403. Same—Place of looking and listening.
- 4404. Same—Duty to look both ways.
- 4405. Same—Right to give greater attention in one direction than another.
- 4406. Same—Circumstances excusing failure to look and listen.
- 4407. Same—Running away of team as excuse for failure to look and listen.
- 4408. Failure to heed customary acts of flagman indicating that train was coming.
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- § 4410. Duty of motorist to ascertain location of crossing.
- 4411. Circumstances increasing care required from traveler.
- 4412. Duty to stop, look, and listen as affected by obstruction of view.
 - 4412(1). Delaware.
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 - 4412(6). Virginia.
- 4418. Conduct of defendant as affecting care required—Unusual speed.
- 4414. Duty to look and listen as affected by failure of defendant to give warning.
 - 4414(1). Delaware.
 - 4414(2). Indiana.
 - 4414(3). Texas.
- 4415. Right to presume that warning will be given of approach of train.
- 4416. Right of traveler to rely on signal of flagman.
- 4417. Right to presume that requirements of ordinance as to speed and warnings will be obeyed.
 - 4417(1). Indiana.
 - 4417(2). Missouri.
- 4418. Duty to heed results of observation.
 - 4418(1). Illinois.
 - 4418(2). Iowa.
 - 4418(3). Kentucky.
 - 4418(4). Virginia.
- 4419. Accident due to error of judgment of traveler.
- 4420. Crossing track on invitation of flagman.
- 4421. Attempting to cross track while switch engine passing back and forth.
- 4422. Crossing between cars.
- 4423. Entering upon cars obstructing crossing for purpose of crossing track.
- 4424. Care required in attempting to go around string of standing cars blocking crossing.
- 4425. Position of safety gates as affecting action of traveler.
 - 4425(1). Illinois.
 - 4425(2). Kentucky.
 - 4425(3). New York.
- 4426. Effect of knowledge of traveler of defects in crossing.
- 4427. Acts in sudden emergencies.
 - 4427(1). South Carolina.
 - 4427(2). Texas.
- 4428. Same—Emergency created by fault of defendant.
- 4429. Duty of occupant of vehicle, approaching crossing, to warn driver.
- 4430. Care required from children.
 - 4430(1). Illinois.
 - 4430(2). Indiana.
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- 4431. Care required from deaf person.
- 4432. Effect of intoxication of traveler.
- 4433. Imputing negligence of driver of vehicle to guest.
 - 4433(1). Alabama.
 - 4433(2). Maryland.
 - 4433(3). Missouri.
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- 4434. Negligence of traveler not proximately contributing to accident.
- 4435. Effect of contributory negligence.
 - 4435(1). United States.
 - 4435(2). Arkansas.

- 4435(3). Indiana.
- 4435(4). Kentucky.
- 4435(5). New York.
- 4435(6). Oklahoma.
- 4435(7). Utah.
- 4435(8). Virginia.
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- 4437. Doctrine of last clear chance.
 - 4437(1). Alabama.
 - 4437(2). California.
 - 4437(3). Florida.
 - 4437(4). Kentucky.
 - 4437(5). Maryland.
 - 4437(6). Missouri.
 - 4437(7). New York.
 - 4437(8). Oklahoma.
 - 4437(9). Texas.
 - 4437(10). Virginia.
 - 4437(11). Washington.
- 4438. Inability to set up contributory negligence as a defense to liability for reckless and wanton conduct.
 - 4438(1). Alabama.
 - 4438(2). Kansas.
- 4439. Comparative negligence.
 - 4. *Pleading and Evidence*
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- 4441. Presumptions and burden of proof.
 - 4441(1). Alabama.
 - 4441(2). Arkansas.
 - 4441(3). Delaware.
 - 4441(4). Georgia.
 - 4441(5). Illinois.
 - 4441(6). Michigan.
 - 4441(7). Oklahoma.
 - 4441(8). Virginia.
- 4442. Burden of proof as to contributory negligence.
 - 4442(1). Indiana.
 - 4442(2). Maryland.
 - 4442(3). Virginia.
 - 4442(4). Washington.
- 4443. Matters considered in determining issues.
- 4444. Matters considered in determining question of contributory negligence.
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- 5. *Action Against Two Defendants*
- 4445. Form of verdict.

H. INJURIES TO PERSONS NEAR TRACK

- 4446. Duty to avoid frightening horses being driven near track or overhead.
 - 4446(1). Indiana.
 - 4446(2). Kentucky.
 - 4446(3). North Carolina.
 - 4446(4). Texas.
 - 4446(5). Virginia.
 - 4446(6). Washington.
- 4447. Liability for placing objects near highway calculated to frighten horses—Hand car.
- 4448. Liability for personal injuries from falling cinders.

- § 4449. Contributory negligence—Duty of traveler to avoid exposing his horses to fright.
4449(1). Arkansas.
4449(2). Kansas.
4449(3). Texas.
4450. Contributory negligence as precluding recovery for intentionally frightening horse.
4451. Presumptions and burden of proof.

I. INJURIES TO ANIMALS

4452. Liability in general.
4452(1). Alabama.
4452(2). Arkansas.
4452(3). Kentucky.
4453. Duty to use ordinary care to avoid injury.
4453(1). Arkansas.
4453(2). North Dakota.
4454. Duty to keep lookout.
4454(1). Alabama.
4454(2). Arkansas.
4455. Duty to keep lookout as affected by discharge of duty to fence.
4456. Sufficiency of headlight.
4457. Duty to whistle or ring bell.
4457(1). Georgia.
4457(2). Iowa.
4457(3). South Carolina.
4458. Speed as negligence.
4459. Same—Violation of ordinance.
4460. Duty to slow down or stop locomotive or train.
4460(1). Illinois.
4460(2). West Virginia.
4461. Duty in backing engine.
4462. Duty to anticipate that cattle will come on track.
4463. Right of engineer to presume that animals will leave track or will not suddenly rush upon track.
4464. Duty of railroad company to fence track or maintain cattle guard.
4464(1). Illinois.
4464(2). Iowa.
4464(3). Michigan.
4464(4). Missouri.
4464(5). Texas.
4465. Same—Duty to repair breaches in fence.
4465(1). Illinois.
4465(2). Indiana.
4466. Same—Duty as to gates.
4467. Same—Waiver of rights by adjoining owner.
4468. Liability for injuries to cattle lawfully permitted to run at large.
4469. Duty towards cattle unlawfully running at large upon the highway.
4469(1). Oklahoma.
4469(2). South Carolina.
4470. Unavoidable accident.
4471. Proximate cause of injuries—Failure to fence track.
4471(1). Kansas.
4471(2). Michigan.
4472. Same—Defective cattle guard as cause of accident.
4473. Contributory negligence.
4473(1). Missouri.
4473(2). Pennsylvania.
4474. Same—Duty of owner of stock with respect to preventing it from running at large.
4475. Gate in private crossing—Duty of plaintiff to keep closed.

- § 4476. Doctrine of last clear chance.
- 4477. Presumptions and burden of proof.
 - 4477(1). Alabama.
 - 4477(2). Arkansas.
 - 4477(3). Georgia.
 - 4477(4). Illinois.
 - 4477(5). Iowa.
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- 4478. Sufficiency of evidence as to cause of injury.
- 4479. Damages.
 - 4479(1). Arkansas.
 - 4479(2). Iowa.
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J. LIABILITY FOR DAMAGES FROM FIRES

- 4480. Liability in general.
 - 4480(1). Alabama.
 - 4480(2). Florida.
 - 4480(3). Illinois.
 - 4480(4). Kentucky.
 - 4480(5). Maryland.
 - 4480(6). Missouri.
 - 4480(7). North Carolina.
 - 4480(8). Texas.
 - 4480(9). Virginia.
- 4481. Duty to exercise ordinary care to avoid fires.
 - 4481(1). Minnesota.
 - 4481(2). Texas.
- 4482. Duty with respect to construction and condition of engines.
 - 4482(1). Alabama.
 - 4482(2). Maryland.
- 4483. Duty to have spark arresters.
 - 4483(1). United States.
 - 4483(2). Alabama.
 - 4483(3). Kentucky.
 - 4483(4). Oregon.
- 4484. Care required with respect to management or operation of engines.
 - 4484(1). Alabama.
 - 4484(2). Kentucky.
 - 4484(3). Oregon.
- 4485. Same—Speed as negligence.
 - 4485(1). Alabama.
 - 4485(2). Michigan.
- 4486. Duty to keep right of way free from combustible material.
 - 4486(1). Maryland.
 - 4486(2). Nebraska.
 - 4486(3). Texas.
 - 4486(4). Virginia.
 - 4486(5). Washington.
- 4487. Duty to keep adjacent lands free from combustible material.
- 4488. Assumption of risks by adjacent property owners.
 - 4488(1). Florida.
 - 4488(2). Georgia.
 - 4488(3). Illinois.
- 4489. Proximate cause as essential element of cause of action.
 - 4489(1). Idaho.
 - 4489(2). Maryland.
 - 4489(3). North Carolina.
- 4490. Same—Liability for personal injuries.
- 4491. For whose acts defendant liable.

- § 4492. Liability for fire set by railroad contractor.
4493. Contributory negligence of owner of property injured.
- 4493(1). Alabama.
 - 4493(2). Arkansas.
 - 4493(3). Florida.
 - 4493(4). Illinois.
 - 4493(5). Kansas.
 - 4493(6). Missouri.
 - 4493(7). Texas.
4494. Application of doctrine of discovered peril.
4495. Presumptions and burden of proof.
- 4495(1). United States.
 - 4495(2). Alabama.
 - 4495(3). Illinois.
 - 4495(4). Maryland.
 - 4495(5). North Carolina.
 - 4495(6). Oregon.
 - 4495(7). Texas.
 - 4495(8). Virginia.
4496. Matters considered in determining question of negligence.
4497. Evidence that engine, setting fire alleged, caused other fires.
4498. Sufficiency of evidence as to cause of fire.
- 4498(1). Alabama.
 - 4498(2). Arkansas.
 - 4498(3). Idaho.
 - 4498(4). Michigan.
 - 4498(5). Missouri.
 - 4498(6). North Carolina.
 - 4498(7). Pennsylvania.
 - 4498(8). Virginia.
4499. Rebuttal of presumption raised by proof that fire caused by sparks from defendant's engine.
- 4499(1). Alabama.
 - 4499(2). North Carolina.
 - 4499(3). Oregon.
 - 4499(4). Texas.
4500. Damages.
- 4500(1). Alabama.
 - 4500(2). Illinois.
 - 4500(3). Indiana.
 - 4500(4). Maryland.
 - 4500(5). Michigan.
 - 4500(6). North Carolina.
 - 4500(7). Texas.
4501. Same—Damages to personal property.
4502. Same—Deduction of insurance.
- 4502(1). Illinois.
 - 4502(2). Missouri.

See, also, Eminent Domain.

A. LOCATION OF TRACKS, BUILDINGS, ETC.

§ 4288. Contract with city as to location

You are instructed that, if you believe from a preponderance of the evidence in this case that the defendant the ——— Railway Company, either under that name or under the name of the ——— Railway Company, made and entered into a contract, either in writing or verbal, express or implied, with the city of ——— for

a valuable consideration received by said railway company, and that, based upon said consideration so received by said defendant, if any, the said defendant agreed to locate or keep and maintain their general offices, machine shops, and roundhouse or their general offices or machine shops or roundhouse, at said city of ———, you will find in the second paragraph of your verdict that the defendant, for a valuable consideration received by it, contracted with the city of ——— to locate or keep and maintain its general offices, or its roundhouse, or its machine shops, or all or any part of them that you may so find from a preponderance of the evidence that it did contract to locate or keep and maintain there, if any.¹

B. CONSTRUCTION AND MAINTENANCE

§ 4289. Injuries to adjacent owner arising in course of construction

Duty of railroad company in constructing bridge or embankment across water course, see post, § 5190.

Duty in constructing railroad to avoid interference with natural flow of surface water, see post, § 5211.

Liability for injuries to adjacent property as constituting appropriation to public use, see ante, §§ 2263, 2264.

The court instructs the jury that, if they believe from the evidence in the cause that the defendant company, in the construction of its road through plaintiff's land, deposited earth, rock, and other matter upon the plaintiff's land, it then became the duty of the defendant company to remove such earth, rock, and matter in a reasonable time, and if they believe from the evidence that the company failed to do so in a reasonable time, then they shall find for the plaintiff whatever damage he has sustained thereby.²

§ 4290. Liability for injuries resulting from defective fence— Proximate cause

The court instructs the jury that, if you find that prior to the accident the panel of fence which caused the injury had blown down, and was lying upon the ground, and that plaintiff, with the assistance of a brother, had raised it up and placed it against the remainder of the fence, and that thereafter the accident occurred by such panel being blown down, or from some cause falling down and striking plaintiff, causing the injuries of which he complains, then the verdict should be in favor of defendant.³

¹ *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 131 S. W. 251, 62 Tex. Civ. App. 242. In this case the contract was capable of being executed within one year, and actually was so executed, and there-

fore was not within the statute of frauds.

² *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

³ *Fishburn v. Burlington & N. W. Ry. Co. (Iowa)* 98 N. W. 380.

§ 4291. Highway crossings—Duty to restore highway to original condition of safety

You are instructed that, whenever a railroad in this state is constructed across a highway, it is the duty of the railroad company to restore the highway thus intersected to its former state or condition, or to such a state and condition as to not necessarily impair its usefulness as a public highway. In other words, it was the duty of the defendant company in this case, after having crossed the highway in question, to restore said highway, as near as it was possible to do so, to its original condition, and this with special reference to its use as a public highway, now burdened with the additional dangers of being crossed by said railroad company. Therefore I instruct you that if you find from the preponderance of the evidence that the defendant railroad company failed and neglected to restore the highway in question to its original condition of safety, so as not to substantially impair or endanger its usefulness as a highway, and that said crossing was left by said defendant company in such a condition as to impair its usefulness as a public highway, and permitted by said defendant to remain in a dangerous condition, then the defendant company was guilty of negligence.⁴

§ 4292. Duty to maintain private crossing—Injuries to stock from defects

You are instructed that if you should find from the evidence that the defendant, through its authorized agents or representatives, agreed to put in a crossing under this bridge for the use of the plaintiff's father, and that, in building the road and fencing the same, the said defendant in any manner attempted to comply with this agreement, then and in that event it was the duty of the defendant company to keep such crossing in reasonable condition for the passage of stock, and if it allowed the same to become dangerous, and plaintiff's horse was injured or damaged by reason thereof, the defendant would be liable, and you should so find; but, if you do not so find, you will find for the defendant.⁵

§ 4293. Same—Contributory negligence

You are further instructed that, before plaintiff can recover in this action, he must show you, by a preponderance of the evidence, that the damage to the horse, if any, was not due to any fault or neglect on his part. In other words, that he was not guilty of contributory negligence. By contributory negligence, as used in

⁴ Atchison, T. & S. F. Ry. Co. v. Townsend, 81 P. 205, 71 Kan. 524, 6 Ann. Cas. 191.

⁵ Hemphill v. Cedar Rapids & I. C. Ry. & Light Co., 151 N. W. 449, 169 Iowa, 498.

this instruction, is meant the doing of something or the failure to do something that a reasonably careful and prudent person would do or would not do under like circumstances.⁶

§ 4294. Steps over right of way fence—Duty to keep in repair

You are instructed that, if you believe from the evidence that the defendant built a fence along its track and across a road not a highway, that defendant erected, or caused steps to be erected at the crossing of the fence and road, and by its continued course of conduct invited the public to cross its steps, then you are instructed that it was the duty of the defendant to erect and maintain the steps in a passable condition, and if it failed to do this, and plaintiff was injured by reason of such failure, and while she was in the exercise of due caution on her part, then you will find in her favor.⁷

The jury are instructed, as a matter of law, that if a railroad company builds and undertakes to keep in repair, for the accommodation of the public, an approach to a private crossing, it is liable for an injury resulting from a defect negligently permitted to exist in said approach, though the crossing is not one that they were bound by statute to keep in condition; and although they may find that the defendant was under no obligation to build and maintain the steps in question, still if you find that they voluntarily undertook to do so, knowing that it was a crossing in common use by the public, it, in effect, invited the use of said steps by the public, and is responsible to persons so using the same for any injuries received by them, which results from a negligent construction and failure to keep in repair.⁸

You are instructed that if you believe from the evidence that the defendant built a fence along the side of its tracks, and that where said fence crossed a road not a highway the defendant built and maintained steps over said fence, and permitted the public to use the same in crossing said fence, then you are instructed that the building of said steps was an implied invitation to the public to use the same as a highway, and in that event it became the duty of the defendant to use reasonable skill and diligence in building and maintaining the same, and if you further find that the defendant failed to use such skill and diligence in the building and maintaining, and that by reason of such failure, and without fault on her part, plaintiff was, while passing over the said steps thrown down and injured, you will find in her favor.⁹

⁶ *Hemphill v. Cedar Rapids & I. C. Ry. & Light Co.*, 151 N. W. 449, 169 Iowa, 498.

⁷ *St. Louis, I. M. & S. Ry. Co. v. Dooley*, 92 S. W. 789, 77 Ark. 561.

⁸ *St. Louis, I. M. & S. Ry. Co. v. Dooley*, 92 S. W. 789, 77 Ark. 561.

⁹ *St. Louis, I. M. & S. Ry. Co. v. Dooley*, 92 S. W. 789, 77 Ark. 561.

§ 4295. Liability to penalty for violation of federal Safety Appliance Act

The jury are instructed that, if they believe from the evidence that the engine No. ——— had originally been equipped with automatic couplers at both the A end and the B end, but that at the time alleged in the first count of the plaintiff's declaration, the lock chain had been disconnected, and the knuckle removed from the coupler at the B end and that thereby the said coupler at the B end of said engine was placed in such a condition that no other car could be coupled to the engine at such B end or uncoupled therefrom either by going between the cars or not, and that the coupler at the A end of such engine was in good condition and that the said coupler at the A end of said engine was the only one used by defendant at the time in question in moving interstate traffic, then the defendant is not liable for the condition of the said coupler at the B end of said engine and you should find the defendant not guilty as to the first count of plaintiff's declaration.¹⁰

§ 4296. Duty with respect to extermination of Canada thistles or other noxious weeds—Criminal liability

The jury is instructed, as a matter of law, that the fact that a stray Canada thistle, growing here and there on the right of way or other lands of a railway company, owning, controlling, or operating a railroad in the state of ———, has been overlooked and permitted to mature its seed, is not of itself a violation of the provision of the statute of the state of ———, which reads, "if any company, association or person, owning, controlling or operating a railroad, shall refuse or neglect to dig up and destroy, or take other certain means of exterminating Canada thistles and other noxious weeds that may at any time be growing upon the right of way or other lands of such roads, or appertaining thereto, they shall be fined for each offense not less than ——— nor more than ——— dollars, the fine to be paid as in the preceding section," when the said railroad company has done all that could be reasonably expected of it for the destruction of the thistles. And if you believe from the evidence in this case that the defendant has in good faith made a bona fide attempt to comply with said law, and has in good faith done all that could reasonably be expected of it for the destruction of said Canada thistles, even though you may believe that a few stray thistles were found growing on the right of way of the defendant company or other lands belonging to the defendant, still, in that case, your verdict should be for the defendant.¹¹

¹⁰ *Wabash R. Co. v. United States* (C. C. A., Ill.) 172 F. 864, 97 C. C. A. 284.

¹¹ *Chicago, M. & St. P. R. Co. v. People*, 132 Ill. App. 531.

C. LIABILITY, IN GENERAL, FOR INJURIES ARISING IN COURSE OF OPERATION AND MANAGEMENT

§ 4297. Recovery for injuries to adjacent property by negligent operation—Smoke, noise, etc.

§ 4297(1). Kentucky

The jury are instructed that the defendant railroad company had the right to construct its switch track upon its right of way adjoining the property of the plaintiff, and had the right to operate its cars and engines over and upon said switch track in a skillful and prudent manner, and that plaintiff is not entitled to recover any damages which may have been caused to her property, or the use or enjoyment thereof, by reason of any cinders, smoke, soot, or noise caused by such skillful and prudent operation of the defendant's cars and engines on said track; but if the jury believe from the evidence that the defendant operated its cars and engines over said switch track in an unskillful or negligent manner, and that by reason of such unskillful or negligent operation of its engines and cars, if there was any such operation, an unusual, excessive, or unnecessary amount of cinders or smoke or soot was thrown over and upon the plaintiff's lot and houses, and that an unusual and excessive and unnecessary amount of noise was created by such operation, and that the use and enjoyment of plaintiff's property was injured by reason of such cinders, soot, and smoke, and by such unusual, excessive, and unnecessary noise, then the jury should find for the plaintiff.¹²

§ 4297(2). Texas

You are instructed that, if you believe from the evidence that said road running along the north of plaintiff's lot was a public highway, as above explained; and if you believe that plaintiff owned the land described in his petition, and that about one year prior to the institution of this suit the defendant began the building and construction of its yards at and near plaintiff's land; and if you believe that, in the work of building said yards, the defendant made excavations, laid additional tracks, and obstructed and rendered unfit for use said road running along on the north side of plaintiff's lot; and if you believe that the use by the defendant of its yards results in the operation of cars and locomotives on said tracks for switching purposes, from which noise, smoke, cinders, and gas escape, and you believe the same reach and affect the plaintiff's premises, and you believe the establishment and use of said yards was without the plaintiff's consent, and you believe the same has

¹² Cincinnati, N. O. & T. P. Ry. Co. v. McQuaid, 189 S. W. 423, 172 Ky. 495.

damaged the plaintiff's said land—then, in that event, you will find for the plaintiff, on this issue, the difference between the fair market value of his land immediately before and immediately after the construction of said yards; and, in estimating such damages, if any, you will only consider such injuries, if any, that are peculiar to plaintiff's property, and you will not consider any injuries sustained by him in common with the general community.¹³

§ 4298. Liability for use of excessive force in arrest of trespasser

The court instructs the jury that if they find from the evidence that the plaintiff was walking on the tracks of the defendant, a body corporate, on or about ———, as testified to, and if they further find that ——— was in the employ of the said defendant as detective or special officer, that while the said ——— was acting within the scope of his authority he arrested plaintiff, and in doing so, while plaintiff was under arrest, used an excessive and unnecessary amount of force and inflicted unnecessary indignities upon plaintiff, then the verdict of the jury must be for the plaintiff, even though the defendant's agent was justified in arresting plaintiff.¹⁴

§ 4299. Accidents to trains

The jury are instructed that, in determining the questions of negligence in this case, they should take into consideration the conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if the jury believe from the evidence that the injury complained of was caused by the negligence of defendant's servants, as described in the declaration, and if the jury further believe from the evidence in this case that the plaintiff was without fault, and was exercising ordinary care and prudence in the discharge of his duties as ——— of the ——— train, then the plaintiff is entitled to recover in this case such damages as the jury may believe, from all the evidence, he is entitled to receive as a compensation for all the damages received and suffered by said plaintiff in the premises, provided the jury find from the evidence that the plaintiff was injured as described in the declaration.¹⁵

§ 4300. Same—Negligence of conductor in mistaking time of day

I charge you that if ——— was the conductor of a special train pulled by engine No. ———, it was the duty of said ——— as such conductor to operate said train according to proper orders and instructions given him by the authority in charge of the move-

¹³ Missouri, K. & T. Ry. Co. of Texas v. Calkins (Civ. App.) 79 S. W. 852.

¹⁴ Baltimore & O. R. Co. v. Strube, 73 A. 697, 111 Md. 119.

¹⁵ Chicago & E. R. Co. v. Holland, 13 N. E. 145, 122 Ill. 461.

ments of that train, and if said ——— as such conductor read his watch wrong, and in reliance on such reading ran the train in violation of such orders so given him, this was at least negligence, and defendant is responsible for its proximate consequences if the death of plaintiff's intestate was one of such consequences.¹⁶

§ 4301. Same—Duty to keep lookout

You are instructed that, if you find from a preponderance of the evidence that plaintiff's intestate was upon a train which was being operated upon the railway, and that the agents and servants of defendant company in charge of its train, whose duty it was to keep a constant lookout for persons and property upon the track, saw the train upon which plaintiff's intestate then was, and the perilous position thereof, in time to have avoided colliding therewith by the exercise of ordinary care, or that said agents and servants of defendant, by keeping a constant lookout, could have seen the train upon which the plaintiff was, and discovered the perilous position thereof, in time to have avoided colliding therewith by the exercise of ordinary care, and failed to exercise such ordinary care to protect plaintiff's intestate from danger and injury, then you will find for plaintiff.¹⁷

§ 4302. Same—Duty to stop on approaching crossing of another railroad

§ 4302(1). Alabama

The court charges the jury that if they believe from the evidence in this case that the way was clear for the ——— Railway engine when the same was proceeding toward the crossing where the collision occurred and immediately before it reached the said crossing, then the engineer in charge of said engine, if he was otherwise free from negligence, had the right to reasonably indulge the presumption that no other train would approach said crossing without stopping.¹⁸

§ 4302(2). Texas

You are instructed that, if you believe from the evidence that the engineer operating the engine of the F. Railway Company, mentioned by the witnesses, failed, on approaching the crossing of the G. Railway Company, to bring his engine to a full stop before reaching the crossing, at such distance therefrom as, under the circumstances, common prudence would dictate as necessary to avoid colliding with the train on the track of the G. Railway Company, and that by reason of such failure to stop within such distance the col-

¹⁶ *Southern Ry. Co. v. Harrison*, 67 So. 597, 191 Ala. 436.

¹⁷ *Chicago, R. I. & P. Ry. Co. v. Scott*, 184 S. W. 65, 123 Ark. 94.

¹⁸ *Vessel v. Seaboard Air Line Ry. Co.*, 62 So. 180, 182 Ala. 589.

lision occurred, the defendant would be negligent, and liable to the plaintiff for any injury that he may have sustained on account of the negligence.¹⁹

§ 4303. Liability for injuries by train operated by another company

The jury are instructed that, although you may believe from the evidence that the injury to and killing of plaintiff's said animals was directly caused by an engine and train operated on defendant's road by the ——— Railroad Company and its servants by consent or permission of defendant, and that such injury was not caused by the willful acts of the servants of the said ——— Railroad Company, still the defendant is liable for the injury; and in law, so far as the rights of plaintiff are concerned, the train and servants of the said ——— Railroad Company, so run and operating on defendant's road, were the train and servants of defendant.²⁰

**D. DUTY AS TO THIRD PERSONS, NOT PASSENGERS, RIDING ON
TRAIN**

§ 4304. Duty as to persons not trespassers

The court instructs the jury that although they may find and believe from the evidence that the train upon which plaintiff was riding was not, under the rules of the railroad company, allowed to carry passengers, yet if you further find and believe that plaintiff without any knowledge of said rules got on said train at ———, with the consent of the conductor of the defendant who was in charge of said train, then and in that case plaintiff was not a trespasser against said defendant; and if you further find and believe from the evidence that the agents and employes of said railroad company in charge of and controlling said train, or any of them, ejected plaintiff from said train, or caused plaintiff to leave the same, and in doing so, and at the time thereof, and immediately thereafter wrongfully, willfully, maliciously and unlawfully assaulted plaintiff by beating him, and by shooting plaintiff with deadly and dangerous weapons, and plaintiff was injured thereby, then the defendant is liable, and your verdict must be for the plaintiff.²¹

§ 4305. Duty to prevent trespassers from boarding train

The court instructs the jury that the defendant was under no duty to station men along the track to prevent the plaintiff and his companions from boarding the train, and I instruct you that you

¹⁹ Ft. Worth & D. C. Ry. Co. v. Mackney, 18 S. W. 949, 83 Tex. 410. The statute required a full stop under the circumstances set out in the instruction.

²⁰ Toledo, P. & W. R. Co. v. Rumbold, 40 Ill. 143.

²¹ McDonald v. St. Louis & S. F. R. Co., 146 S. W. 83, 165 Mo. App. 75.

cannot render a verdict against the defendant because defendant failed to have guards at the train to prevent the plaintiff and other persons from attempting to go beneath the cars.²²

§ 4306. Duty to discover presence of trespassers on train

The court instructs the jury that all persons who board the railroad company's trains without authority are merely trespassers, to whom the company owes no duty until their presence is actually discovered, and then only to abstain from willfully or wantonly inflicting injuries on them, or to use ordinary care to avoid injuring them if it actually discovers them in a position of peril. A railroad company is not under any duty to discover the presence of such persons on its trains. No obligation exists on the part of the members of the train crew to be on a lookout for such trespassers. When the trainmen actually acquire knowledge of the presence of such trespassers on the trains their only duty is to abstain from wantonly and willfully inflicting injuries on them, or, if they actually see them in a position of peril, to use ordinary care to avoid injuring them.²³

§ 4307. Duty to trespassers after presence is known

The court instructs the jury that the defendant is not charged with omitting to do anything to avoid harm to the plaintiff, but with doing things which defendant ought not to have done, viz. by threats and intimidations forcing him to leave the train while going at a dangerous rate of speed and firing a pistol shot; and in this connection I instruct you that, if you find that the defendant is not guilty of the things charged, you have no right to return a verdict against it on the theory that it was at fault in not stopping the train the moment some employé standing beside the train saw the plaintiff start to go under it.²⁴

The court instructs the jury that the fact that the train was not equipped in such a manner that the rear engine had no control over the train's automatic air brakes afford no ground for complaint on the part of the plaintiff. Nor does the fact that the air whistle throughout the train was connected with the rear engine, and not with the lead engine, and that stop signals given by the train air whistle had to be transmitted by the rear engine to the front engine by whistle, afford any ground for complaint on the part of the plaintiff. The defendant owed the plaintiff no duty to equip its train in such a way that the rear engine would have control over the automatic air brakes in the train, nor did the defendant owe

²² *Bergman v. Denver & R. G. R. Co.*, 178 P. 68, 53 Utah, 213.

²³ *Bergman v. Denver & R. G. R. Co.*, 178 P. 68, 53 Utah, 213.

²⁴ *Bergman v. Denver & R. G. R. Co.*, 178 P. 68, 53 Utah, 213.

the plaintiff any duty to equip its train in such a way that stop signals given by the train air whistle could be passed directly to the lead engine. I therefore withdraw from your consideration the question whether the train might have been stopped sooner if the train's air whistle had been connected to the lead engine instead of to the rear engine.²⁵

§ 4308. Right to compel trespassers to leave train

§ 4308(1). United States

The jury are instructed that, the plaintiff being wrongfully upon the train, the conductor had a perfect right, under the law, to remove him from the train, but in the exercise of that right he was charged with the duty not to unnecessarily expose the plaintiff to danger. The fact that the plaintiff was wrongfully upon the train would give the conductor no right either to injure him or expose him to danger. He, therefore, had no right to insist upon the plaintiff's leaving the train while it was in motion. His duty was either to stop the train and put the plaintiff off, if he decided that the plaintiff must leave the train, or to carry the plaintiff to the nearest station. This brings us to the issue of fact in the case upon which there is a conflict of evidence. Plaintiff says, in substance, that the conductor ordered him to leave the train, and that he stepped to the door for the purpose of pointing out that the train was going so fast that he could not leave it, and that the conductor shut the door, and locked it, thus fastening him out upon the platform. If you believe that is a true statement of the occurrence, the conduct of the conductor was wrongful, and if that wrongful conduct was the proximate cause of the plaintiff's injuries he is entitled to recover, unless he himself was guilty of contributory negligence, which I will presently explain to you more fully. Shutting the plaintiff out on the platform, if you find that he was shut out upon the platform, would be the proximate cause of plaintiff's injuries, if those injuries were the natural and probable result of that act, and such as a reasonable and prudent man would have foreseen as likely to result therefrom.²⁶

§ 4308(2). Arizona

The court instructs the jury that, if you believe from the evidence that the plaintiff was ordered to jump from said train by the brakeman, and was threatened with violence if he did not so jump, while the train was in motion, and the appearance at the time was such as to lead an ordinarily prudent and careful man to the conclusion that violence would be used by said brakeman of said

²⁵ *Bergman v. Denver & R. G. R. Co.*, 178 P. 68, 53 Utah, 213.

²⁶ *Great Northern Ry. Co. v. Bruyere (C. C. A., N. D.)* 114 F. 540, 51 C. C. A. 574.

company on said train, and the brakeman was acting within the general scope of his duties, then the plaintiff was not required to wait until actually forced from said train by violence, and it can make no difference, under this set of circumstances, whether he was ejected by actual force or by threats, if he jumped from said train at the command of an employé of said company, when he saw a brakeman coming towards him, and threatening to throw him off, if he did believe that force would immediately be used to eject him.²⁷

§ 4308(3). Nebraska

You are instructed that it is the duty of a person, when traveling upon a railroad from one station to another, to enter the passenger coaches provided for the carrying of passengers, and to remain therein while such train is in motion, and to procure prior to the entering therein a ticket from the agents of said company, or, if such ticket be not purchased, then to pay the conductor on said train the proper and legal fare. A person doing this, and not guilty of misconduct on said train, would be a passenger, and the railroad company would be bound under the law to properly care for and attend to the necessary and reasonable conveniences and wants of such passenger, and would be *prima facie* liable for any injury that such passenger received while so traveling. But a person riding on the outside of such passenger train, whether on the platform or some other place without, or on parts of the baggage car, for the purpose of obtaining a ride on such train without the payment of any fare therefor, would not be a passenger upon such train, but would be a trespasser thereon, and such railroad would owe no duty to such person, and the employés of such company would have the right to put such person off of the train, and the railroad company would not be liable therefor, unless such removal was done in a reckless, careless, or negligent manner, and the injury, if any, was the result of such negligence.²⁸

You are instructed that if you find, from the evidence, that the plaintiff was traveling upon the train in question, and that for the purpose of avoiding the payment of fare he was riding upon the platform of one of said cars, or other place outside the passenger coach, then the employés of the defendant would have the right to use all force and power necessary to overcome any resistance that might be offered; but they would not have the right to remove

²⁷ Southern Pac. R. Co. v. Svendsen, 108 P. 262, 13 Ariz. 111.

²⁸ Pledger v. Chicago, B. & Q. R. Co., 95 N. W. 1057, 69 Neb. 456. This is proper in connection with instructions making clear that defendant

had no right to remove plaintiff at such time and place or in such a manner as would be liable to injure him, and presenting the rule that the defendant was bound to use due care, even in removing trespassers.

him, or push him off, or require him to jump off at a place where it was unsafe to get off, or at a time when the train was running at such rate of speed that it would be unsafe for a person to get off; and if you find that the plaintiff has established by a preponderance of the evidence that the brakeman on said train, or other employé thereon, did push the plaintiff off of said train at a place where it was unsafe to jump off, or at a time when the train was running at a speed when it made such act dangerous, and that the plaintiff was injured thereby, then your verdict must be for the plaintiff.²⁹

§ 4308(4). Utah

The court instructs the jury that, if you should find that the plaintiff was ordered by some proper employé of defendant's to leave the train as he was in the act of getting under it, and before he had succeeded in gaining a position of safety, and that in endeavoring to make his exit pursuant to such command he was run over and injured, without any pistol shot being fired, and without any threats of personal violence being made which would cause him to lose his self-control, then I instruct you that he cannot recover; for the defendant had the right, under such circumstances, to command him not to carry out his intended trespass, and the law will not impute to a command given under such circumstances wantonness or willful intention to inflict injury on defendant's part. Such a warning amounts to no more than what the law itself commands. While the defendant had no right to injure him wantonly or willfully in evicting him from the train, it did have the right to tell him to desist in his efforts if he was then attempting to secure a position to ride under the train, and if, in attempting to make his exit pursuant to such warning, he was run over, his own negligence in attempting to steal a ride will bar any recovery.³⁰

§ 4309. Forcing trespasser to leave train while in motion

§ 4309(1). Mississippi

The jury are instructed that if they believe from the evidence that the porter of defendant, on the train in question, pushed, forced, or threw — from the train, and by his fall from the train, so caused, the plaintiff was injured as set out in the declaration, then the jury should find for the plaintiff, and assess his damages in such sum as they may believe from the evidence he has been damaged, not to exceed the sum of \$——; and this, too, whether or not they may believe from the evidence plaintiff had a ticket on said train and trip.³¹

²⁹ Pledger v. Chicago, B. & Q. R. Co., 95 N. W. 1057, 69 Neb. 456.

³⁰ Bergman v. Denver & R. G. R. Co., 178 P. 68, 53 Utah, 213.

³¹ Gulf & S. I. R. Co. v. Nelson, 35 So. 158, 82 Miss. 653.

§ 4309(2). *Virginia*

The jury are instructed that, although they may believe that the plaintiff had no business or right to be on defendant's train, and was a trespasser thereon, yet if they further believe that he was given no reasonable opportunity, without exposing himself to danger, but was forced to leave the train while the same was in motion, by reason of force exercised by the employes of said company, or any of them, within the scope of their employment, and that in so leaving he received the injuries complained of, they must find a verdict for the plaintiff.³²

§ 4310. *Gross negligence*

The court instructs you that, if you believe from the evidence that plaintiff rode on defendant's train No. — from N. to C. without paying his fare, and without permission of any one with authority and got off said train at C., but afterwards, in company with — and others, got back on the engine of said train, with the consent or knowledge of the engineer, — and was so riding on the engine at the time of the wreck; then you will find a verdict for the plaintiff, if you further believe from the evidence that the engineer, shortly before the wreck, received a communication or information from the train dispatcher notifying him that the track of defendant on which his train must shortly run was under water, and with such information or knowledge in mind, and conscious of the probable danger at the time, ran his engine and train at a speed of — miles an hour, and at such a speed that he could not stop his train in a less distance than — yards, over the track covered by said communication, and at the time under weather, and other conditions which rendered him unable to see more than — yards ahead, if you believe the evidence showed such conditions to exist and to be known by said engineer, if you further believe from the evidence that as a result thereof the train was wrecked, and plaintiff received his injuries thereby.³³

§ 4311. *Defense that railroad employee acted without scope of employment*

The jury are instructed that if they believe from the evidence that the brakemen on the trains run by Ex-Conductor K. were in the habit of expelling trespassers from said trains without orders from K., but in his sight or hearing, and with his approval and assent at the time, they are instructed that all expulsions so made must be construed to be the acts of K., and must not be considered as a violation of the rules and regulations of the defendant

³² *Chesapeake & O. R. Co. v. Anderson*, 25 S. E. 947, 93 Va. 650.

³³ *Illinois Cent. R. Co. v. Cole*, 74 So. 700, 113 Miss. 896.

that require its brakemen to report such trespassers to their conductors.³⁴

E. INJURIES TO PERSONS ON TRACK AT PLACES OTHER THAN CROSSINGS

1. *Liability in General*

§ 4312. Negligent and careless management of train in general

The court instructs the jury that the plaintiff, as the widow of ———, brings this suit to recover \$—— damages for the death of her husband, which she, in her petition, alleges to have been caused by the carelessness, negligence, and unskillfulness of the defendant, its officers, agents, servants, and employés, while running, conducting, and managing certain cars of the defendant, by negligently, carelessly, and unskillfully running two of said cars over her husband, instantly killing him. The defendant, in its answer, denies the allegations of the petition, and sets up as a defense that the plaintiff's husband received the injuries from which he died by reason of his own negligence directly contributing thereto. The undisputed facts in this case show that the plaintiff's husband was, on or about the ——— day of ———, run over and killed by two of the cars of the defendant, and that at the time he was so run over he was upon the track of defendant on ——— street, between ——— and ——— streets in ———. The court instructs the jury that, if they believe from the evidence in the case that the plaintiff's husband at the time in question was run over and killed at the place in question by the defendant's cars, and that the servants, agents, or employés of the defendant negligently and carelessly managed the cars in question so as to run over the plaintiff's husband, then the verdict shall be for plaintiff in the sum of \$——, unless the jury shall further find from the evidence that the defense of contributory negligence set up in this case by the defendant has been established by a fair preponderance of the evidence.³⁵

§ 4313. Degree of care required to avoid injuries

§ 4313(1). *Alabama*

I charge you, gentlemen of the jury, that evidence as to the distance in which a train may be stopped under perfect or ideal conditions is not conclusive in this case. The question here is whether or not defendant's engineer, after his mind had become conscious of and he realized and understood ———'s danger, negligently or intentionally failed to use the means at his command to avoid the

³⁴ Chesapeake & O. R. Co. v. Anderson, 25 S. E. 947, 93 Va. 650.

³⁵ Le May v. Missouri Pac. Ry. Co., 16 S. W. 1049, 103 Mo. 361.

injury. Unless the engineer was guilty of such dereliction in his duty after becoming conscious of ———'s peril, your verdict must be for the defendant.³⁶

§ 4313(2). Kentucky

The jury are instructed that at the time and place of the accident to the plaintiff it was the duty of the defendant, its agents and servants in charge of its trains, to give reasonable and timely warning by the ringing of the bell or the blowing of the whistle, or other reasonable warning, of the approach of the train, and to keep a lookout for the presence of persons upon its track and right of way for the purpose of avoiding injuring them by the operation of the train. It was the duty of the plaintiff in passing along or over the tracks and right of way of the defendant to exercise ordinary care for his own protection and safety, and to avoid being injured by trains passing upon the defendant's railway tracks. If the jury shall believe from all the evidence that at the time and place of the accident to the plaintiff mentioned and described in the evidence the defendant, its agents and servants in charge of said train, failed to give reasonable and timely warning of the approach of its train by the blowing of the whistle or ringing of the bell, or other reasonable warning, or failed to keep a lookout for the presence of persons upon its tracks and right of way, and that by reason of such failure, if any such there was, the plaintiff was struck, or run over, by the defendant's locomotive engine or train, and thereby injured, the jury will find a verdict for the plaintiff, unless the jury shall further find as in instruction No. ———, in which event the jury will find a verdict for the defendant.³⁷

You are instructed that, unless you shall believe from all the evidence that at the time and place of the accident to plaintiff mentioned and described in the evidence the defendant, its agents and servants in charge of said train, failed to give reasonable and timely warning of the approach of its train by the blowing of the whistle or ringing of the bell, or other reasonable warning, or failed to keep a lookout for the presence of persons upon its tracks and right of way, and that by reason of such failure, if any such there was, the plaintiff was struck or run over by the defendant's locomotive engine or train, and thereby injured, you will find a verdict for the defendant.³⁸

³⁶ Brown v. St. Louis & S. F. R. Co.,
55 So. 107, 171 Ala. 310.

³⁷ Louisville & N. R. Co. v. Cook,
128 S. W. 81.

³⁸ Louisville & N. R. Co. v. Cook,
128 S. W. 81.

§ 4313(3). Texas

You are instructed that if you believe from the evidence that the engineer of the engine in question, after he discovered the deceased on or near the track, if he did discover him, and knew of his perilous position, if any, and after he appreciated his danger, if any, and realized that it was a man or some animate object, exercised ordinary care to avoid striking the deceased, then, if you so find, you are instructed to return a verdict for the defendant.³⁹

The court instructs the jury that it is the duty of the employes of a railway company, operating its trains, to use ordinary care to discover and avoid injuring persons who may be upon or near its track; the degree of such care being such as a person of ordinary prudence and caution would ordinarily exercise under the circumstances, and varying as the known probabilities of danger may vary along the different portions of the route over which such trains are run, and a failure to use such care by its employes, is negligence on the part of such company for which it is liable in damages for an injury resulting from such negligence, unless such liability is defeated by contributory negligence on the part of the person injured.⁴⁰

You are instructed that, if you find and believe from the evidence that ——— was killed on ———, by being run into, against, over, or struck by a moving car or cars attached to an engine on the defendant's track known as the "——— track," in its yards in the city of ———, while he, the said ———, was walking along or across the said track, and if you further find that the agents, servants, or employes of the defendant, in charge of the operation of said car or cars and engine, did not exercise ordinary care to keep a lookout for said ———, or did not exercise ordinary care to avoid injuring the said ——— at the time, if any, they so ran or moved said car or cars and engine, and if you further find that such failure, if any, to exercise ordinary care, proximately caused the death of the said ———, then you will find for some one or all of the plaintiffs, unless you find for the defendant under some other paragraph of this charge.⁴¹

§ 4313(4). West Virginia

The jury are instructed that if they are satisfied by the evidence that defendant's train killed ——— on the night of ———, at ———, and that such train was not, under the circumstances shown in evidence, run with reasonable care to prevent accidents, this will render defendant liable for his death, unless it is shown

³⁹ San Antonio & A. P. Ry. Co. v. McGill (Civ. App.) 202 S. W. 338.

⁴⁰ Ft. Worth & D. C. Ry. Co. v. Wininger, 151 S. W. 586.

⁴¹ Gulf, C. & S. F. Ry. Co. v. Cohen et al. (Civ. App.) 126 S. W. 916.

either by the evidence of plaintiff that said ——— was himself guilty of negligence which was in part cause of his death, or defendant has shown such negligence by a preponderance of the testimony.⁴²

§ 4314. Unavoidable accident

The jury are instructed that, if you believe from the evidence that ——— gave immediate warning to the engineer when he saw the deceased approach and get upon the track, and that the engineer immediately cut off the steam and applied the emergency simultaneously, and did all in his power known to skillful engineers to stop the engine, and could not avoid hitting the intestate, then defendant is not liable in this case.⁴³

§ 4315. Violation of ordinance as negligence—Care required with respect to movements of trains in city limits

The jury are instructed that, if you believe from the evidence that an ordinance of the city of ——— required the defendant, when moving any car, cars, or locomotive propelled by steam power within the limits of said city, to cause the bell of the engine to be constantly sounded, and, when backing any freight car, cars, or locomotive propelled by steam power within said limits, to have a man stationed on the top of the car at the end of the train furthest from the engine to give danger signals, and further required that no freight train should at any time be moved within said limits without being well manned with experienced brakemen at their posts, so stationed as to see the danger signals and hear the signals from the engine, then any neglect or failure by defendant, its agents, servants, or employes, to comply with any or all of the above requirements was of itself negligence on the part of defendant; and if you believe from the evidence that as a result of such negligence or failure on the part of defendant, its agents, servants, or employes, the plaintiff was injured, you will give a verdict in favor of plaintiff, unless you also believe from the evidence that plaintiff was himself guilty of negligence which contributed directly to cause his injuries.⁴⁴

§ 4316. Duty of defendant to keep a lookout

See, also, post, § 4372.

§ 4316(1). Arkansas

The jury are instructed that it was the duty of the employes in charge of said engine to keep a constant lookout for persons on

⁴² *McVey v. Chesapeake & O. Ry. Co.*, 32 S. E. 1012, 46 W. Va. 111.

⁴³ *Louisville & N. R. Co. v. Jones*, 67 So. 691, 191 Ala. 484.

⁴⁴ *Dahlstrom v. St. Louis, I. M. & S. Ry. Co.*, 18 S. W. 919, 108 Mo. 525.

the track, although it was not required that every employé upon said engine should be constantly upon the lookout, and it was sufficient that the lookout was kept by one person, unless by reason of a curving track or other obstruction a careful lookout could not be kept by one person only. And, if you find from all the evidence that such constant lookout was not kept by either the fireman or conductor or engineer on said engine at the time and place of the injury complained of, and that, had such lookout been kept, said child could have been seen in time to have avoided the alleged injury by the use of ordinary care, and that by reason of such neglect to keep such lookout, if any, the said child, ———, was injured your verdict will be for the plaintiff.⁴⁵

§ 4316(2). Texas

The court instructs the jury that, if you find from a preponderance of the evidence that on or about the time complained of by plaintiff he was in the act of inspecting a car or cars of defendant's railroad, or one of them, and that while so doing he was struck by an engine of one of the defendants, and you further find that the employés of the defendant whose engine struck plaintiff did not keep a lookout along the track on which such engine was moving, and you find that in failing to keep a lookout, if they did fail, the employés of defendant whose engine struck plaintiff were negligent, and that such negligence, if any, was a proximate cause of plaintiff's injury, you will find for the plaintiff, unless you find that plaintiff assumed the risk, as herein submitted to you in this main charge.⁴⁶

You are instructed that the defendant company was entitled to its railway track for its trains to run upon, and its servants and agents in charge of running the train had the right to act upon the presumption that the right of way for trains would be respected by persons thereon. This, however, would not excuse the running upon or over persons upon the track. It was the duty of the servants and agents of the defendant, running trains upon its track, at all times to keep a lookout; and, if persons were seen upon the track, and in danger, to check up, halt, or stop the train, if it could be done by the exercise of ordinary care, and by the use of ordinary means, to avoid inflicting injury upon such persons.⁴⁷

§ 4317. Duty to warn travelers

The court instructs the jury that it was the duty of the agents and employés of the defendant, in operating the passenger train

⁴⁵ St. Louis, I. M. & S. Ry. Co. v. Flinn, 115 S. W. 142, 88 Ark. 484.

⁴⁶ El Paso & S. W. Ry. Co. v. Havens (Civ. App.) 216 S. W. 444.

⁴⁷ Parham v. Ft. Worth & D. C. Ry. Co., 113 S. W. 154, 51 Tex. Civ. App. 511.

at the time ——— was killed, to keep a lookout for the presence of persons using its tracks as a foot passway, and to run its train at a reasonable rate of speed, and to give reasonable warning of its approach to avoid injuring them; and if the jury believe from the evidence that said ——— was walking upon the north track of defendant, and that the defendant's agents and employés, in charge of its train at the time and place when said ——— was killed, negligently failed to give him reasonable warning of the approach of the train by ringing its bell or sounding its whistle in time for him to get off the track before the train struck him, and he did not know of the approach of the train in time for him to get out of its way before it struck him, then the law is for the plaintiff, and the jury should so find. But if the jury shall believe from the evidence that ——— knew of the approach of the train in time to get out of its way by the exercise of ordinary care, and undertook to do so, but failed to get far enough from the track, and by reason of this was struck and killed, the law is for the defendant, and the jury should so find.⁴⁸

§ 4318. Duty to give warning of movements of trains in yards

You are instructed that it is the duty of the defendant's engineer or fireman to ring the bell or sound the whistle, or to give other suitable and sufficient signals and warnings of the approach of its train, while moving its trains in its yards, and to use all proper and reasonable efforts to avoid injuring any party who may be in its yards on legitimate business; and if the jury find from the greater weight of evidence that the defendant failed to give such signal and take such precautions, and the said acts on the part of the defendant resulted in the killing of the plaintiff's intestate, they should answer the first issue "Yes."⁴⁹

§ 4319. Duty to carry headlight

Duty of street car company, see post, § 4832.

You are instructed that, if the plaintiff was on the road of the defendant at a place other than the crossing, the defendant did not owe him the duty of sounding the whistle at the crossing because that requirement is for the protection of people who are traveling along the highway, and have as much right as the railroad company had in the use of the crossing. They have a right to cross the track, and if nothing else appeared, the plaintiff would not be entitled to recover. But the plaintiff says that not only did they not ring the bell or sound the whistle at the crossing,

⁴⁸ Louisville & N. R. Co. v. Shoemaker's Adm'r, 171 S. W. 383, 161 Ky. 746.

⁴⁹ Edwards v. Carolina & N. W. R. Co., 52 S. E. 234, 140 N. C. 49.

which if sounded would have given him warning, but that it had no headlight on its engine. If the defendant was running its train without a headlight, it was guilty of negligence towards the plaintiff, and if he was injured in consequence, if he was exercising the care of a reasonably prudent man, the defendant would be responsible for the injury which he sustained.⁵⁰

§ 4320. Backing train without flagman or lights on leading car
§ 4320(1). Missouri

You are instructed that, if you believe from the evidence that plaintiff was knocked down, run over, and injured on —— street, in the city of ——, by a freight car, cars, or locomotive propelled by steam power, which were then and there being backed on the tracks of defendant, within the limits of said city of ——, without having a man stationed on the top of the car at the end of the train furthest from the engine to give danger signals, and if you further believe from the evidence that if defendant had had a man so stationed, such man would, by the exercise of ordinary diligence, have discovered plaintiff, after his position became dangerous, in time to have avoided running over him, by the exercise of ordinary care and promptness on the part of the men in charge of said train, then, even though you may believe that plaintiff was guilty of negligence, yet such negligence on his part will not prevent his recovering damages in this suit.⁵¹

§ 4320(2). North Carolina

You are instructed that, if the train was backing under the shed without displaying the light from the front end of the leading car, and without having a flagman stationed thereon, and was backing without due care, and the intestate knew it, and placed himself in a position of danger, his negligence was the proximate cause of the injury (he had the last chance to avoid the injury); and, this being so, he, and not the defendant, would be responsible for his death. On the contrary, if —— was standing on or near the track, he was not called upon to look out for a backing train which displayed no light and had no flagman, if you should so find, on the front of the leading car, for it was the duty of the defendant, as before explained, to display the light, and have a flagman at his post, he not being bound to expect a violation of duty. If therefore, he (——) was standing on or near the track, and the defendant backed its train under the shed without the light on the front end of the leading car, or in a conspicuous place there-

⁵⁰ Powers v. Norfolk Southern R. Co., 82 S. E. 972, 166 N. C. 599. In North Carolina the statute makes the

failure to carry a headlight at night negligence per se.

⁵¹ Dahlstrom v. St. Louis, I. M. & S. Ry. Co., 18 S. W. 919, 108 Mo. 525.

on, or without a flagman thereon, and if the jury should further find that ——— did not discover the train in time to escape, then the defendant was negligent, and such negligence was the cause of the injury.⁵²

§ 4321. Duty to stop train

See, also, post, § 4378.

Duty of street car company, see post, § 4833.

§ 4321(1). Kentucky

The court instructs the jury that, if they believe from the evidence that those in charge of the engine and tender saw plaintiff upon the track and had reasonable grounds to believe from his conduct that he was unconscious of the approaching engine and tender, and would not probably leave the track in time to save himself from injury, then in such case it was duty of those in charge of the engine and tender, after they had such notice, to use ordinary care in the exercise of all reasonable means at their command to save him from injury, and if they failed to do this the jury will find for plaintiff; otherwise, for the defendant. Reasonable grounds to believe a thing are such grounds as would induce a person of ordinary prudence to believe it under the circumstances.⁵³

§ 4321(2). Missouri

The court instructs the jury that if you find and believe from the evidence in the cause that the plaintiff, while traveling on defendant's track on ———, became fastened in defendant's cattle guard by having her foot caught therein, and fell on said cattle guard, and that her position was then a perilous one, and that defendant's engineer in charge of its engine saw her fall and became aware of her perilous position, then it became and was the duty of said engineer, immediately and at once upon seeing her fall and becoming aware of her said perilous position, to attempt to stop the train by the use of all the means and appliances at hand, consistent with safety to himself, the train, and those on board of the train. And if the jury further believe from the evidence that the engineer, after he saw plaintiff fall on said cattle guard, if he did so see, and became aware of her perilous position, if he did so become aware thereof, did not immediately and at once use all the means and appliances at hand to attempt to stop the train, consistent with the safety of himself, his train, and those on board the train, and that plaintiff was run over and injured by

⁵² *Purnell v. Raleigh & G. R. Co.*, 20 S. E. 953, 122 N. C. 832.

⁵³ *Hovius v. Cincinnati, N. O. & T. P. Ry. Co.*, 107 S. W. 214, 32 Ky. Law Rep. 736.

reason of the failure of said engineer to immediately and at once use all such means and appliances at hand in the manner aforesaid to attempt to stop said train, then the verdict must be for the plaintiff.⁵⁴

The court instructs the jury that if you believe from the evidence that ———, at the time that she was struck and injured by defendant's engine and cars, operated by its agents, if you believe from the evidence that she was so struck and injured, was on a cattle guard at or near a public road crossing for the accommodation of the public passing over defendant's road, and that the track was in such a condition for ——— feet east from the point of the collision that defendant's agents and servants operating its engine and cars could have seen plaintiff on said track between said points; that for about ——— years prior thereto and at about the time of the said striking of said ———, with the knowledge of defendant, that part of defendant's railroad track had been and was frequently used by pedestrians in going to and from ——— schoolhouse from the east, and that said ——— schoolhouse was near said public road crossing and near defendant's track, and that for about ——— years prior thereto school children attending said school at said schoolhouse had been in the habit of using defendant's said track to walk thereon, and many children had been accustomed to use said crossing at about the hour of the day that the injury is shown by the evidence to have been inflicted on plaintiff, and that defendant had knowledge of such use of its track and said crossing, and that said ———, while traveling upon defendant's track at or near said public road crossing, became fastened in said cattle guard so that she could not extricate herself, and became in imminent peril of being struck by defendant's train, and defendant's employes in charge of said train became aware of her perilous position at said cattle guard in time to have enabled them, by the exercise of ordinary care, to have stopped said train and to have averted the injury to plaintiff, or if the jury believe from the evidence that said employes in charge of said train, by the exercise of ordinary care, could have become aware of her perilous position at said cattle guard, if the evidence shows she was in a perilous position, in time to have stopped said train and to have averted said injury to plaintiff, and that they failed to exercise such care to stop said train, and that, by reason of such failure to exercise such ordinary care, the said train was not stopped, and said ——— was struck and injured—then the jury must find for the plaintiff, though the jury may believe that ——— was guilty of negligence in going up and traveling on de-

⁵⁴ Woods v. Wabash R. Co., 86 S. W. 1082, 188 Mo. 229.

fendant's track. And by "ordinary care," as used in this instruction, is meant such care as an ordinary, careful, and prudent person or persons would exercise under the same or similar circumstances.⁵⁵

§ 4321(3). North Carolina

The jury are instructed that, if the engineer saw intestate sitting in an erect position, or in any other position which did not make it appear that he was helpless, he had a right to assume up to the last moment that he would get out of danger, and was under no obligation to check his speed or stop his train; and, if the jury find from the evidence that intestate's position was not such as to make it appear to him that he was helpless in time to have stopped the train, the answers to the first and third issues should be, "No."⁵⁶

§ 4321(4). Texas

You are instructed that it is the duty of a railway engineer to use all the means within his power, consistent with the safety of the train, to prevent injuring persons upon the track, as soon as he may realize from the facts then within his knowledge that such persons thereon would not probably leave the track. And under the facts in this case it became the duty of the engineer to use all the means under his control, consistent with the safety of the train, to prevent the injury of the deceased, ——— and ———, and of ———, or to have lessened the injury to them, so soon as he realized, if he did so, from the facts within his knowledge that said parties would not, or probably could not, leave the track.⁵⁷

§ 4322. Speed as evidence of negligence

See, also, post, § 4376.

Speed of street car, see post, § 4331.

You are instructed that to run a train at a high rate of speed and without signals of approach, without warning, at a place in a populous district of an incorporated town where those in charge of the train know the public are wont to pass with such frequency and in such numbers as that they may know there is a likelihood that there are persons on the track at such place, and that such persons may probably be injured by such trains, is such reckless indifference to the safety of such persons as would render the employer liable for injury resulting therefrom, notwithstanding there

⁵⁵ *Woods v. Wabash R. Co.*, 86 S. W. 1082, 188 Mo. 229.

⁵⁶ *McArver v. Southern Ry. Co.*, 40 S. E. 94, 129 N. C. 380.

⁵⁷ *Parham v. Ft. Worth & D. C. Ry. Co.*, 113 S. W. 154, 51 Tex. Civ. App. 511.

was negligence on the part of the person injured and no fault on the part of the servants after seeing the danger.⁵⁸

§ 4323. Same—Violation of ordinance

Violation by street car company, see post, § 4842.

The court instructs the jury that if you believe from the evidence that at the time the deceased, ———, was struck and killed by defendant's train of cars, such engine and cars were being run at a greater rate of speed than ——— miles in the corporate limits of the city of ———, and that by reason of such running of cars the said ——— was struck and killed without negligence on his part contributing to his death, then you should find for the plaintiff in the sum of \$———. ⁵⁹

§ 4324. Care required in making flying switch

The jury are instructed that, if they believe from the evidence that the car which struck and injured ——— was being run at the time of the injury on a running or flying switch, and that such manner of handling said car was more dangerous to and more likely to injure persons who might be on the track or attempting to cross the track than the ordinary and usual manner of switching cars, as shown by the evidence, then the defendant's servants were bound to use more than ordinary care and caution in making such switch, and, if you believe from the evidence that the injury to ——— was the result of any want of care and caution on the part of the defendant's servants in making such running or flying switch, you should find for the plaintiff. ⁶⁰

§ 4325. Care required as dependent upon whether persons may reasonably be expected to be upon track

The jury are instructed that the degree of care to be exercised by a railroad company must necessarily depend upon the location of the track and the circumstances of the case. In a place not frequented by the public, either by right or permission, expressed or implied, of the company, and in locations where people are not constantly passing about, and where they cannot reasonably be expected to be, persons in charge of a train are not required by law to be on the lookout for them. In such cases, the company is entitled to the exclusive use of the track, and the persons in charge of the train are only required to avoid injury to them if they can do so upon becoming aware of their peril. But when the place is within the limits of a city, in the yard of a company, or yard used

⁵⁸ Alabama Great Southern R. Co. v. Guest, 39 So. 634, 144 Ala. 373.

⁵⁹ Jackson v. Kansas City, Ft. S.

& M. R. Co., 58 S. W. 32, 157 Mo. 621, 50 Am. St. Rep. 650.

⁶⁰ Lange v. Missouri Pac. Ry. Co., 106 S. W. 660, 208 Mo. 458.

by several companies together, or with tracks in close proximity to each other, and employés of companies whose tracks are in close proximity are engaged in the discharge of their duties, the safety of human life requires a different rule; and in this case, if you find that deceased was an employé of one of said roads in the line of his duty, and the employés of defendant were not on the lookout for such persons, and had their engine in possession or under the control of an incompetent person, if it was, and were running at a dangerous and unlawful rate of speed, if it was, and the injury was inflicted by reason of the want of proper care on the part of the defendant, if it was, the defendant would be guilty of negligence.⁶¹

§ 4326. Care required as dependent on whether country populous or nonpopulous

The court charges the jury that if the place at which the killing occurred was not in a populous district of an incorporated town, and was not a place where those in charge of the train knew the public were accustomed to pass with such frequency and in such number as that they may know there is a likelihood that there are persons on the track at such time and place, then the jury cannot find a verdict for the plaintiff, unless they find that after discovery of peril some agent or servant of defendant consciously failed to do something which he knew it was his duty to do to prevent the happening of the injury.⁶²

The court charges the jury that if the place at which ——— was killed was not in a populous district of an incorporated town, and was not a place where those in charge of the train knew the public were accustomed to pass with such frequency and in such numbers as that they might know or have reason to believe there is a likelihood that there are persons on the track at such time and place, then the jury cannot find for the plaintiff, unless they find that after discovery of the peril of ——— defendant's agent or servant in charge of the cars failed to do something which he knew it was his duty to do to prevent injury.⁶³

§ 4327. Who are trespassers

§ 4327(1). Iowa

The jury are instructed that, if you find from the evidence that the deceased and other employés of the ——— Railway Company had, for a considerable time prior to the accident, been accustomed to use the track of the defendant railroad company, at and near the

⁶¹ *McMarshall v. Chicago, R. I. & P. Ry. Co.*, 45 N. W. 1065, 80 Iowa, 757, 20 Am. St. Rep. 445.

⁶² *Alabama Great Southern R. Co. v. Guest*, 39 So. 654, 144 Ala. 373.

⁶³ *Alabama Great Southern R. Co. v. Guest*, 39 So. 654, 144 Ala. 373.

place where the accident occurred, for the purpose of using the same for giving signals by the acquiescence of the company, then the deceased was not a trespasser upon the track, and such permission may be implied if the deceased and other employes of said ——— Railway Company were in the habit of so using the railroad of defendant without objections on its part; and it is for you to determine, from all the facts in evidence before you, whether or not deceased had such permission.⁶⁴

§ 4327(2). *Missouri*

The court instructs the jury that if they believe from the evidence that the plaintiff's husband and others were in the habit of using the track of the defendant's railway next to the ——— river, and on which plaintiff's husband was at the time he was killed, in towing said boats up the river, and had been in the habit of doing so continuously for a long time prior to the day in question, without objection or protest on the part of the defendant, or under such circumstances when, by the exercise of ordinary care, it might have known that they were using said track, and that said track was on ——— street between ——— and ——— streets, and if from the nature of the ground lying between said track and the ——— river there was no other place where those towing boats up the river could reasonably be expected to go, then the court instructs the jury that the plaintiff's husband was not a trespasser in being upon said track at the time he was run against and killed.⁶⁵

§ 4327(3). *Virginia*

You are instructed that the jury are the triors of the facts as to whether or not ——— was a licensee on the defendant's right of way. If the jury believe from the evidence that the deceased, ———, when he received his injuries, was traveling along the foot-path or way over the defendant's land, which had been long used as a walk way, leading to a crossing over defendant's track, by himself and certain other individuals, occupants of an adjoining lot or close, or by the general public, with the knowledge of the defendant company, and without any objection on its part, then the jury must find that said ——— was not a trespasser while traveling said path, but that he was a licensee, and not wrongfully traveling said path.⁶⁶

⁶⁴ *McMarshall v. Chicago, R. I. & P. Ry. Co.*, 45 N. W. 1065, 80 Iowa, 757, 20 Am. St. Rep. 445.

⁶⁵ *Le May v. Missouri Pac. Ry. Co.*, 16 S. W. 1049, 106 Mo. 361.

⁶⁶ *Norfolk & W. R. Co. v. De Board's Adm'r*, 22 S. E. 514, 91 Va. 700, 29 L. R. A. 825.

§ 4328. Same—Effect of signs warning pedestrians to keep off track

The court instructs the jury that although they may believe from the evidence that defendant, at the time plaintiff received his injuries, had on its grounds in one or more conspicuous places signboards warning pedestrians of the danger of going upon its tracks at the place of the accident and not to do so, if they also believe from the evidence that such signboards had not been up such length of time as would afford reasonable opportunity to persons in the habit of using defendant's tracks or intending to use them to know of their presence, then and in such event they would not be authorized to find that plaintiff, at the time of receiving his injuries, was a trespasser upon defendant's tracks, unless they should further believe from the evidence that he in fact saw the signboards or one of them before the accident, under such circumstances as would have enabled a person of ordinary intelligence and prudence, situated as he was, to understand their warning to keep off defendant's tracks at the place of the accident.⁶⁷

§ 4329. Duty towards trespassers on track

§ 4329(1). Alabama

The court instructs the jury that, although ——— was a trespasser on defendant's track at the time he was hit by defendant's engine, yet, if the agent or employes of defendant in charge of the train saw him on the track in time to stop the train and avoid hitting him and failed to do so, then your verdict should be for plaintiff.⁶⁸

The court instructs the jury that, if you are reasonably satisfied that the engineer of defendant saw plaintiff's intestate in front of his train in a perilous position in time to stop said train before striking said intestate, and said engineer negligently failed to stop said train, and that intestate's death was a proximate cause of such negligence, then your verdict should be for plaintiff.⁶⁹

§ 4329(2). Georgia

You are instructed that, where persons generally, even though trespassers, habitually use the property of a railroad company, with the knowledge and without the disapproval of the employes having such property in charge, or to such an extent as to put the railroad company and its servants and agents upon notice of such use, and there is no disapproval or means adopted to prevent its use,

⁶⁷ *Southern Ry. Co. in Kentucky v. Jones*, 188 S. W. 873, 172 Ky. 8.

⁶⁸ *Louisville & N. R. Co. v. Rayburn*, 72 So. 461, 198 Ala. 191.

⁶⁹ *Louisville & N. R. Co. v. Rayburn*, 73 So. 461, 198 Ala. 191.

the railroad company, in that event, if that exists, if that be true, is bound to anticipate that such use of the property will continue.⁷⁰

§ 4329(3). *Indiana*

The court instructs the jury that the decedent, ———, was a trespasser upon defendant's track at the time and place complained of by the plaintiff, and the jury in this case will find for the defendant, unless they further believe from a preponderance of the evidence that the defendant's engineer in charge of its east-bound train No. ——— at the time and place complained of discovered that said decedent, ———, was in a perilous position on defendant's track in front of said train, and that the decedent was unaware of his perilous position, and that he made said discovery in time to avoid striking said decedent by stopping said train or checking the speed thereof by the exercise of ordinary care in the use of the means then at hand and under the control of said engineer consistent with the safety of said train and the passengers thereon. But, in case you find that said engineer, with ordinary care in the use of such means as were then at hand and under his control, and without endangering the train or the persons thereon, could have stopped said train or checked the speed thereof so as to avoid striking said decedent, then your verdict should be for the plaintiff.⁷¹

§ 4329(4). *Kentucky*

The court instructs the jury that decedent, at the time he was struck, was a trespasser on the defendant's right of way and those in charge of the train owed him no duty until his peril was actually discovered by them, and if you believe that, after his peril was actually discovered, the defendant's employes used all reasonable means at their command to avoid injuring him, considering the time at their disposal, you should find for the defendant.⁷²

You are instructed that, if you believe from the evidence in this case that, after the engineer in charge of defendant's engine became aware of the fact that decedent was on or so near the track on which said train was running as to render his position dangerous or perilous, he failed to use ordinary care to apprise decedent of the approach of the train and to avoid striking him, and that as a result thereof he was struck and killed, you should find for the plaintiff. On the other hand, unless you do believe from the evidence that the said engineer, after becoming aware of decedent's presence on or so near said track as to render his position dangerous or perilous, did fail to use ordinary care to apprise him

⁷⁰ *Western & A. R. Co. v. Watkins*, 80 S. E. 916, 14 Ga. App. 388.

⁷¹ *Pennsylvania Co. v. Reesor*, 103 N. E. 983, 60 Ind. App. 636.

⁷² *Johnson's Adm'r v. Louisville & N. R. Co.*, 118 S. W. 383.

of the approach of the train and to avoid striking him, you should find for the defendant; and, in determining the question as to whether said engineer did or not use ordinary care, you should consider the time in which he had to act, and all the circumstances of the situation.⁷³

§ 4329(5). Mississippi

The court instructs the jury that the defendant's engineer was not bound to keep a lookout for persons walking along the track, or sitting upon the railroad track in the nighttime, at a place between stations, for purposes of their own convenience, nor is the defendant railroad company under any obligations to such persons to equip its locomotives with headlights, or to see that the headlights are burning, but its only duty and obligation to such person is to not wantonly or willfully injure him.⁷⁴

§ 4329(6). Oklahoma

You are instructed that under the evidence in this case the plaintiff's decedent was a trespasser upon the company's tracks, but even as such it became the duty of the defendants' agents and servants in charge of its train, when they saw him in imminent peril, if they did so see him, to exercise ordinary care to avoid injuring him. The law is that this duty does not arise until the imminent peril of the trespasser is discovered, but whether or not the agents and servants of the defendant company in charge of its train saw plaintiff's decedent in imminent peril in time to avoid injuring him by the use of ordinary care is a question of fact for the jury under all the facts and circumstances in proof in the case.⁷⁵

§ 4329(7). Oregon

I instruct you, as a matter of law in this particular case, that the injured party, ———, at the time of the accident was a trespasser upon the property of the railroad company, the defendant in this case. Now the law compels a railroad company, or anybody else, to use a certain amount of diligence even toward trespassers, and the duty which they are required to perform is that they shall not willfully or wantonly injure anybody, even a trespasser. It is for you to determine, under all the circumstances of this case, whether the engineer saw the parties upon the trestle or bridge in sufficient time so that with the use of ordinary care he could have avoided injuring them. If he could have, then the railroad company is liable. If he used his best endeavors, after he did see them and found out that they were upon the track, to stop the train, and

⁷³ *Johnson's Adm'r v. Louisville & N. R. Co.*, 118 S. W. 383.

⁷⁴ *Alabama Great Southern Ry. Co. v. Daniell*, 66 So. 730, 108 Miss. 358.

⁷⁵ *Bonner v. Chicago, R. I. & P. Ry. Co.*, 185 P. 1093, 77 Okl. 18.

notwithstanding that they were injured, then the railroad company is not liable.⁷⁶

§ 4329(8). Texas

You are instructed that the plaintiff at the time of the collision and injury complained of was a trespasser on the track of the defendant, and that the defendant owed him no duty until his position of peril was discovered.⁷⁷

§ 4329(9). West Virginia

The court instructs the jury that, even if the plaintiff's decedent, ———, was in the position of a trespasser on the defendant's property, yet it was the duty of the defendant to exercise ordinary care to avoid injury to him; therefore, if the jury believe from all the evidence that said ——— could have been seen by the engineer or fireman on the engine mentioned in evidence by the exercise of ordinary care in time to stop the engine and avert the accident, it was their duty to do so, and, if they neglected to keep a constant lookout ahead, and thereby failed to see him in time to stop, the defendant railway company is liable, and the jury should find for the plaintiff.⁷⁸

The court instructs the jury that, even if the plaintiff's decedent, ———, was in the position of a trespasser on the defendant's property, it was the defendant's duty to exercise ordinary care to avoid injury to him. Therefore, if the jury believe from all the evidence in this case that the engineer or fireman on the engine mentioned in the evidence did see the hand car mentioned in evidence, on which the said ——— was riding, in time to stop the engine and avert the accident, it was their duty to stop the engine as soon as possible, and if they could have stopped in time to avoid injury to him by the exercise of ordinary care, and neglected to do so, the defendant is liable, and the jury should find for the plaintiff.⁷⁹

§ 4330. Care required as to licensees

§ 4330(1). United States

The jury are instructed that, if the plaintiff was lawfully upon the railroad of the defendant at the time of the collision by the license of the defendant, and the collision and consequent injuries to him were caused by the gross negligence of one of the servants of defendant then and there employed on the road, plaintiff is entitled to recover, notwithstanding the circumstances given in evi-

⁷⁶ *Summerfield v. Southern Pac. Co.*, 163 P. 420, 83 Or. 219.

⁷⁷ *Frick v. International & G. N. Ry. Co. (Civ. App.)* 207 S. W. 198.

⁷⁸ *Davidson v. Pittsburg, C., C. &*

St. L. Ry. Co., 23 S. E. 593, 41 W. Va. 407.

⁷⁹ *Davidson v. Pittsburg, C., C. & St. L. Ry. Co.*, 23 S. E. 593, 41 W. Va. 407.

dence and relied upon by defendant as a defense, to wit, that the plaintiff was a stockholder of defendant riding by invitation of the president of defendant, paying no fare and not in the usual passenger cars.⁸⁰

§ 4330(2). *Illinois*

The court instructs the jury that if you believe, from the evidence, that plaintiff was on the railroad right of way where he was injured simply by the acquiescence of the railroad company he was a mere licensee, and the defendant would owe him no other or greater duty as to his safety than if he were a trespasser on said railroad track, and the duty owed to a trespasser by a railroad company is simply to refrain from wantonly and willfully injuring him.⁸¹

§ 4330(3). *Missouri*

The court instructs the jury that, if they believe from the evidence that on ———, and for several years before that date, the “crusher plant,” mentioned in evidence, was maintained on the right of way of the defendant, ——— Railroad Company, and that said “crusher plant” was then and there maintained for the mutual, financial benefit of the operators of said “crusher plant” and the defendants, and that there was a “footpath” extending across the “main line” from the “engine house” to a “toolhouse” mentioned in evidence, and that for several years said “footpath” had been frequently, habitually, and generally used by employés of said “crusher plant” walking across said “main line” with the knowledge and acquiescence of the defendants, and that such use of said “footpath” and said “main line” was reasonably necessary in transacting the business of said “crusher plant,” and that the usual and ordinary running of said “crusher plant” makes a louder noise than the running of a train, together with the ringing of the bell on the locomotive engine thereof, and that a clear view of the “main line” near said “crusher plant” is frequently obscured by dust and smoke, and that the defendants, acting through their officers, servants, and agents, either knew of said surrounding conditions, or, by the exercise of ordinary care and diligence, might have known thereof, then employés of said “crusher plant,” if properly and with reasonable care using said “footpath” and “main line,” were not trespassers, and the defendants’ employés in running trains over said stretch of track near said “crusher plant” did not have a right to expect an absolutely clear track; but, if you so find the facts to be, it was their duty to exercise ordinary and rea-

⁸⁰ *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502.

⁸¹ *Cunningham v. Toledo, St. L. & W. R. Co.*, 103 N. E. 594, 260 Ill. 589.

sonable care and caution for the personal safety of employes of said "crusher plant." And a failure to perform this duty, if you believe from the evidence that there was such failure, is negligence as a matter of law.⁸²

The court instructs the jury that, if they believe from the evidence in the case that at the time in question the plaintiff's husband was on the track of the defendant's railway on the levee on ——— street in ——— between ——— and ——— streets, going up the track in a westerly direction, and pulling with a rope a sand-boat, which was in the ——— river, and that the plaintiff's husband and others had been accustomed for a long time prior thereto to use the track at said place in pulling their boats up the river, which the defendant, its servants, agents, and employes knew, or by the exercise of ordinary care might have known, and that, while the plaintiff's husband was so on said track as aforesaid, the defendant's servants, agents, or employes negligently and carelessly caused two cars to be run onto the track where plaintiff's husband was walking, and the said cars were detached from the engine, and negligently and carelessly projected onto said track where the same was down grade, and the defendant negligently and carelessly left said cars so that the same could not be stopped, or negligently or carelessly failed to stop said cars, so that the said cars ran upon the plaintiff's husband from behind him, and killed him, and that the defendant knew, or by the exercise of ordinary care might have known, the danger to which plaintiff's husband was exposed, in time to have avoided a collision with the plaintiff's husband, and negligently and carelessly failed to avoid a collision with plaintiff's husband, and negligently and carelessly failed to give the plaintiff's husband warning of the approach of said cars, then the plaintiff is entitled to recover, unless the plaintiff's husband knew, or by the exercise of ordinary care might have known, that said cars were approaching, and could have, after he knew, or by the exercise of ordinary care might have known, that said cars were approaching, avoided a collision with the same by the exercise of ordinary care on his part.⁸³

§ 4330(4). **South Carolina**

You are instructed that, if the jury believe from the evidence that the track upon which the plaintiff is alleged to have been injured was frequented by people passing to and fro along said railroad, which fact was well known to defendant or its agents, servants, and employes, and it had been so used for a long time, then the plaintiff in being found upon said track with no knowledge of

⁸² Hubbard v. Wabash R. Co., 193 S. W. 579.

⁸³ Le May v. Missouri Pac. Ry. Co., 10 S. W. 1049, 105 Mo. 361.

the approach of the train would be a licensee thereon, and it was the duty of the defendant to observe ordinary care in backing its cars into said yard and upon said track.⁸⁴

The jury is instructed that, if they believe from the testimony that the plaintiff at the time of the said accident was in the employment of the mill, and that he was without knowledge of the approach of the cars and in the pursuit of lawful business, and it was the custom of the employes of the mill to cross said track and to go upon the said track at their pleasure and without warning to keep off of it, then the plaintiff had a right to be there, and defendant owed him the duty of ordinary care.⁸⁵

§ 4330(5). Virginia

The court instructs the jury that it was not the duty of the defendant company, so far as ——— was concerned, to station a lookout on its front car, or to make any previous preparation for him.⁸⁶

The court instructs the jury that the defendant railway company did not owe ——— the duty of running its trains in any particular manner or at any particular rate of speed; and it was under no obligation to keep a lookout on its car, or to ring its bell, or to blow its whistle; and no recovery can be had by the plaintiff in this case, based upon the defendant's failure to do any or all of these things.⁸⁷

The court further instructs the jury that, if they find that ——— was traveling said path as such licensee, no duty was imposed upon the defendant company to keep the said path in good order and repair, and the said ——— traveled thereon at his peril. But if the jury believe from the evidence that the defendant company did carelessly and negligently make an excavation beneath said pathway, not open to the common observation of persons walking along said path, and no notice or warning had been given to said ——— and that said ———, while walking along said path or way with due caution and care, was injured and killed by reason of said excavation, then the said defendant company is liable to answer therefor in damages. But if the jury believe from the evidence that the supposed excavation complained of was open to the common observation of those traveling along said pathway, and that said ———, by the exercise of ordinary care, could have observed the same, and that he carelessly and negligently stepped into said ex-

⁸⁴ Goodwin v. Atlantic Coast Line R. Co., 64 S. E. 242, 82 S. C. 321.

⁸⁵ Goodwin v. Atlantic Coast Line R. Co., 64 S. E. 242, 82 S. C. 321.

⁸⁶ Chesapeake & O. Ry. Co. v.

Saunders' Adm'r, 83 S. E. 374, 116 Va. 826.

⁸⁷ Chesapeake & O. Ry. Co. v. Saunders' Adm'r, 83 S. E. 374, 116 Va. 826.

cavation, then he was chargeable with contributory negligence, and is not entitled to recover.⁸⁸

§ 4331. Duty to persons riding on hand car by permission of employees of railroad company given without authority

The court instructs the jury that, if they believe from the evidence that the plaintiff's decedent, ———, was killed while riding on defendant's hand car, and that the defendant was not accustomed to carry passengers on its hand car, and had not authorized its servants who were in charge of the hand car in which said decedent was so riding to carry passengers thereon, they will find a verdict for the defendant, unless they further find that the engineer and fireman in charge of the extra passenger train mentioned in the evidence failed to use ordinary care to avoid such killing, even though they also find that said decedent was riding on said hand car by permission of the servants in charge thereof.⁸⁹

§ 4332. Duty to persons in habit of using track as passway for private convenience

See, also, ante, § 4321(2).

§ 4332(1). United States

The jury are instructed that, if you believe from the evidence that the defendant's tracks and right of way at the place in question, for a long time prior to the accident, had been openly, continuously, and habitually used as a passway by a large number of persons both by day and night, and that the defendant knew, or in the exercise of reasonable care could have known, of such use of its tracks, and that the servants of defendant "kicked" or "shunted" a car without lookout, lights, or signals along said tracks and right of way on the night in question, where and when they might have reasonably expected people to be passing, and that they thereby failed to exercise the degree of care ordinarily and reasonably to be required of them under the circumstances, and that by reason thereof the plaintiff, without any lack of ordinary care on his part, was struck and injured by said car, then you should find for the plaintiff.⁹⁰

§ 4332(2). Kentucky

You are instructed that it is the undisputed evidence in this case that, at and before the time complained of by plaintiff, persons, and the public generally, were in the habit of using the tracks and yard of the defendant ——— Railway, between ——— and ———

⁸⁸ Norfolk & W. R. Co. v. De St. L. Ry. Co., 23 S. E. 593, 41 W. Va. Board's Adm'r, 22 S. E. 514, 91 Va. 407.
700, 29 L. R. A. 825.

⁸⁹ Davidson v. Pittsburg, C., C. & ⁹⁰ Hines v. Kountis (C. C. A., Va.) 272 F. 105.

streets in the city of ———, with the knowledge of said defendant, and the court now instructs you that it was the duty of said defendant's engineer, ———, and other employes of said railroad, in charge of said engine, at the time and place complained of by plaintiff, to keep a lookout for persons using said track and yard, and on or so near its said track between said streets as to be liable to collide with, or be struck by, said engine, and to give notice of the movements and approach of said engine by ringing the bell or blowing the whistle of said engine, and to have said engine under reasonable control, and to exercise ordinary care to avoid striking and injuring persons so using said tracks and yard between said two streets. And if you shall believe from the evidence that defendant and its said engineer failed to do any of these things, and by reason of such failure and as the direct and proximate cause thereof, said engine was caused to be run against the plaintiff, and she was thereby injured, then defendants are chargeable with negligence, and the law in this case is for the plaintiff, and you will find for her.⁹¹

§ 4332(3). Missouri

The jury are instructed that if they believe from the evidence that, at the point on the track of the defendant where plaintiff's husband was killed, said track was clear and unobstructed, and sufficiently straight to permit a plain view along the track from any approaching train, and if the jury believe further that, at said point where said deceased was struck by the train, the roadbed of the defendant, both east and west of said spot, was at that time used, and had for a long period of time prior thereto been used, with the knowledge of the defendant, its servants and employes, by pedestrians as a passway leading to and from the village of ———, then it was the duty of the employes of the defendant in charge of the train, when approaching such portion of the roadbed of defendant as was used as aforesaid as a passway, to keep a lookout for persons and to ascertain that the track was clear.*

§ 4332(4). Oklahoma

The jury are instructed that, if you find from a preponderance of the evidence that at the time of the alleged killing of the deceased by the defendant, and long prior thereto, the defendant had permitted, or acquiesced in allowing, the public to travel along its right of way and track at the point where it was alleged that the deceased was killed, then it was the duty of defendant, while operating its engines and cars, through its agents and employees, along

⁹¹ *Shrader v. Nashville, C. & St. L. Ry. Co.*, 114 S. W. 788.

* *Morgan v. Wabash R. Co.*, 60 S. W. 195, 159 Mo. 262.

said track and right of way, to keep a reasonable lookout for persons who might be traveling along said track and right of way.⁹²

§ 4332(5). *Virginia*

The court instructs the jury that, if the jury find from the evidence that the defendant's right of way at the point where the accident occurred was at the time of the accident, and prior thereto, being constantly used as a footway by men, women, and children passing over it daily and at all hours for such length of time as to put the railway company on notice of same, then the defendant, its motormen and servants, are, in law, charged with notice that it was so used, and it then became the duty of the defendant company to use ordinary care to discover — (an infant of the age of — years), if on the track on the bridge on which the train was proceeding, and in danger at the place mentioned, and that if the defendant did not use ordinary care, and that by its failure so to do the said accident occurred, then they must find for the plaintiff's intestate, even though the said plaintiff's intestate, if an adult, would have been guilty of contributory negligence, provided they believe from the evidence that the servants of the defendant company in charge of its car did not do all that they could consistently with their own safety after the danger of the said — was known, or might have been discovered, by the said servants of the defendant by the exercise of ordinary care in keeping a lookout for persons at the point where the accident occurred.⁹³

The court instructs the jury that if from the evidence in the case they believe that with the knowledge of the defendant its track at the point of the alleged accident had been for a number of years prior to and up to the time of said accident constantly used by such a number of the inhabitants of the village of — and other people as a walkway and passway, and that the defendant might reasonably have expected that some of such inhabitants or people might be then and there upon its track at the said point, then the defendant owed the duty of taking reasonable care to discover and not to injure any such person whom it might reasonably expect to be on its track at that point; and, if the jury believe from the evidence in the case that the servant of the defendant in charge of its engine at the time of the injury complained of could by the exercise of reasonable care under the circumstances surrounding him at the time have discovered the danger of the infant plaintiff in time to have avoided injuring him, but that he failed to exercise such reasonable care under the circumstances surrounding him at the time, and as the result of such failure ran the engine against and upon the infant plaintiff, and thereby inflicting the injuries

⁹² St. Louis-San Francisco Ry. Co. v. Donahoo, 198 P. 81.

⁹³ Washington & O. D. Ry. v. Ward's Adm'r, 89 S. E. 140, 119 Va. 334.

complained of, the defendant is liable, and the jury should find for the plaintiff.⁹⁴

The court instructs the jury that if they believe from the evidence that the defendant, or its agents and servants in charge of and operating its work train, had knowledge that the defendant's track had been for a considerable time and still was in constant and daily use by a large number of the employes of the contractors who were engaged in work upon defendant's track, or its agents and servants in charge of its train might reasonably have expected said employes to be upon the track at the time and point that the plaintiff's decedent was killed, it was the duty of the defendant, and its agents and servants in charge of and operating its train, to use reasonable care to discover and not to injure them; and if by the exercise of reasonable care the defendant, and its agents and servants operating said train, could have discovered said decedent and avoided injury to him, it was their duty to do so, and a failure to discharge that duty would be negligence, for which the defendant would be liable, if of the character charged in the declaration and provided such negligence was the proximate cause of the injury, and provided, further, the plaintiff's intestate was not guilty of any contributory negligence other than merely walking on the defendant's track.⁹⁵

The court instructs the jury that if they shall believe from the evidence that the plaintiff's decedent, along with other employes of the contractors, was in the habit of walking on defendant's track in going to and from their place of work with the knowledge and acquiescence of the defendant, and if they further believe from the evidence that at the time he was killed he was going to his work on defendant's track, then his mere presence there upon the track did not constitute him a trespasser, nor of itself constitute contributory negligence; and if you believe from the evidence that the defendant, or its agents and servants in charge of its train, should have apprehended the presence of such employes upon the track by reason of the large number of persons using same, it was their duty to have kept a reasonable lookout for them, to avoid injuring them, and to have given reasonable notice or warning to such employes of the approach of said train, and a failure to perform either duty would be negligence. The jury must further believe, however, that such negligence was the proximate cause of the injury, and that the plaintiff was not guilty of contributory negligence, before they can find against the defendant.⁹⁶

⁹⁴ *Southern Ry. Co. v. Wiley*, 70 S. E. 510, 112 Va. 183.

⁹⁵ *Norfolk & W. Ry. Co. v. Denny's* Adm'r, 56 S. E. 321, 106 Va. 383.

⁹⁶ *Norfolk & W. Ry. Co. v. Denny's* Adm'r, 56 S. E. 321, 106 Va. 383.

The court instructs the jury that if from the evidence in this case they believe that, by and with the knowledge of the defendant, its track at the point and time of the accident was constantly used by the employes of the contractors, and that defendant might reasonably have expected that such employes might be on its track, then said defendant owed the duty of taking reasonable care to discover and not to injure any such person whom it might reasonably expect to be on its track at that point; and if the jury believe from the evidence in this case that the servants of the defendant in charge of its trains could, in the exercise of reasonable care under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff's intestate in time to avoid the accident, and that said defendant negligently failed to have a proper lookout, and this failure was the proximate cause of the death of plaintiff's intestate, and that there was no contributory negligence on the part of the plaintiff, then they must find for the plaintiff.⁹⁷

The court further instructs the jury that, even if they should believe from the evidence in this case that the plaintiff's intestate was himself guilty of contributory negligence in going upon defendant's track, yet if they believe from the evidence that the defendant knew that its track at this time and point was being constantly used as a passway by the employes of the contractors in going to and from their work, and could or should by the exercise of reasonable care have discovered the perilous position of the plaintiff's intestate on its track, by having a proper lookout, or could have warned them of the approach of the train in time to avoid the accident, but negligently failed to do so, and by reason of such failure the plaintiff's intestate was run over by its train and killed, then they must find for the plaintiff, unless the jury further believe the plaintiff was guilty of contributory negligence other than merely going upon the track, in which case the jury must find for the defendant.⁹⁸

§ 4333. Persons on bridge or trestle

The court instructs the jury that the defendant did not owe the plaintiff's decedent the duty of blowing its whistle, ringing its bell, running its engines at any particular rate of speed, or having a light on said engines or tender; and if the jury believe from the evidence that the signals near ——— street were for the use and guidance of the employes of the company in running trains and

⁹⁷ *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 56 S. E. 321, 106 Va. 383. In this instruction the phrase "by having proper lookout" should not be construed to mean that it was the duty

of the railroad company to provide additional force to keep a proper lookout.

⁹⁸ *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 56 S. E. 321, 106 Va. 383.

engines over said bridge or trestle, and were not for the benefit or information of the public, no negligence can be imputed to the defendant for changing its signal and running its engines across the eastern or upper trestle or bridge at the time it did. And if the jury believe from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care, under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to avoid the accident, they must find for the defendant. But the jury are further instructed that if they believe from the evidence that the servants of the defendant in charge of the engine could, in the exercise of reasonable care, under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff's intestate in time to avoid the accident, they must find for the plaintiff.¹

§ 4334. Right to assume that travelers will keep out of danger or that persons on track will leave it

See, also, post, § 4391.

Presumptions permissible to motorman of street car, see post, § 4840.

§ 4334(1). Kentucky

The jury are instructed that if the agents and servants of the defendant in charge of the train which injured the plaintiff were giving timely and reasonable warning by the ringing of the bell or the blowing of the whistle, or other reasonable warning, of the approach of said train to the place where the plaintiff was injured, and if at said time the plaintiff was walking between the defendant's railway tracks in a position where he was not in danger of being struck by said train, and if defendant's agents or servants in charge of said train saw the plaintiff so walking, then the defendant was not required to anticipate that the plaintiff would put himself in a position of peril, but had the right to assume that he was aware of the approach of the train, and would keep out of danger; and, if the jury shall believe from the evidence that the plaintiff changed his course and went upon the railway track in front of the approaching train, or so close to it as to be struck by it in passing, and was struck, or run over, by said train, the jury will find a verdict for the defendant.²

§ 4334(2). Missouri

The court instructs the jury that if you find that ——— was in a place of safety before he stepped onto the track, and when the engineer first discovered him, then the engineer had the right to

¹ Chesapeake & O. Ry. Co. v. Rogers' Adm'r, 41 S. E. 732, 100 Va. 324.

² Louisville & N. R. Co. v. Cook, 128 S. W. 81.

presume that he would not go onto the track in front of an approaching train, and the engineer was not required to make any effort to stop said train until he discovered that said ——— intended to or was starting to go onto the track; and the engineer had the right to presume that the said ——— possessed reasonable intelligence sufficient to avoid danger, in the absence of evidence that the engineer knew the said ——— was mentally deranged or of unsound mind.³

§ 4334(3). Virginia

The court instructs the jury that if they believe from the evidence that the brakeman or conductor, who were on the end of the lead car of the work train, saw ——— and ——— walking on the railroad track in front of the moving train, and there was nothing about their appearance or manner to indicate that they were not aware of their danger, then they had the right to presume that the said ——— and ——— would exercise reasonable care and prudence to avoid danger, and would get off of the said track in time to avoid the approaching train, and it was not their duty to undertake to protect said ——— and ——— until they saw that the said ——— and ——— would not get off the said track and were in a position of danger.⁴

§ 4335. Duty to persons apparently unconscious of danger

See, also, ante, §§ 4321(1), 4329(3); post, § 4850.

You are instructed that, if the jury believe from the evidence that the engineer in charge of the locomotive saw the plaintiff was engaged in his work and apparently unconscious that the train was approaching him, notwithstanding the warning that may have been given him, then it was the duty of the engineer to use all reasonable means in his power to arrest the attention of the plaintiff, and avoid injuring him.⁵

§ 4336. Duty to know that person stepping off track has reached a place of safety

Now, I charge you, as a matter of law, that if he passed beyond the cross-ties, the question of liability in the case, if he stepped from the side of the track at all, would depend upon the distance that he stepped to one side of the track, under all of the circumstances of the case. If the employes running a railroad train see a person ahead on the track as an obstruction, and sound the alarm, and he seeing it, or for any other reason, on learning that the train

³ *Jackson v. Kansas City, Ft. S. & M. R. Co.*, 58 S. W. 32, 157 Mo. 621, 80 Am. St. Rep. 650.

⁴ *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 56 S. E. 321, 106 Va. 383.

⁵ *Louisville & N. R. Co. v. Morlay* (C. C. A., Ill.) 86 F. 240, 30 C. C. A. 6.

is approaching, steps from the track, completely out of striking distance, and into a position of safety, and then afterwards from some other reason falls against the train, the railway company would not be liable. In other words, the railway company has to take every precaution under the statute to avoid the accident; but, if a person has stepped from the track beyond striking distance and in a place where there is no danger, then of course the railway company does not have to stop its train. It may go on and carry its passengers or discharge the mission on which it is engaged. But I charge you, gentlemen, that passing outside of striking distance, within the rule that I have laid down, so as to excuse the railway company from further observance of the statutory precautions, does not simply mean passing to merely an inch beyond where a person could be struck, if he was standing still; it does not mean simply passing beyond where he could be barely struck by the front of the train if he was standing absolutely still. In other words, a person does not pass out of striking distance, so as to excuse the railway from observing the statutory precautions, while he is still so close to the track that, having due regard for the instinct of self-preservation and the involuntary movements of the body, there is still a reasonable probability or likelihood that he may fall or be thrown against the side of the engine or train as it passes him; and, so long as he has not passed to such a distance from the track as to be safely out of striking distance, so that, all things being considered, the speed of the train, distance, etc., there is no reasonable probability of his falling, or being thrown against the side of the train as it passes him in its onward motion, he is not outside of striking distance in such sense as to justify the railway in ceasing to observe the statutory precautions. Of course, as I have said, if he had passed to such a distance from the track that there was no reasonable probability or likelihood that he might not, in the exercise of the instinct of self-preservation, have fallen or been thrown against that train as it passed him, then the railway was absolved from further duty. That is the question which you will have to consider, even if you shall find that when he was struck he was not actually on the cross-ties, namely: Had he passed outside of striking distance, as I have defined it, before the railway employes stopped using the statutory precautions? The burden of proof on that point is on the railway. It must show by a preponderance of the evidence, in order to justify it in the action of its employes in not going ahead in their effort to stop the train, that he had passed to such a distance from the track. If it has shown you by a preponderance of the evidence, and you believe from a preponderance of the

evidence that he had passed to such a distance from the track, then I charge you that there is no liability whatever in this case, and it would be your duty to return a verdict for the defendant. If you find that he had not passed to that distance and was struck by the train as a result of that failure and by being still within that distance while the train was going ahead, and that on account of his being still within that distance he fell or was thrown against the side of the engine, there would be liability on the part of the railway company.*

§ 4337. Duty as to children

Duty of street car company, see post, § 4857.

§ 4337(1). North Carolina

You are instructed that it was the duty of the engineer to have made an effort to check the speed of his engine as soon as the train reached a point on the track when by looking he could have seen the child. It is not material in this case whether the engineer actually saw the child on the track or not. If in the exercise of ordinary care, by looking ahead, he could have seen the child in time, without injury to his passengers, to have stopped the train before he ran over it, and failed to do so, the defendant company was negligent. Therefore, if the jury shall find as a fact from the evidence that the engineer, in the exercise of ordinary care, by looking ahead, could have seen the child, and, without injury to his passengers, stopped the train before he struck it, and that he failed to stop the train, thinking that the child would get off the track, or be taken off before he got to it, and so ran over it, the company would be negligent, and the jury should answer the first issue "Yes."¹

§ 4337(2). Texas

You are instructed that, if you believe from the evidence that plaintiff's child was killed by defendant's cars, as alleged, and that at the time of such killing the child was less than ——— years old, and if you further believe from the evidence that those in charge of defendant's train of cars, by the exercise of ordinary care, skill, and caution might have observed the child in time to have stopped the train of cars in the usual manner before it reached and ran upon the child, then the plaintiff should recover damages, unless you believe from the evidence that the child's parents or the person in charge of it, or one of them, failed to exercise ordinary pru-

* *Southern Ry. Co. v. Sutton* (C. C. A., Tenn.) 179 F. 471, 103 C. C. A. 51.

¹ *Jeffries v. Seaboard Air Line R. Co.*, 39 S. E. 836, 129 N. C. 236.

dence and diligence in preventing it from going upon the defendant's track.⁸

§ 4337(3). Virginia

The court instructs the jury that, should they believe from the evidence that the defendant's track at the point of the accident had not been used by a large number of people as a walkway and passway with the knowledge of the defendant, still if they do believe from the evidence that the engineer of the defendant company in charge of its engine at the time of the injury complained of discovered the infant plaintiff in this case on the track in front of the said engine in time to have stopped the engine and avoided the said injury, but that, after such discovery, he negligently and carelessly failed to take any precaution to stop said engine, but ran the same against and over him, then the defendant is liable, and the jury must find for the plaintiff.⁹

§ 4337(4). West Virginia

The court instructs the jury that, according to the law of ———, it is the duty of the engineer and fireman on an engine to keep a constant lookout ahead for children that may be trespassing on the railroad track, so as to avoid injury to them, if possible; and, if they neglect to do so the railroad company employing them is liable for any injury caused by their negligence.¹⁰

§ 4338. Duty to persons between cars without knowledge of railroad company

You are instructed that the defendant, his agents and servants in charge of the train by which plaintiff was injured, rested under no duty or obligation to plaintiff to maintain a lookout or to exercise diligence or care to discover that the plaintiff was between the cars, before proceeding to move said train; and if you believe from the evidence that the plaintiff was between the cars and on the drawheads or couplings at the time the train was moved, and that his presence there was not known to defendant, his agents or servants in charge of said train, then you will return a verdict for the defendant.¹¹

§ 4339. Duty as to child under car

§ 4339(1). Iowa

You are instructed that if you should find from the evidence that the general public, with the knowledge of the railway com-

⁸ *San Antonio & A. P. Ry. Co. v. Vaughn*, 23 S. W. 745, 5 Tex. Civ. App. 195.

⁹ *Southern Ry. Co. v. Wiley*, 70 S. E. 510, 112 Va. 183.

¹⁰ *Davidson v. Pittsburg, C., C. & St. L. Ry. Co.*, 23 S. E. 593, 41 W. Va. 407.

¹¹ *Freeman v. Huffman*, 130 S. W. 195, 61 Tex. Civ. App. 200.

pany, had been using certain spaces between the tracks from ——— street to ——— avenue as driveways and footways at and prior to the time of the accident in question, yet such finding would not authorize plaintiff's child to be at any other place or places than those named, or to be under defendant's cars or south of its cars between the rails of the scale track; and if you find from the evidence that it was under the defendant's cars, or at or near the south end of them, between the rails of the scale track, at and just prior to its injury, and the defendant's employes did not see it in time to prevent the accident, then it was a trespasser, and plaintiff is not entitled to recover, and your verdict must be for defendant.¹²

You are instructed that at and just prior to the time of the accident in question defendant was in the actual use and occupancy of its scale tracks, where its cars were standing, and that such use and occupancy, while it lasted, amounted to a suspension and revocation of any right, if such you find there was or had been, in the public to cross said track when so occupied; and if you find from the evidence that plaintiff's child attempted so to do by crawling under defendant's cars, and was killed, while so doing, by the movement of the cars, defendant would not be liable, and your verdict should be for the defendant.¹³

§ 4339(2). Michigan

You are instructed that it was the duty of the defendant and its crew at the time it moved its engine upon the track to make a coupling with the standing cars in question, to be watchful and attentive, and guard with reasonable care against possible accidents of all kinds, without special reference to any particular persons or things, to observe environments, watch where they were going, and maintain such a lookout at all times as is reasonably required by the circumstances. If you are satisfied from the evidence that such reasonable care was exercised by the defendant's train crew at the time in question, then you are instructed that it becomes your duty to return a verdict, "No cause of action," or, "Not guilty."¹⁴

§ 4340. Negligence of defendant as proximate cause of accident

See, also, post, § 4861.

The court instructs the jury that although you may find and believe from the evidence that defendant's train of cars at the time ——— went onto the railroad track was running at a greater rate of speed than that allowed by the city ordinance, to wit, ———

¹² *Wagner v. Chicago & N. W. Ry. Co.*, 98 N. W. 141, 122 Iowa, 360.

¹³ *Wagner v. Chicago & N. W. Ry. Co.*, 98 N. W. 141, 122 Iowa, 360.

¹⁴ *Anderson v. Manistique & L. S. Ry. Co.*, 172 N. W. 387, 206 Mich. 239.

miles per hour, still you cannot find for the plaintiff unless you further find from the evidence that, after the engineer discovered that said ——— was intending to cross the track, he (the said engineer) could have stopped the train in time to have prevented the striking, had he been running not to exceed ——— miles per hour.¹⁵

The court instructs the jury that if they believe from the evidence that the deceased, ———, saw the engine approaching, or knew of its approach, before he got upon defendant's track, then the failure of defendant's servants to ring the bell of the engine, if a fact, is immaterial, and plaintiff is not entitled to recover on that ground of negligence.¹⁶

2. Contributory Negligence

§ 4341. Duty of traveler to exercise ordinary care

You are instructed that it was the duty of the plaintiff in going upon and walking along defendant's tracks to exercise such care as may be usually expected of an ordinarily prudent person to learn of the approach of defendant's cars or hand car, and keep out of their way; and, if he failed to exercise such care, and but for this would not have been injured, the law is for the defendant, and the jury should so find.¹⁷

§ 4342. Duty of traveler to look and listen

Duty to look and listen before crossing street car track, see post, § 4867.

§ 4342(1). Alabama

The jury are instructed that, if you believe from the evidence that deceased stepped on the track on which the engine was running without stopping, looking, or listening, and that this action on his part was the proximate cause of his death, and that he was not discovered in said place by any one on the engine keeping a lookout at the time, and that at the time of his getting upon the track, and his discovery in said position, the engine was so close to him that it could not have been stopped by the application of all appliances and the use of all means known to skillful engineers in time to avoid hitting and injuring him, then your verdict should be for defendant.¹⁸

§ 4342(2). Missouri

The court instructs the jury that it was the duty of the deceased before going upon or crossing over the track in question between

¹⁵ Jackson v. Kansas City, Ft. S. & M. R. Co., 58 S. W. 32, 157 Mo. 621, 80 Am. St. Rep. 650.

¹⁷ Louisville & N. R. Co. v. Berry, 111 S. W. 370, 33 Ky. Law Rep. 850.

¹⁶ McManamee v. Missouri Pac. Ry. Co., 37 S. W. 119, 135 Mo. 440.

¹⁸ Louisville & N. R. Co. v. Jones, 67 So. 691, 191 Ala. 484.

the end of the standing car and the concrete wall to look and listen for an approaching train or engine, if under all the facts and circumstances in evidence the presence of a locomotive at work upon said track at that time could reasonably have been anticipated by deceased, and if you find that by looking where there was an opportunity, if any, to see the engine he could have seen it, or by listening he could have heard it, in time to have averted the injury to him and failed to do so, then the said deceased was guilty of contributory negligence, and plaintiff cannot recover, and your verdict must be for defendant, and this is so even though you may find from the evidence that the engine did not give a reasonable warning of its approach, and even though you may further believe that no one of defendant's employes was sent ahead of the engine to warn persons of its approach.¹⁹

§ 4342(3). Virginia

The court instructs the jury that the defendant railroad company's track in itself was a proclamation of danger, and the law required ——— to keep a constant lookout for approaching trains, coming from either direction. Any failure to do so on his part was negligence.²⁰

The court instructs the jury that the track of a railway company is of itself a proclamation of danger to a person going upon it, and that he must not only use his eyes and ears, looking and listening in both directions, but he must keep a constant lookout in each direction for approaching trains. If such looking and listening does or would warn him of the near approach of a train, then it is his duty to keep off the track until the train is past, and to be on the track under such circumstances is negligence, and he cannot recover. And if the jury believe, from the evidence, that ——— did not keep a constant lookout in each direction for approaching trains, and if they further believe that by such lookout he could have seen the approaching train in time to have stepped off the track, then the jury should find for the defendant, even though they may believe from the evidence that the defendant also was negligent.²¹

The court instructs the jury that a person going upon the tracks of a railroad company and walking along the same is bound to listen and keep a lookout in each direction for approaching trains, so that, if the jury believe from the evidence that the plaintiffs' in-

¹⁹ *McQuitty v. Kansas City Southern Ry. Co.*, 194 S. W. 888, 196 Mo. App. 450. This instruction asserts an exception, based on the particular facts of the case, to the general rule that a railroad track is itself a signal of danger.

²⁰ *Chesapeake & O. Ry. Co. v. Saunders' Adm'r*, 83 S. E. 374, 116 Va. 826.

²¹ *Chesapeake & O. Ry. Co. v. Saunders' Adm'r*, 83 S. E. 374, 116 Va. 826.

testates in these cases entered upon the tracks of the defendant company at the point mentioned in the declaration, and were walking along the same at the time of the accident, and that they did not listen or keep a lookout for trains approaching them from each direction, and that on account of their failure so to listen and to keep a lookout they did not get off the track in time to avoid the work train mentioned in the evidence as it approached them, and that this was the proximate cause of the accident to and death of the plaintiffs' intestates, then they must find for the defendant.²²

The court instructs the jury that if they believe from the evidence that the plaintiff's decedent was, at the time of his death, on defendant's track in conformity with the habit of himself and other employes of the contractors in going to and from their work on defendant's road, which habit was known to and acquiesced in by the defendant, it was his duty, while on said track to use reasonable care to avoid being injured by the defendant's train; and reasonable care is such care and caution as a man of ordinary prudence would exercise for his own protection under the same circumstances, in view of the danger to be avoided, and includes the duty of looking and listening for approaching trains.*

The court instructs the jury that it was the duty of —, while on the trestle or bridge, to listen and keep a constant lookout in each direction for approaching trains; and if the jury believe from the evidence that, had he been thus observant and watchful, he could have known of the approach of the engine, and could have avoided the same by getting out on a cap sill, they must find for the defendant, even though they may believe that the defendant was negligent, as charged in the declaration.²³

§ 4342(4). Wisconsin

You are instructed that it was the duty of the plaintiff to exercise ordinary care to keep himself out of danger. It was his duty to listen for signals that cars were approaching. And if you believe from the evidence that he did not listen for signals that cars were approaching, and for that reason failed to hear what — called out to —, he was guilty of a want of ordinary care. And if you believe from all the credible evidence that he was guilty of a want of ordinary care, and that such want of ordinary care naturally and probably contributed to his injury, and that he, as a person of ordinary intelligence and prudence, ought to have seen, under the attending circumstances, that by failure to listen for signals he

²² *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 56 S. E. 321, 106 Va. 383.

* *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 56 S. E. 321, 106 Va. 383.

²³ *Chesapeake & O. Ry. Co. v. Rogers' Adm'r*, 41 S. E. 732, 100 Va. 324.

might receive injury of some kind to his person, you will answer the sixth question "Yes." Otherwise, you will answer the question "No."²⁴

§ 4343. Using railroad track as footpath to place of work

You are instructed that every person of ordinary intelligence is bound to know that a crossing of a railroad track over a public highway, when cars are frequently passing, is a place of more than ordinary danger, and it becomes his legal duty at such place to use corresponding care and caution to avoid injury; and while it is true that the public have a right to be upon a railroad track, at the crossing of a public highway, for the purpose of crossing over such track, it is the duty of all persons crossing over such track to do so with all convenient dispatch; and if the jury believe, from the evidence, that in this case the deceased, ———, was upon the track of the defendants' railroad, not for the purpose of crossing over the same, but for the purpose of employing the same as a footpath from his place of labor to his residence, it was negligence on his part to employ such railroad track for such a purpose, even though the jury should believe, from the evidence, that, at the time he was so injured by defendants' cars, he had actually proceeded to, and arrived at, a point within the boundaries of a public highway.²⁵

§ 4344. Going too close to track

You are instructed that, if you believe from the evidence that the plaintiff went on or too near the track of the defendant, and in so doing was guilty of negligence, or that the plaintiff could have passed on the other side of the street with safety to himself, and that in being on that portion of said street where he was at the time he was injured, if he was injured on said street, under all the surrounding facts and circumstances appearing in evidence, he was guilty of negligence, and either or both of such negligent acts or omissions combined, if plaintiff was guilty of negligence in either or both such particulars, proximately contributed to cause plaintiff's injury, then your verdict must be for the defendant.²⁶

§ 4345. Running in front of train to save property

See, also, post, § 4883.

The jury are instructed that, while it may have been the duty of defendant's servants to make all reasonable efforts to stop the train and avoid the collision, yet the like duty devolved upon the

²⁴ Sommerfeld v. Chicago, M. & St. P. Ry. Co., 143 N. W. 1032, 155 Wis. 102.

²⁵ Illinois Central R. Co. v. Baches, 55 Ill. 379.

²⁶ Atchison, T. & S. F. Ry. Co. v. Shadden (Tex. Civ. App.) 185 S. W. 629.

deceased, and if, after he saw the train coming, or might, by looking and listening, have seen it coming, he could have gotten out of its way, or kept out of its way, but did not, then the plaintiff cannot recover; and, even should the jury believe that the deceased's horse and wagon were exposed to a collision with defendant's train, this would not excuse or justify his precipitating himself in front of the train, and, if you find he did so in order to save his said horse and buggy, then your verdict must be for the defendant.²⁷

§ 4346. Care required of one riding on car to avoid injury from car on another track

The court instructs the jury that, if they find from the evidence that the plaintiff was hurt while standing on the side of a freight car, which was passing a car standing on another track, and that before he placed himself in such a place of danger, he had notice that the cars standing on the adjoining track were close to the clearance of the car on which plaintiff was riding, and that the attention of the plaintiff to said clearance space was further called by ———, car inspector of the defendant railroad company, and that the plaintiff, notwithstanding such notice and attention being called, placed himself in such position of danger, and thereby contributed to his own injury, their verdict must be for the defendant, even though the jury may believe that the defendant was negligent in leaving the car too close for the clearance of the passing train.²⁸

§ 4347. Care required from intoxicated person

Care required of intoxicated person in crossing street car track, see post, § 4886.

§ 4347(1). Illinois

The jury are instructed that, if you believe from the evidence that the deceased, while intoxicated, placed himself about dark, or in the dusk of the evening, on defendant's track running along a public street, where defendant's trains were constantly passing and repassing, and so remained there until run over and killed by the passing engine of defendant, then deceased was guilty of such gross negligence that you should find the defendant not guilty, unless you further believe from the evidence that the agents of defendant willfully caused the death of deceased, or were guilty of such gross neglect as amounts in law to willful neglect of duty.²⁹

²⁷ *McManamee v. Missouri Pac. Ry. Co.*, 37 S. W. 119, 135 Mo. 440.

²⁸ *Pennsylvania R. Co. v. Cecil*, 73 A. 820, 111 Md. 288.

²⁹ *Illinois Central R. Co. v. Hutchinson*, 47 Ill. 408. A party objecting to this instruction, for its omission to define "willful neglect of duty," should ask for such a definition.

§ 4347(2). *Missouri*

The court instructs you that if you find from the evidence that plaintiff was injured while on the track of defendant's railroad, as alleged in the petition, and when he was so injured he was intoxicated in any degree, and his intoxication was unknown to the defendant's servants in charge of the train, then his intoxication will not excuse the omission, on his part, of that same care and prudence which would have been required of a sober man, under the same circumstances and situation, to protect himself against injuries, and if you further find from the evidence that, by reason of his intoxication, he failed to exercise that care and caution a prudent and reasonably sober man, or a man not intoxicated to the extent he was, would have exercised in the same situation and under the same circumstances, and further find from the evidence that, had he exercised such care, he would have avoided the injury, then he cannot recover in this action, and your verdict must be for the defendant.³⁰

§ 4348. *Care required from children*

Care required of children in going on street car track, see post, § 4887.

§ 4348(1). *Maryland*

The jury are instructed that, if the jury shall find from the evidence that the death of the child, ———, resulted from the want of ordinary care and caution on the part of a driver in the employment of defendant, the plaintiff is entitled to recover, provided that the jury find that the accident causing her death could not have been avoided by the exercise of such care and caution by the child as ought, under all the circumstances to have been reasonably expected from one of her age and intelligence, or by the exercise of ordinary care and caution on the part of the father of the child, or of the person accompanying the child at the time of the accident.³¹

§ 4348(2). *Missouri*

You are further instructed that the plaintiff was bound to exercise only such care and prudence as might be reasonably expected of a girl of her age and capacity, under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required from a person of tender years as from a person of mature years and greater discretion under similar circumstances, and, if the jury believe from the evidence that the plaintiff was at the time of the accident of about ——— years and ——— months of

³⁰ Cotner v. St. Louis & S. F. R. Co., 119 S. W. 610, 220 Mo. 284.

³¹ Baltimore & O. R. Co. v. Fryer, 30 Md. 47.

age, you may take that fact into consideration in considering the question of negligence, if any, on part of the plaintiff.³²

You are further instructed that, although you may believe from the evidence that it would have been negligence in an adult to have stopped upon said side track in front of said detached freight car while the same was in motion, if you believe from the evidence plaintiff did so stop on said side track on the occasion of her injuries, still, if the jury find that by reason of her youth and inexperience she was not aware of the danger to which she was exposed in doing so, then the jury will take this into consideration in passing upon the question of plaintiff's alleged contributory negligence.³³

The court instructs the jury that, if you believe from the evidence that the plaintiff was frightened by the discharge of steam from the defendant's engine on the main track in front of the cinder platform on which she was standing, and that she was caused thereby to retreat backward to the side track, and that her attention was on that account fixed upon said engine and so diverted as to cause her not to notice the empty freight car approaching her on said side track, you will take that fact into consideration in connection with her youth and inexperience in determining whether, under all the facts and circumstances, she was guilty of negligence causing her injuries.³⁴

§ 4348(3). *Montana*

You are instructed that a child is bound to exercise only the care of those of his own age and understanding, and if you find that the plaintiff and her brother, who was driving the carriage in which she was riding, were children at the time of the alleged injury, and that they exercised such care as a reasonable person of their respective ages would exercise under the circumstances of this case, then neither of them was guilty of contributory negligence which would defeat plaintiff's right to recover in this action.³⁵

§ 4348(4). *Virginia*

The court instructs the jury that, if they believe from the evidence that on ——— the plaintiff was about ——— years of age, then he is presumed to have been incapable of contributory negligence.³⁶

³² *Lange v. Missouri Pac. Ry. Co.*,
106 S. W. 660, 208 Mo. 453.

³³ *Lange v. Missouri Pac. Ry. Co.*,
106 S. W. 660, 208 Mo. 458.

³⁴ *Lange v. Missouri Pac. Ry. Co.*,
106 S. W. 660, 208 Mo. 453.

³⁵ *Mason v. Northern Pac. Ry. Co.*,
124 P. 271, 45 Mont. 474.

³⁶ *Southern Ry. Co. v. Wiley*, 70 S.
E. 510, 112 Va. 183.

§ 4349. Care required from parent to prevent child from going on track

The court instructs the jury that if they believe from the evidence in this case that the plaintiff permitted his decedent, ———, a boy about ——— years of age, to go from his home at ——— after, or to get, elderberries, but did not know that he was going to ride on a hand car, he, the plaintiff, is not, by reason of such permission, guilty of contributory negligence, and the defendant cannot be relieved from liability solely because the plaintiff thus permitted his said son to go from home.³⁷

§ 4350. Effect of contributory negligence

See, also, post, § 4890.

§ 4350(1). Illinois

The court instructs you that before the plaintiff can recover in this case you must find from the evidence—First, that at the time of and immediately preceding the accident the deceased was in the exercise of such care and caution for his safety as a reasonably prudent and careful man would exercise under the circumstances; second, that the defendant was guilty of some act or acts of negligence as charged in the declaration, which caused the accident; but if you find from the evidence that at the time of and immediately before the accident ——— the deceased did not exercise such care and caution as a reasonably prudent man would have exercised under the circumstances, and that he carelessly and negligently stepped upon and walked upon the track upon which he was killed, and that such carelessness and negligence materially contributed to the accident, then your verdict must be for the defendant (even if you should also find that the defendant was guilty of some act or acts of negligence as charged in the declaration, for the law is settled in this state); the law being that in cases of this character the injured party must be in the exercise of such due care and caution as a reasonably prudent and cautious man would exercise under the circumstances.³⁸

§ 4350(2). Kentucky

You are instructed that, if you shall believe from all the evidence that at the time and place of the accident to the plaintiff mentioned and described in the evidence the plaintiff was himself negligent, and that but for such negligence contributing thereto the accident would not have happened, and he would not have

³⁷ Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 23 S. E. 593, 41 W. Va. 407. ³⁸ Chicago, M. & St. P. Ry. Co. v. O'Sullivan, 32 N. E. 398, 143 Ill. 48.

been injured, you will find a verdict for the defendant, even though you shall believe as in the — instruction.³⁹

§ 4350(3). Missouri

The jury are instructed that the rule of law is that where both parties are at fault neither can recover, and you are instructed that if the deceased could have avoided the accident to himself, although the defendant's servants may have been guilty of negligence, then the plaintiff cannot recover, and you must find for the defendant.⁴⁰

§ 4351. Leaving horse unfastened as proximate cause of injury to driver

The court instructs the jury that if they believe from the evidence that the horse in charge of the deceased, —, was attached to a wagon, and was standing on the levee, at the time of the accident, without being fastened or so guarded as to prevent its running away, and that said horse ran away, and deceased was injured in consequence of its not being fastened or guarded, they will find their verdict for the defendant.⁴¹

§ 4352. Doctrine of last clear chance

See, also, ante, § 4320(1); post, § 4891.

§ 4352(1). United States

The jury are instructed that the plaintiff's intestate, it is admitted, was upon the bridge of the defendant company. He was himself negligent in being there. He was a trespasser. Under those circumstances the company, or its employes, who conducted its train, owed him no duty until they discovered him in peril, if he was. When they did discover him in peril, if he was in peril, they owed to him the duty not to wantonly injure him.⁴²

§ 4352(2). Alabama

The court instructs the jury that, although the engineer owed intestate no duty to discover him prone on the track, yet if the engineer did, in fact, discover him prone upon the track in time to stop the train before striking him, and he negligently failed to stop the train, and because of such negligence said intestate was killed, then your verdict should be for plaintiff.⁴³

§ 4352(3). Arkansas

You are instructed that, if you find from the evidence in this case that the deceased, —, was walking in a perilous position

³⁹ Louisville & N. R. Co. v. Cook, 128 S. W. 81.

⁴⁰ McManamee v. Missouri Pac. Ry. Co., 37 S. W. 119, 135 Mo. 440.

⁴¹ McManamee v. Missouri Pac. Ry. Co., 37 S. W. 119, 135 Mo. 440.

⁴² Chesapeake & O. Ry. Co. v. Hawkins (C. C. A., W. Va.) 187 F. 568, 109 C. C. A. 258.

⁴³ Louisville & N. R. Co. v. Rayburn, 73 So. 461, 198 Ala. 191.

on the footpath near the track of the defendant railway company, with his back towards defendant's approaching train, and that he was hard of hearing, and unaware of the approach of defendant's train, and you further find that the engineer in charge of said train saw him in a perilous position, if any, and by keeping a constant lookout ahead should have discovered his perilous condition and danger, if any, in time, by the use of ordinary care and prudence, to have warned him of the approach of, and, if necessary, to have stopped the train, and could have prevented the injury, and that the engineer of said train negligently and carelessly failed to do so, and that by reason thereof deceased was struck and killed by said train, then and in that event your verdict will be for the plaintiff, even though you find that the deceased was wrongfully on said track and guilty of negligence on his part.⁴⁴

You are instructed that if defendant's servants discovered plaintiff's peril in time to have avoided injuring him by the exercise of ordinary care, or if they could have discovered it in time by keeping a constant lookout, then it is immaterial whether the plaintiff was asleep, drunk, or sober, and immaterial that he was a trespasser.⁴⁵

§ 4352(4). Idaho

You are instructed that, notwithstanding the fact that the plaintiff has been guilty of some negligence in exposing his person to an injury at the hand of the defendant, yet if the defendant discovered the exposed situation of the plaintiff in time, by the exercise of ordinary or reasonable care after so discovering it, to have avoided injuring him, and nevertheless failed to do so, the contributory negligence of the plaintiff does not bar a recovery of damages from the defendant. Where a person negligently walks upon a railroad track, if the engineer, after noticing his exposed situation, fails to give the proper signals, or otherwise acts willfully and recklessly, in consequence of which the person is killed or injured, the company shall be liable in damages.⁴⁶

You are instructed that, if you find from the evidence that after discovering the plaintiff upon the track, the servants of the defendant did not sound alarm signals, either by whistle or the bell upon the engine, until it was too late for the plaintiff to escape from the railroad track before being struck, then you should find the defendant guilty of negligence.⁴⁷

⁴⁴ St. Louis Southwestern Ry. Co. v. Morgan, 215 S. W. 589, 144 Ark. 641.

⁴⁵ St. Louis, I. M. & S. Ry. Co. v. Elrod, 173 S. W. 836, 116 Ark. 514.

⁴⁶ Denbeigh v. Oregon-Washington

R. & Nav. Co., 132 P. 112, 23 Idaho, 663.

⁴⁷ Denbeigh v. Oregon-Washington R. & Nav. Co., 132 P. 112, 23 Idaho, 663.

§ 4352(5). Kentucky

The jury are instructed that, if the jury believe from the evidence that the plaintiff, after receiving or having warning or notice of the approaching engine, ran upon the track or so close to it that the injury to him could not have been averted by those in charge of the engine, if reasonably sufficient lookout had been observed, you should find for the defendants.⁴⁸

§ 4352(6). Minnesota

You are instructed that, if the defendant's servants who were in control and running the hand car actually saw the child upon the track in a place of danger, and could by the exercise of reasonable care and the use of the appliances under their control have stopped the car in time to have avoided the injury, and they did not, and if their failure to do so caused this injury, then these servants would be guilty of willful and wanton negligence, and plaintiff would be entitled to recover such sum as would compensate as far as possible for the loss sustained.⁴⁹

§ 4352(7). Missouri

The jury are instructed that, although the jury may believe from the evidence that defendant's employes were guilty of negligence in failing to discover the presence of plaintiffs' son, ———, on the track, yet if they also believe from the evidence that said son was negligent in failing to discover the approach of defendant's train in time to have kept out of its way, or to have gotten out of its way if in it, then your verdict will be for the defendant, unless you should further find from the evidence that after the deceased was in a position of peril the defendant's servants in charge of said train either saw him, or by the exercise of ordinary care might have seen him, in time to have stopped the train, by the exercise of ordinary care, before it struck him.⁵⁰

You are instructed that it will be the duty of the jury to return a verdict in favor of the plaintiff, if they find from the evidence that no man was stationed on defendant's said train on the car furthest from the engine; that, in consequence of such omission, plaintiff was not warned of the approach of said train in season to escape injury; and that, notwithstanding the said negligence of plaintiff in the premises, said injury would not have occurred if such a man had been so stationed on defendant's said train, and had exercised ordinary care to warn plaintiff of danger after he discovered (or by the exercise of ordinary care on his part could have discovered) the plaintiff was not observing the

⁴⁸ Chesapeake & O. Ry. Co. v. Honaker, 226 S. W. 394, 190 Ky. 125.

⁴⁹ Sloniker v. Great Northern Ry. Co., 79 N. W. 168, 76 Minn. 306.

⁵⁰ Schmitt v. Missouri Pac. Ry. Co., 60 S. W. 1043, 160 Mo. 43.

near approach of said train, and was in imminent danger of being struck by it.⁵¹

You are instructed that, if the jury find from the evidence that a man was stationed on defendant's said train on the car furthest from the engine, that he failed to make any outcry or warning of danger after he could have discovered, by the exercise of ordinary care on his part, that plaintiff was not observing the near approach of said train, and was in imminent danger of being struck by it, and that, in consequence of such failure, the plaintiff was injured, then it will be the duty of the jury to return a verdict for plaintiff.⁵²

The jury are instructed that defendant is liable in this case only if its servants failed to exercise ordinary care to prevent the injury after they became aware of the danger to which deceased was exposed, and by ordinary care is meant such care as would be ordinarily used by prudent persons performing like services under similar circumstances.⁵³

§ 4352(8). Texas

You are instructed that in occupying the position he did at the time he was hurt plaintiff was as a matter of law guilty of "contributory negligence," and you will return your verdict for defendant unless you shall believe from the preponderance of the evidence that defendant's employé, ———, actually saw plaintiff in a position of danger and knew he was in danger should the car be moved, and so saw him in time to have prevented injury to the plaintiff by the use of the means and efforts that a man of ordinary prudence could and would have used under the circumstances, and believe that ——— was guilty of "negligence" under the circumstances and that such "negligence," if "negligence" you find there was, was so directly the cause of plaintiff's injury that but for the same the injury would not have occurred, in which case you will return your verdict for plaintiff.⁵⁴

You are instructed that if the defendant, by its servants in charge of the engine, knew of ———'s peril in time to have avoided the same, such knowledge imposed upon it the duty of using every means then within its power, consistent with the safety of the engine and cars and the persons thereon, to avoid running him down or striking him, and failure to use such means would render the defendant liable, notwithstanding plaintiff may have been

⁵¹ Kelly v. Union Ry. & Transit Co., 8 S. W. 420, 95 Mo. 279.

⁵² Kelly v. Union Ry. & Transit Co., 8 S. W. 420, 95 Mo. 279.

⁵³ Rine v. Chicago & A. R. Co., 88 Mo. 392. The inclusion in this instruction of the phrase, "or after they

might have become aware of the danger of deceased by the exercise of ordinary care," was not required under the circumstances of the case.

⁵⁴ Texas & N. O. R. Co. v. McDonald, 120 S. W. 494, 56 Tex. Civ. App. 34.

wrongfully on defendant's track. Therefore, if you believe from a preponderance of the evidence that after ——— was discovered on the track in front of the approaching engine, defendant's servants in charge of the train negligently failed to use such care, attention, and skill and effort to stop or check up the train and avoid the collision with plaintiff as they reasonably should and could have done after it reasonably became apparent to them that plaintiff would not get off the track, and if plaintiff received some or all of the injuries complained of in his petition through such fault of defendant's said servants, then you will find for the plaintiff.⁵⁵

§ 4352(9). Virginia

The court instructs the jury that if they believe from the evidence that the defendant's train by which the plaintiff was injured was in charge of the conductor, who had the direction and control of its operation and movements, and that a short time before, and up to the happening of the accident complained of, the plaintiff was upon the track of the defendant with his mind occupied in a conversation with the said conductor and in examining one of its cars, which was standing on the said track and to which his attention had been directed by said conductor, and that he was paying no heed to his danger from the approaching engine by which the said train was being operated, and showed by his conduct that he was oblivious to his impending danger and would take no steps to secure his own safety, and if the jury further believe from the evidence that while he was so engaged, the said conductor was immediately by his side and saw this in time to have, by the exercise of ordinary care, either stopped said engine or warned the plaintiff of its approach in time to prevent said accident, and failed to do so, and that under those circumstances the plaintiff was injured as alleged in the declaration, then the negligence of the plaintiff, if any, in being on the track and in failing to look for the approaching train was not the proximate or direct cause of the accident, but a remote cause, and they should find for the plaintiff, whether he was guilty of such negligence or not.⁵⁶

§ 4353. Comparative negligence

You are instructed that no person shall recover damage from a railroad company for injury to himself or property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, provided he could not by the exercise of ordinary care have prevented the injury, but the damages

⁵⁵ *Nacogdoches & S. E. R. Co. v. Beene*, 106 S. W. 456, 47 Tex. Civ. App. 585. ⁵⁶ *Norfolk Southern R. Co. v. Crocker*, 84 S. E. 681, 117 Va. 327.

shall be diminished by the jury in proportion to the amount of default attributable to him.⁵⁷

3. Evidence

§ 4354. Presumptions and burden of proof

§ 4354(1). Alabama

The court instructs the jury that the burden of proof, in so far as count — of the complaint is concerned, is upon the plaintiff to show to your reasonable satisfaction that defendant's employés, in charge and control of the engine which killed the plaintiff's intestate, discovered said intestate on the track in time to have avoided injuring him by the exercise of due care and preventive effort, and that after the discovery of such peril they failed to exercise such care as a reasonably careful man would have exercised to prevent the injury.⁵⁸

I charge you that the burden of proof is on the plaintiff to show to your reasonable satisfaction that the defendant, whose negligence was alleged in the complaint, was guilty of wantonness or willfulness in causing the injury.⁵⁹

§ 4354(2). Iowa

The jury are instructed that the burden is on the plaintiff to show both the negligence of the defendant and the care of the deceased; that is, such care as a child of her age and discretion would naturally use. But she is not bound to do more than raise by her proof a reasonable presumption of negligence. If the facts proved make it probable that the defendant neglected its duty, it is for the jury to decide whether or not it did so.⁶⁰

§ 4354(3). Michigan

You are instructed that each of the allegations of negligence claimed by the plaintiff to have been committed by the defendant stands by itself. Each must be passed upon separately. Upon each of said allegations of negligence, the burden of proof is upon the plaintiff, and you can find the defendant guilty of no one of the negligent acts claimed unless the testimony upon that point satisfies you by a preponderance of the evidence that the alleged act was committed.⁶¹

§ 4354(4). Mississippi

The court instructs the jury for the plaintiff that ordinarily the burden of proof is upon the plaintiff throughout to establish his

⁵⁷ Western & A. R. Co. v. Davis, 77 S. E. 576, 139 Ga. 493.

⁵⁸ Southern Ry. Co. v. Smith, 50 So. 390, 163 Ala. 174.

⁵⁹ Southern Ry. Co. v. Smith, 50 So. 390, 163 Ala. 174.

⁶⁰ McMillan v. B. & M. R. Co., 46 Iowa, 231.

⁶¹ Anderson v. Manistique & L. S. Ry. Co., 172 N. W. 587, 206 Mich. 259.

right of recovery; but in this case the jury is instructed that, if the plaintiff has proved that the injury complained of in the declaration was inflicted on the track of the railroad company and by the running of its locomotive or cars, this is *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury, and imposes the burden of proof upon the defendant to show that it was not guilty of negligence as to this, and this presumption cannot be overcome by conjecture, but the circumstances of the accident must be clearly shown, and the facts so proven must exonerate the defendant from blame, otherwise the defendant is not relieved from liability, and in this case, unless the jury believe from the evidence that the defendant has overcome this burden, then the jury must find for the plaintiff.⁶²

§ 4354(5). *Missouri*

The court instructs the jury that there are two main questions to be determined by the jury: First. Was the death of the plaintiff's husband caused by the negligence of the defendant? Second. Did the plaintiff's husband, by his own negligence, directly contribute to the injury? The burden of proof is upon the plaintiff to establish by a fair preponderance of evidence the alleged negligence of the defendant; and the burden of proof is upon the defendant to establish the alleged contributory negligence of the plaintiff's husband.⁶³

§ 4354(6). *Virginia*

The court instructs the jury that the burden of proving negligence is upon the plaintiffs in both of the causes which are being tried before them, and that negligence must be proved by affirmative evidence, which must show more than a probability of a negligent act. A verdict cannot be found upon mere conjecture, and there must be affirmative and preponderating proof that the injury from which ——— and ——— died would not have occurred except through the negligence of the defendant company or that of its agents in the manner charged in the declaration. Affirmative evidence, however, may be direct evidence of any fact or any reasonable inference therefrom.⁶⁴

The burden of proving that the defendant company was negligent is upon the plaintiffs, and they must prove this by a preponderance of evidence; and the mere fact of the plaintiffs' intestates having been found dead upon the tracks of the defendant company

⁶² *Alabama & V. Ry. Co. v. Thornhill*, 63 So. 674, 106 Miss. 387.

⁶³ *Le May v. Missouri Pac. Ry. Co.*, 16 S. W. 1049, 105 Mo. 361.

⁶⁴ *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 56 S. E. 321, 106 Va. 383.

is not sufficient by itself to establish actionable negligence on the part of the defendant company, nor to raise a presumption of such negligence.⁶⁵

§ 4355. Burden of proof as to keeping lookout

You are instructed that it is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for a person or property upon the track of any and all railroads; and, if any person or property shall be killed or injured by the negligence of any employé of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from the neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employé or employés in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril, and the burden of the proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed.⁶⁶

§ 4356. Burden of proof with respect to contributory negligence

See, also, ante, § 4354(5).

Rule in action against street car company, see post, § 4856.

The court instructs the jury that contributory negligence is a matter of defense, and that the burden rests upon the defendant to prove it, unless it appears from the plaintiff's evidence; and, in determining whether or not the plaintiff's intestate was guilty of such contributory negligence, they should consider all the evidence which has been adduced, both plaintiff's and defendant's, and all the facts and circumstances of the case.⁶⁷

§ 4357. Matters considered in determining issues

You are instructed that in determining the question of negligence and contributory negligence in this case, the jury should take into consideration the place at which the accident occurred, the nature of the surrounding country, the condition of the road-bed, the manner in which the train was being propelled, the character of the use of that railroad track, the probability of pedestrians being on the track at that time and place, if any, and from all of the facts and circumstances determine whether or not the servants of the defendant in charge of the train exercised ordi-

⁶⁵ *Norfolk & W. Ry. Co. v. Denny's* Adm'r, 56 S. E. 321, 106 Va. 383.

⁶⁶ *St. Louis, I. M. & S. Ry. Co. v. Gibson*, 168 S. W. 1129, 113 Ark. 417. This instruction does not place the

burden of proof upon the defendant as to the whole case.

⁶⁷ *Norfolk & W. Ry. Co. v. Denny's* Adm'r, 56 S. E. 321, 106 Va. 383.

nary care and prudence in the management and operation of the train at the time and place mentioned, and whether the plaintiff was guilty of contributory negligence under the instructions covering the same.⁶⁸

§ 4358. Sufficiency of evidence that engineer saw person injured

The court instructs the jury that, if the plaintiff's intestate was in a position of peril on the track and the track was straight for about a mile west of where he was injured, and the engineer in charge of the train was looking ahead down the track, from the time that he came within view of the plaintiff's intestate, you would be authorized to infer from these facts and this testimony that he saw the plaintiff's intestate, even though he said that he was looking ahead and did not see him, provided plaintiff's intestate was in view of defendant's said engineer, and could have been seen by him from the time he commenced looking ahead down the track.⁶⁹

F. DUTY WITH RESPECT TO THIRD PERSONS WORKING, OR HAVING BUSINESS, ON OR AROUND CARS

§ 4359. In general

§ 4359(1). Illinois

The court instructs the jury that if they believe from the evidence in this case that the servants of the defendant discovered the slack car by which the deceased was killed in motion, and discovered that a collision was probable in time to have stopped their train and prevented such collision, by the exercise of ordinary care and diligence; and if the jury believe from the evidence that the defendant's servants did not use such precautions, and exercise such care and diligence, and that the want of such precautions, care, and diligence caused the death of —, while he was in the exercise of due care and caution for his own safety, then they should find the defendant guilty, and assess the plaintiff's damages in such sum, if any, as they believe the evidence warrants.⁷⁰

The jury are instructed that if the jury believe, from the evidence, that at the time of the alleged injury to the plaintiff, said plaintiff was legally and rightfully upon the passenger platform of the defendant at —, for the purpose of ascertaining the time of departure of a train, and while passing along on said platform, the agents or servants of the defendant, without any notice or warning to passengers, threw out of a box car, on the said pas-

⁶⁸ *Denbeigh v. Oregon-Washington R. & Nav. Co.*, 132 P. 112, 23 Idaho, 663.

⁶⁹ *Central of Georgia Ry. Co. v. Elison*, 75 So. 159, 199 Ala. 571.

⁷⁰ *Chicago & A. R. Co. v. Anderson*, 46 N. E. 1125, 166 Ill. 572.

senger platform, a large and heavy stick of timber on his forehead, and thereby knocked said plaintiff down, and seriously injured him; and if they further find, from the testimony, that said plaintiff, at that time, was using ordinary care, and did not cause the infliction of said alleged injury by his negligence, and that the agents of the defendant did not use reasonable care in discharging said timber, then the defendant is liable in this case for whatever injury resulted to the plaintiff from said alleged injury, not to exceed the sum claimed in the declaration in the case.⁷¹

§ 4359(2). *Kentucky*

You are instructed that, if you believe from the evidence that the defendant, the ——— Railway Company, placed one of its cars on one of its side tracks to be loaded with ties by one ——— and workmen under him, and that when the plaintiff, ———, was on said car, or getting onto it to do said work, as one of said workmen, it was, through the negligence of the defendant, or its agent or employés, in operating same, struck by another car or cars of the defendant, in consequence of which the plaintiff was knocked down and injured, then the law is for the plaintiff, and the jury will so find, unless they further believe from the evidence that at the time of the alleged injury the plaintiff was so negligent of his own safety that but for such negligence it would not have happened, in which event they will find for the defendant.⁷²

§ 4359(3). *Michigan*

You are instructed that the term "negligence," as used in this case, means a failure by the defendant to perform some legal duty it owed to the deceased at the time of the accident. It was the defendant's duty, when it determined to move the car on which the deceased was working, and switch it back to the place where it originally stood, if the defendant's agents who had charge of and performed that work knew that deceased was standing on the car during the operation, to do the switching with such care and prudence as a reasonably careful and prudent man would exercise under the circumstances, and to run against the cars, on one of which the deceased was standing, with only such speed and force as was reasonably necessary for that purpose under the circumstances. It must be assumed that it was necessary to use some speed and force, or the result could not be accomplished. The defendant had the right to run against the stone cars with sufficient speed and force to move them into their proper positions. In doing so the defendant was performing an act necessary to be performed in the usual course of its business; and the deceased boy, when

⁷¹ *Toledo, W. & W. Ry. Co. v. Maine*, 67 Ill. 298.

⁷² *Chesapeake & O. Ry. Co. v. Conley*, 124 S. W. 861, 136 Ky. 601.

he chose to remain on the car during the operation, is chargeable with knowledge that the defendant would and must use such speed and force in running and switching the cars as was reasonably necessary for that purpose, and to have taken the chances of any accident which might result from the use of that amount of speed and force. The use of such speed and force as were reasonably necessary, under the circumstances, to switch the cars, was lawful, and the defendant was not negligent in using it. But if the defendant ran its engine and connecting cars against the stone cars with unnecessary speed and force, the employment of such unnecessary speed and force was a negligent act, and constituted negligence, as charged in the first and third counts of plaintiff's declaration. The question, then, upon this branch of the case, for you to determine, is, did the defendant use unnecessary force and speed, under the circumstances, in running its engine and connecting cars against the stone cars, upon one of which the deceased was standing at the time of the accident? This is a material proposition in the case, and I submit it to you as a question of fact, to be determined from the evidence bearing upon that subject.⁷³

§ 4360. Injury to shipper of stock while loading it

On the other hand, if you find and believe from the evidence that plaintiff entered the car for the purpose of tying and fastening said horse, and that afterwards he agreed with the defendant's employés that they would carry the car to the yards with the horse untied or unfastened and that plaintiff and employés would hold the horse while it was being so transported, and you further believe from the evidence that plaintiff was willing that said horse should be so carried, untied, and unfastened, and with the door open, then, under such circumstances, the plaintiff would assume the risks ordinarily resulting from carrying the horse not properly tied and fastened in the car, and, if you so find and believe from the evidence, you will return a verdict in favor of the defendant.⁷⁴

Now, bearing in mind the above and foregoing general instructions, you are further instructed, if you find and believe from the evidence that when plaintiff placed his horse in the car furnished him by the defendant he entered said car to load and to fasten and to tie said horse, and if you further find and believe from the evidence that defendant's employés in charge of said car and engine, with which the same was to be operated from the point where said horse was loaded, started said car over the protest of plaintiff and against his wishes, and before plaintiff had had a rea-

⁷³ *Dolson v. Lake Shore & M. S. Ry. Co.*, 87 N. W. 629, 128 Mich. 444. ⁷⁴ *Houston & T. C. R. Co. v. Wilkins* (Tex. Civ. App.) 98 S. W. 202.

sonable time under the circumstances to securely fasten and tie said horse, and while the door of said car was open, and that plaintiff remained in said car to prevent said horse from escaping therefrom, and if you further believe from the evidence that while said car was being moved from the point where it was loaded up to defendant's yards, said horse became restless and frightened and manifested a disposition to try to get out of the car, and if you further believe from the evidence that plaintiff undertook to assist one of defendant's employes to close the door in order to prevent said horse from backing out of said car, and if you further believe from the evidence that, while plaintiff was so engaged, said horse kicked and injured him, and if you further believe from the evidence that defendant's employes, in control and operation of said car and engine, were guilty of negligence, under all the facts and circumstances of this case, in moving said car in which the horse was placed, before plaintiff had had reasonable time in which to tie and fasten said horse if you find they did so move said car, and if you further believe from the evidence that such negligence on the part of said employes in this respect, if you find they were so negligent, was the direct and proximate cause of plaintiff's said injury, then you will find for the plaintiff, and assess his damages under other instructions hereinafter given you, unless you find for the defendant under other instructions given you by the court.⁷⁵

§ 4361. Duty to give notice of movements of cars

§ 4361(1). Oklahoma

You are instructed that if you believe from the evidence in this case that, at the time the husband of the plaintiff was killed, he was engaged in loading a car load of stock which he was about to ship over the defendant's road from the town of ———, and that, while so engaged, he was standing between one of the defendant's cars and the platform of the defendant, from which the stock was loaded, for some purpose connected with the care of said stock or of the car in which the stock was situated, and if he was there with the knowledge of the trainmen in charge of the defendant's train, or if the trainmen in charge of defendant's train had the means of knowing, by the use of ordinary care, that he was so situated between the car and the said platform, then, in that event, it was the duty of the trainmen in charge of said train, before undertaking to in any manner move the said car, to warn the said deceased of their intention so to do, in order that he might reach a place of safety. And a failure to so warn the said deceased, if

⁷⁵ Houston & T. C. R. Co. v. Wilkins (Tex. Civ. App.) 98 S. W. 202.

they did so fail, would be negligence, for which the defendant would be liable in this case.⁷⁶

§ 4361(2). **Utah**

The jury are instructed that, when a railroad company puts unloaded cars upon the side track for the purpose of being loaded by the owners of the freight, and such owners, their agents or servants, with the express or implied consent of the company, proceed to load the car, the company in such case has no right, without reasonable notice or warning, to run or back a train upon the side track while the cars are being loaded. And while in such case those engaged in the work of loading are not permitted to close their eyes or ears to what comes within the range of their senses, yet they may give their undivided attention to their work, and are justified in assuming that the company will not molest them or render their position hazardous without such notice or warning.⁷⁷

§ 4362. **Duty, with respect to employees of shippers, as to equipment of cars**

The court instructs the jury, for the plaintiff, that, if you believe from the evidence in this case plaintiff was working for the ——— Lumber Company loading lumber, and while so engaged was instructed by his superior to repair a door or window in one of the defendant's railroad cars or one furnished by it to said company, and if you further believe while he was so engaged he used the ladder or handhold affixed by defendant company on another car, also furnished by it in the manner alleged in the declaration, and if you believe defendant railroad company had negligently allowed or permitted said ladder or handhold to get in a defective and dangerous condition, and knew said ladder or handhold would be used by the servants of the lumber company in the performance of their duties, and that by reason of such defective condition, if any, while plaintiff was undertaking to use same as aforesaid, said handhold or part of ladder on which his foot was placed gave way and caused him to fall, striking his back against the drawhead of said car injuring him, then it is your duty to find for the plaintiff.⁷⁸

The court instructs the jury for the plaintiff that under the law defendant was required to furnish and equip its cars with reasonably safe ladder or handholds, and to use ordinary care to keep the ladder or handhold in reasonably safe condition, and this rule of law also applies to foreign cars furnished by it to shippers;

⁷⁶ *St. Louis & S. F. R. Co. v. Cole*, 149 P. 872, 49 Okl. 1, L. R. A. 1915F, 360.

⁷⁷ *Copley v. Union Pac. Ry. Co.*, 73 P. 517, 26 Utah, 361.

⁷⁸ *Mississippi Cent. R. Co. v. Lott*, 60 So. 277, 118 Miss. 816.

and, if you believe from the testimony in this case that defendant furnished cars to the —— Lumber Company, knowing that same were to be loaded with lumber, and knowing that in doing so said lumber company's servants would be required to use said ladder or handholds, then the defendant railroad company owed a duty to the servants of the lumber company to use ordinary care in seeing that the ladder or handholds on said car or cars furnished by it were kept in a reasonably safe condition.⁷⁹

§ 4363. Duty of inspection

The court instructs the jury for the plaintiff that if the defendant engaged in the business of furnishing freight cars for service equipped with ladder or handholds which it might, or by the exercise of ordinary care ought to, have known would be used by the servants of the shippers in loading or unloading said cars, then it became the duty of the defendant in the operation of its business, not only to furnish cars equipped with reasonably safe ladders or handholds, but to use ordinary care in inspecting or otherwise maintaining said handholds or ladders in reasonably safe repair for such uses.⁸⁰

§ 4364. Care required of persons working around cars

§ 4364(1). United States

You are instructed that it is the duty of one engaged in dangerous work to adopt that method which is the least dangerous; hence under some phases of this case it might become an important inquiry on your part as to which was the less dangerous—scaling upon the cars or upon the ground. Again, however you resolve that question, it would necessarily be important to find whether the defendant, through the defects in the tongs or failure to use the bunching chain for hoisting logs, was guilty of negligence, and, if so, did the deceased in performing his duties observe those precautions which ordinarily prudent men observe to guard against consequences which might naturally be expected to result? If the danger would have been perfectly apparent to a reasonably careful and prudent man, and the deceased could by the use of ordinary care himself have avoided the injury and still have performed his duties, then, as you have already been advised, there could be no recovery.⁸¹

§ 4364(2). Mississippi

The court instructs the jury for the plaintiff that, if you believe from the evidence defendant company furnished to the ——

⁷⁹ Mississippi Cent. R. Co. v. Lott, 80 So. 277, 118 Miss. 816.

⁸⁰ Mississippi Cent. R. Co. v. Lott, 80 So. 277, 118 Miss. 816.

⁸¹ Idaho & W. N. R. R. v. Wall (C. C. A., Wash.) 184 F. 677, 106 C. C. A. 631.

Lumber Company cars equipped with ladders or handholds for the shipment of lumber, and knew at the time that said ladder or handhold would be used by the servants of the lumber company about the loading and preparation of said car and lumber for shipment, then in using the ladder or handhold on the car for a purpose connected with the business of loading said car or in properly closing the door or window of said car, so that same might be accepted by the railroad company, the plaintiff had a right to presume defendant had performed its duty in furnishing a reasonably safe ladder or handhold, and the law did not require him to make any inspection thereof before using same for the purpose of searching out or finding if said ladder was safe for said uses.⁸²

§ 4364(3). North Carolina

I charge you that if you find from the evidence that the plaintiff and the employés of the ——— Company, for whom the plaintiff was at work at the time he was injured, had been accustomed to cross the railroad track, and, whenever it was necessary, to move the cars in order to make an opening, and that this was known to the defendants, or could have been known to them by reasonable observation, and that they were permitted to do so from time to time, that permission amounted to a license, and the plaintiff was not a trespasser in attempting to move the car, if you shall so find by the greater weight of the evidence. But being a licensee or having a license to go on the track and move the cars wouldn't relieve him from the responsibility of exercising the care of a reasonably prudent man; that is, a person who is reasonably prudent, to avoid injury to himself. The defendants insist that on this evidence he has shown that he was not a reasonably prudent man, and that he was guilty of negligence in failing to take the necessary precaution.⁸³

I charge you that if you find from the evidence, by the greater weight of the evidence, that the plaintiff entered upon one of the defendant's spur tracks and undertook to remove certain cars on and along said spur track, and, while so engaged in removing said cars, entered between certain cars on said side track, and there remained for a space of several minutes in a position where he could not be seen by the defendants' servants, agents, or employés in charge of an engine and cars being operated and moved about the depot near by, knowing at the time that said spur track upon which he had entered and along which he had undertaken to move said cars was frequently used by engines and cars entering thereon for the purpose either of placing cars on said spur track or

⁸² Mississippi Cent. R. Co. v. Lott, 80 So. 277, 118 Miss. 816.

⁸³ Wilkinson v. Southern Ry. Co., 94 S. E. 521, 174 N. C. 761.

removing cars therefrom, and under such circumstances that there was danger of the plaintiff being injured by a collision between engines and cars entering on said spur track and those already stationary thereon, and that the plaintiff did this without notice or warning to the defendant or to its servants, agents, or employés operating a shifting engine about said depot and said side track, and without keeping a lookout for his own protection, and under such circumstances that there was imminent danger of his being injured, and you further find from the evidence that was a contributing cause of the injury, then the jury will answer the second issue, "Yes."⁸⁴

The court instructs the jury that, if the jury find from the evidence, and by its greater weight, that the plaintiff entered upon the defendant's side track in the town of — upon which engines and cars were being constantly moved, and where there was danger of collision between the cars already on said side track and cars placed thereon by the defendant's shifting crew engaged about said depot, and that, after entering upon said side track and between the cars standing thereon, the plaintiff remained thereon, undertaking to move cars on and along said spur track, the plaintiff being in a position where he could not be seen by the members of said train crew by the exercise of ordinary care and caution, and without notice or warning given the defendant or any of its train crew in charge of said shifting engine, and without keeping a lookout for his own protection, and that plaintiff did this with knowledge of the fact that said engine was constantly placing cars on said side track and removing cars therefrom, and that there was danger of collision between the cars placed on said side track and those already thereon, and danger of the plaintiff being injured by reason of such collision, he would be guilty of negligence, and if you find from the evidence by the greater weight of the evidence that was the contributing cause of the injury, then the jury will answer the second issue, "Yes."⁸⁵

The jury is instructed that, if the jury find from the evidence that the exercise of ordinary care would have required the plaintiff, before he entered between said cars on the spur track and attempted to remove the same, to have given some notice or warning of his presence in a place of danger, or would have required the plaintiff to maintain some lookout in order to notify him of approaching danger while in a position where he could not be seen, and the jury further find that the failure of the plaintiff to give such notice or warning or to maintain such lookout contrib-

⁸⁴ *Wilkinson v. Southern Ry. Co.*,
94 S. E. 521, 174 N. C. 761.

⁸⁵ *Wilkinson v. Southern Ry. Co.*,
94 S. E. 521, 174 N. C. 761.

uted to cause and bring about his injury, then the jury will answer the second issue, "Yes." ⁸⁶

You are instructed that plaintiff contends that you cannot find him guilty of contributory negligence. He contends that before he entered upon the work, or went between the cars, he had inquiry made by the secretary and treasurer of the company and had him to look out to see whether or not there was any danger of approaching cars or engines, and he contends that from the observation which he made, or caused to be made, he had reason to believe that there was no danger, and he insists that a reasonably prudent man would have gone to the work as he did, thinking that was the condition and feeling that there was no danger in doing so, that a reasonable man would not have expected or anticipated any danger. That is his contention. If you find from the evidence that the precautions which he took were such as a reasonably prudent man would have taken under the circumstances, being at the same time mindful to go about the work in a way in which he would not receive injury, and he exercised the care of a reasonably prudent man, that he was careful to avoid injury under the circumstances, then he would not be guilty of contributory negligence, and it would be your duty to answer the second issue, "No." ⁸⁷

§ 4365. Effect of contributory negligence

The jury is instructed that if the jury find that the plaintiff did not exercise the care and prudence that an ordinarily prudent man would have exercised under the circumstances and the situation, and that his failure to do so contributed to his injury, it would be the duty of the jury to answer the second issue, "Yes." ⁸⁸

G. ACCIDENTS AT CROSSINGS

1. *Liability in General*

§ 4366. Elements of cause of action in general

§ 4366(1). Indiana

The jury are instructed that the facts necessary to be established by plaintiff by a preponderance of all the evidence, to entitle him to recover, are—First, negligence on the part of the defendant in the matter complained of; second, plaintiff's freedom from fault or negligence in the matter complained of; and, third, damage to the plaintiff proximately caused by the defendant's neg-

⁸⁶ *Wilkinson v. Southern Ry. Co.*,
94 S. E. 521, 174 N. C. 761.

⁸⁷ *Wilkinson v. Southern Ry. Co.*,
94 S. E. 521, 174 N. C. 761.

⁸⁸ *Wilkinson v. Southern Ry. Co.*,
94 S. E. 521, 174 N. C. 761.

ligence; and a failure to establish any of these by a preponderance of all the evidence will preclude a recovery.⁸⁹

§ 4366(2). *Maryland*

You are instructed that, if the jury find that on or about the _____ of _____, the plaintiff was injured by the locomotive or cars of the defendant, while operated by its agents on its road, and that said injury resulted directly from the want of ordinary care and prudence of the agents of the defendant, and not from the want of ordinary care and prudence on the part of the plaintiff, directly contributing to the injury, then the plaintiff is entitled to recover.⁹⁰

§ 4366(3). *Nebraska*

You are therefore instructed that, to entitle the plaintiff to recover in this case on account of failure to give signal by bell or whistle in approaching the crossing, the following facts must be established by a fair preponderance of the evidence: First, that the defendant did, at the time and place specified in plaintiff's petition, run its engine onto the said crossing of _____ street, over the defendant's tracks, without giving a signal of the approach of said engine to said crossing by either bell or whistle; second, that said failure to give signal by bell or whistle was, under all the circumstances shown by the evidence, negligence on the part of the defendant; third, that said negligence was the proximate cause of the injury to said _____; and, fourth, that said _____ sustained damages by reason of said negligence. Unless the evidence in the case establishes every one of the foregoing elements, the plaintiff would not be entitled to recover on account of the alleged negligence in omission to give a signal of the approach of said locomotive to said crossing, but, if all of the foregoing elements are established by a preponderance of the evidence, your verdict should be for the plaintiff, unless the said _____, by negligence on her own part, contributed to the injury.⁹¹

§ 4366(4). *Texas*

You are instructed that it is the duty of the defendant company to exercise ordinary care in operating its cars to prevent injury to persons at places used as crossings by the public over its tracks; and if you believe from the evidence that on or about _____, the plaintiff was crossing on foot the track of defendant at or near a point where _____ avenue intersects _____ street, in the city of _____; and if you further believe from the evidence that the

⁸⁹ *Baltimore & O. S. W. Ry. Co. v. Young*, 54 N. E. 791, 153 Ind. 163.

⁹⁰ *Philadelphia, W. & B. R. Co. v.*

Hogeland, 66 Md. 149, 7 A. 105, 55 Am. Rep. 159.

⁹¹ *Geist v. Missouri Pac. Ry. Co.*, 87 N. W. 43, 62 Neb. 309.

said — street, at the place where it crosses said track, was used by the public as a crossing; and if you further believe from the evidence that, while the plaintiff was crossing the said track at said point, defendant's employes pushed one of its flat cars forward upon its track, in an easterly direction, upon and over a part of the right foot of the plaintiff, as set forth in plaintiff's petition; and if you find from the evidence that the plaintiff received the injuries as described in said petition; and if you further find from all the facts and circumstances in evidence that the collision, if any, between the plaintiff and the said car was caused by negligence of the defendant, and that such negligence, if any, was the proximate cause of the said injuries, if any, of the plaintiff—then you are instructed to find for the plaintiff, unless you find that the plaintiff himself was guilty of negligence which contributed to cause his injuries, if any. On the other hand, if you do not believe that the defendant was guilty of negligence proximately causing plaintiff's injuries, if any, or if you believe from the evidence that the plaintiff was injured on defendant's track in its private yard, at a place other than the crossing at — street, above referred to, or if you believe the plaintiff was guilty of negligence himself that contributed to or caused his injuries, then, in either of these events, you should find for the defendant.⁹²

§ 4367. Duty to keep crossing in good condition

§ 4367(1). Arkansas

The jury are instructed that, although you may believe from the evidence that the plaintiff received the injury complained of at the crossing mentioned in the complaint, yet this fact alone does not authorize you to find a verdict in his favor. Before you would be authorized to find for the plaintiff, you must not only believe from the evidence that he received the injury at said crossing, but also that the injury was caused by reason of the failure of the defendant to exercise ordinary care to keep the crossing reasonably safe for use by the public. Unless you so find, your verdict should be for the defendant.

You are instructed that the defendant railway company was not an insurer of the safety of those using the public road over its right of way; all that it was required to do in this case was to use ordinary care to see that said bridge was reasonably safe for the use of the public. Therefore, unless you find from the preponderance of the evidence that the defendant failed to use such care—in other words was guilty of negligence—and that as a result of such negligence plaintiff was thrown out of a wagon and injured

⁹² Galveston, H. & S. A. Ry. Co. v. Kief (Civ. App.) 58 S. W. 625.

as alleged by him, it will be your duty to return a verdict for the defendant.⁹³

The jury are instructed that the railway company did not have to construct or maintain an absolutely safe bridge at the place where the plaintiff alleges he was hurt. Its duty merely was to exercise ordinary care to construct and maintain a bridge at said place that was reasonably sufficient for the safety and convenience of people using the road. If, therefore, from the testimony, you believe that the bridge in question, at the time the plaintiff is said to have been injured, was reasonably sufficient and safe for use by the public, or that the defendant had exercised ordinary care to keep it reasonably safe, then in either event your verdict could be for the defendant.⁹⁴

§ 4367(2). Michigan

You are instructed, gentlemen, that it was the duty of this defendant when it built the road across the public highway to restore the highway to its former condition, as near as might be; that it was defendant's duty to put and keep plank each side of the rails of its railroad, and also between the rails, in a good condition, and one-half inch above the rails. Further, you are instructed that, in constructing and maintaining this crossing so that it should be reasonably safe for public travel, the defendant is not obliged to anticipate that some one might come over that crossing with a bob sleigh with a short tongue dragging upon the ground, and that such short tongue might catch in one of its rails and upset the sleigh, and therefore defendant would not be negligent because it did not anticipate such an occurrence. And it is for you to say whether or not this crossing was in reasonable repair, so that it was reasonably safe for public travel, on the ——— day of ———, and, if not in reasonable repair, whether or not such want of reasonable repair caused this accident. If it was in reasonable repair, then plaintiff would not be entitled to recover. Or if it was not in reasonable repair, but such want of reasonable repair did not cause the sleigh to upset and produce the accident, then plaintiff would not be entitled to recover. But if it was not in reasonable repair, and such want of reasonable repair did cause this sleigh to upset and produce the accident, then plaintiff would be entitled to recover, if she and her driver were not guilty of any negligence which contributed to this injury.⁹⁵

⁹³ Texas & P. Ry. Co. v. Krieger, 185 S. W. 448, 123 Ark. 619.

⁹⁴ Texas & P. Ry. Co. v. Krieger, 185 S. W. 448, 123 Ark. 619.

⁹⁵ Logan v. Lake Shore & M. S. Ry. Co., 112 N. W. 506, 148 Mich. 603.

§ 4367(3). North Carolina

The jury are instructed that from the evidence in this case, and the defendant so admits, the crossing in question was across a public highway extending from ——— to ———, and unless the defendant company built and maintained its track at said crossing in a manner as safe and convenient to the public as it would have been if said railroad had not been built across said highway, then such neglect of duty would constitute negligence.⁹⁶

§ 4367(4). Oklahoma

You are instructed that, it was not only the duty of the railroad company to so construct and maintain the said highway upon its right of way and said crossing as to prevent the washing or creation of a deep hole in said highway, or in close proximity to the traveled portion thereof, but it was also its duty to keep any such dangerous place free from weeds, brush, or other obstruction, or to erect suitable barriers as would reasonably be calculated to prevent the driving or falling into said hole by persons traveling that highway, and if it was neglect on the part of the railroad company of its duties, as herein explained, which was the direct and proximate cause of said accident, then the defendant railroad company is responsible for the consequences thereof, unless you shall further find from the evidence that the said deceased was guilty of contributory negligence, as set out in these instructions.⁹⁷

§ 4368. Permitting obstructions shutting off view of track

§ 4368(1). Kansas

The jury is instructed that, before it can find the defendant guilty of negligence on account of permitting or suffering hedge fence, tall weeds, or an embankment of dirt to grow and be and remain on its right of way near the crossing in question, you must find from the evidence that said alleged obstructions were the proximate cause of the injury in question; that is to say, that said obstructions caused the injury without any negligence on the part of the deceased, and that but for said alleged obstructions in and upon the right of way near said crossing, said injury which resulted in the death of said ——— would not have been received.⁹⁸

§ 4368(2). Texas

The court instructs the jury that, if you believe from the evidence that defendant permitted obstructions to be placed and re-

⁹⁶ Pusey v. Atlantic Coast Line R. Co., 106 S. E. 452, 181 N. C. 137.

⁹⁷ St. Louis & S. F. R. Co. v. Bell, 159 P. 336, 58 Okl. 84, L. R. A. 1917A, 543.

⁹⁸ Corley v. Atchison, T. & S. F. Ry. Co., 147 P. 842, 95 Kan. 124, Ann. Cas. 1916B, 163.

main upon its track and right of way, so as to obstruct the view of plaintiff in approaching the public crossing in the town of ———, and if you believe such acts, if any, constituted negligence on the part of defendant, and that they were the proximate cause of plaintiff's injuries, and that plaintiff did not by his negligence contribute to his injuries, then you will find your verdict for the plaintiff.⁹⁹

§ 4369. Duties in management of train, locomotive, or cars on approaching crossing

§ 4369(1). Arkansas

You are instructed that it was the duty of the defendant's servants to exercise ordinary care to observe travelers about to cross the railroad upon the highway, and in the running and handling of said switch engine to have exercised that degree of care and prudence which an ordinarily careful and prudent person engaged in like business would have exercised under like circumstances; and a failure to exercise such degree of care and prudence would render the defendant guilty of negligence in that respect.¹

§ 4369(2). Connecticut

You are instructed that if you find plaintiff was in peril, and the engineer knew, or ought to have known, it, then reasonable care required him to use every precaution to avoid the injury to plaintiff which a reasonably prudent person, similarly situated, would use. If a reasonably prudent person would have, under these circumstances, blown the whistle or checked the speed or stopped the train, it was incumbent upon the engineer to have done this; and, if, by so doing, injury to plaintiff would not have occurred, the defendant is liable, unless plaintiff's own negligence thereafter essentially contributed to his injuries. If the doing of any of these things, or of any other things, after the engineer knew, or ought to have known, of this peril, would not have avoided the injury to plaintiff, the defendant cannot be held liable for its failure to have done them.²

§ 4369(3). Kentucky

The court instructs the jury that it was the duty of the defendant to keep a reasonable lookout ahead for persons, who were using the crossing at ——— street, mentioned in the evidence, to give notice of the approach of the train to the crossing by ringing the bell or blowing the whistle far enough away from the crossing to

⁹⁹ Galveston, H. & S. A. Ry. Co. v. Michalke, 37 S. W. 480, 14 Tex. Civ. App. 495.

¹ Louisiana & A. Ry. Co. v. Ratcliffe, 115 S. W. 396, 88 Ark. 524.

² Freedman v. New York, N. H. & H. R. Co., 71 A. 901, 81 Conn. 601, 15 Ann. Cas. 464.

give reasonable warning of the approach of the train to persons using the crossing, and to have the engine headlight lighted; and if it failed in any of these duties, and by reason thereof the plaintiff was struck and injured, they should find for the plaintiff, unless they shall find as set out in instruction number ____.³

The court instructs the jury that it was the duty of defendant's agents and servants in charge of its train to use ordinary care to prevent collisions with, and injury to, persons traveling the street where it crosses the railroad track at the place plaintiff was struck by keeping a lookout in approaching said crossing, and in giving reasonably sufficient signals, by ringing the engine bell to warn travelers of the approach of the train, and by running at such rate of speed as was reasonably consistent with the safety of persons traveling the street. And if the jury believe from the evidence that on the occasion in controversy the defendant's agents and servants in charge of its train failed in the performance of all or any of these duties, and by reason of such failure the collision occurred, then the jury will find for the plaintiff, unless they believe from the evidence that plaintiff failed to exercise ordinary care for his own safety.⁴

The court instructs the jury that it was the duty of the defendant's employes in charge of the train which struck ____ at the time and place mentioned in the petition to have the engine under reasonable control when it approached the crossing at ____ street, to keep a lookout ahead for the persons who were using the crossing, to give timely notice of the approach of the train by ringing the bell of the engine, to have the headlight burning, and to exercise ordinary care to prevent injury to persons using the crossing; and if the jury shall believe from the evidence that the said employes failed to perform any of these duties, and that by reason thereof the said ____ was struck by the engine and killed, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the said ____ was negligent, and thereby helped to cause or bring about his injuries, and that he would not have been injured but for his contributory negligence, if any there was.⁵

§ 4369(4). Maryland

The jury are instructed that, if the jury find from the evidence that the defendant was, at the time of the happening of the alleged injury of which the plaintiff complains, the owner of a railroad, with several tracks, running through the city of ____, and across the

³ Chesapeake & O. Ry. Co. v. Hogg, 197 S. W. 840, 177 Ky. 425.

⁵ Southern Ry. Co. in Kentucky v. Winchester's Ex'x, 105 S. W. 167, 127 Ky. 144.

⁴ Cross v. Illinois Cent. R. Co., 110 S. W. 290, 33 Ky. Law Rep. 432.

streets thereof, and was engaged in moving trains propelled by steam thereon, then in the management of said trains the defendant was bound to use such care and caution to prevent injury to persons traveling along said streets, where they are crossed by said tracks, as prudent and discreet persons would have used and exercised under like circumstances; and if they find that on the night of ———, the plaintiff, while crossing the railroad of the defendant on ——— street, in said city, was run over by the cars of the defendant and injured, as stated in the testimony, and that such injury was caused by the negligence of the defendant, or its agents, in charge of said cars, and that by the exercise of ordinary care and caution by the defendant, or its agents, the accident causing such injury could have been avoided, the plaintiff is entitled to recover, if the jury further find that the plaintiff was, at the time of the accident, using due care and caution on his part.⁶

§ 4369(5). Michigan

You are instructed that, in determining what would amount to reasonable and ordinary care in the operation of a passenger train on approaching a crossing, you may and should consider the conditions as they existed at the crossing so far as they were apparent to those operating the engine of the passenger train, or in so far as those conditions should have been apparent to those operating that engine had they been in the exercise of reasonable and ordinary care.⁷

§ 4369(6). New York

The jury are instructed that the law does not exact of the engineer an impossibility. It holds him to this degree of care which I have already defined to you: That he must exercise that degree of care which a person of ordinary prudence in his calling would exercise under like conditions. The more dangerous the indications, the more prudence he must exercise. When the indications of danger are very slight, the degree of care required may not be so high; but, when the indications amount to a manifestation of approaching danger of collision, his prudence must equal what such a situation calls for. That is the rule to apply to this engineer, taking into account time and the speed at which he was going. Did he omit anything which in the exercise of ordinary prudence he should do? If he did, what was it? If he failed in that respect, you could say such failure was negligence.*

* Baltimore & O. R. Co. v. Kean, 65 Md. 394, 5 A. 325.

⁷ Ommen v. Grand Trunk Western Ry. Co., 169 N. W. 914, 204 Mich. 392.

* Stewart v. Long Island R. Co., 66 N. Y. S. 436, 54 App. Div. 623.

§ 4369(7). Virginia

The court instructs the jury that, if you believe from the evidence that the decedent, ———, suffered injury and death from collision with defendant's engine or train, as charged in the declaration, and that said collision was caused by the negligent failure of the defendant, or of its agents and servants who were in charge of and operating said train, to give warning of its approach to said crossing, both by negligently failing to sharply sound the whistle and ring the bell, as is mentioned in instruction No. ———, or by negligently failing to give any other reasonable and timely warning of the approach of said train to said crossing, as is mentioned in instruction No. ———, then they should find for the plaintiff, unless they shall further find from the evidence that the decedent was guilty of negligence in undertaking to pass over said crossing at that time. But if the jury shall find from the evidence that the defendant and its said agents and servants were not guilty of negligence in the respects, as mentioned above, or that the said decedent was guilty of contributory negligence in going upon the crossing at that time, either because he was guilty of negligence in failing to ascertain the dangerous approach of the train to said crossing, or otherwise, then they should find for the defendant.⁸

§ 4370. Reciprocal duties of railroad company and traveler on approaching crossing

The court instructs the jury that the duty of a railroad company, when its train is approaching a highway crossing, and of a traveler on the highway, when approaching the same crossing, are reciprocal. It is the duty of the railroad company to exercise ordinary and reasonable care to give notice of the approach of its train to the crossing; and it is the duty of the traveler on the highway and about to pass over the crossing to exercise the same degree of care, by caution in his movements and by the use of his senses of seeing and hearing, to ascertain if a train is approaching dangerously near to the crossing, so as to avoid injury to himself from such train. And the failure on the part of either to discharge its or his said duty would be negligence.⁹

The court further instructs the jury that ordinary care, as expressed in the foregoing instructions, as applied to each, the decedent and the defendant, means such care and caution as an ordinarily prudent and reasonable person would have exercised under the same circumstances, conditions, and surroundings.¹⁰

⁸ Southern Ry. Co. v. Vaughan's Adm'r, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

⁹ Southern Ry. Co. v. Vaughan's Adm'r, 88 S. E. 305, 118 Va. 692, L.

R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

¹⁰ Southern Ry. Co. v. Vaughan's Adm'r, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

§ 4371. Right of way as between automobile and interurban car

You are instructed that the rights of plaintiff and defendant at the railroad crossing in question were equal, subject to the precedence which the heavy and rapidly moving interurban cars may require when both parties approach the crossing at the same time.¹¹

§ 4372. Duty of railroad company to keep lookout**§ 4372(1). United States**

You are instructed that, if you find that the train hands kept no proper lookout, and managed the train without due caution and reasonable care, you will be authorized to infer negligence on the part of the company as one of the facts established in the case.¹²

§ 4372(2). Florida

You are instructed that it is gross negligence to back a train, without a brakeman at the rear end as a lookout, across the main thoroughfare of a village, when there is no flagman at the crossing, even at a rate but little faster than a person walks.¹³

§ 4372(3). Georgia

The court instructs the jury that it is contended by the plaintiff that the defendant was further negligent in that its servants kept no proper lookout ahead, and that no brakeman or lookout was stationed on its cars, or on the car which struck the deceased. I charge you that in looking to all the evidence, the circumstances, the scene of the homicide, and all of the surroundings, it is a question for you to determine as to whether or not ordinary care and prudence required that the defendant railroad company should have kept some one constantly on the lookout in front of its moving train to warn passers-by of danger, and whether or not a failure so to do was negligence upon the part of the defendant company. You may or may not determine that ordinary care and prudence on the part of the railroad company required this, or that the failure so to do constituted negligence on its part. But, if you should determine that ordinary care and diligence so required, and that the failure so to provide some one on the constant watch and lookout was negligence, and that such negligence contributed to or was the cause resulting in the homicide of the deceased, and that at the time, by the exercise of ordinary care and prudence upon his part, he could not have prevented the homicide, then that would make such a case as would authorize a recovery upon the part of this plaintiff.¹⁴

¹¹ *Hawkins v. Interurban Ry. Co.*, 168 N. W. 234, 184 Iowa, 232.

¹² *Grand Trunk Ry. Co. of Canada v. Ives*, 12 S. Ct. 679, 144 U. S. 408, 36 L. Ed. 485.

¹³ *Florida Cent. & P. R. Co. v. Foxworth*, 25 So. 338, 41 Fla. 1, 74 Am. St. Rep. 149.

¹⁴ *Atlanta & W. P. R. Co. v. Miller*, 98 S. E. 248, 23 Ga. App. 347.

§ 4372(4). Kentucky

The court instructs the jury that it was the duty of defendant and its employés, in charge of the engine and train of cars that struck and killed ———, to handle same in a reasonably safe and prudent manner in and through the city of ———, and that it was the duty of defendant to place some one on the moving cars in such position that he could give warning of its approach, and to give reasonable signals of the approach of such cars at the public crossings in said city, by the ringing of the engine bell or by the whistle, to warn all persons approaching said crossings; and if the jury should believe from the evidence that the defendant and employés, in backing said train of cars, failed to place some one on said moving cars in such position as to give reasonable warning of the approach of said train, and to keep a lookout and to give warning of its approach, or failed to discharge the duty imposed by the reasonably safe and prudent handling of said train, and by the ringing of the bell or sounding of the whistle to warn persons approaching ——— street crossing in the city of ———, and by reason of such failure plaintiff was struck and killed by defendant's train, then the law is for the plaintiff, and the jury should so find, not exceeding the amount claimed in the petition of \$———. ¹⁵

§ 4372(5). Texas

You are instructed that the law requires that those engaged in operating trains of cars over railway tracks across the streets of a city shall, in approaching such crossings, keep such lookout to avoid injuring persons using such crossings as a person of ordinary prudence would keep under the same or similar circumstances, taking into consideration the character and extent of the use of such crossings by the public. ¹⁶

§ 4373. Duty of railroad company to give warning of approach to crossing**§ 4373(1). Arkansas**

The court instructs the jury that under the record here, as made up from the evidence in this case, your verdict should be for the plaintiff, unless you find that at the time of the alleged injuries and damages, the employés in charge of the train which struck these mules and wagon, killing one mule, injuring another one, and demolishing the wagon, were, at the time, keeping an efficient lookout, as required by the laws of this state, and that, after discovering the property in a dangerous position at or near the track, the employé in charge of the engine exercised every means at his com-

¹⁵ Louisville & N. R. Co. v. Veach's Adm'r, 112 S. W. 869, 129 Ky. 775.

¹⁶ Missouri, K. & T. Ry. Co. of Tex. as v. Kennon (Civ. App.) 164 S. W. 867.

mand consistent with his own and the safety of the other employés upon the train to avoid the injury to the property, and was unable to do so. If you so find, your verdict should be for the defendants, unless you further find, gentlemen of the jury, that just before the injury complained of here the employés in charge of the train had failed to comply with a certain statute of this state, which requires all railroad companies to give warning at a distance of ——— rods from public crossings, such warning to be either by ringing the bell or sounding the whistle. It was not only the duty of the employés of the railway train to sound the whistle or ring the bell a distance of ——— rods north of the crossing, but it was their duty to continue to give the warning until they reached the crossing. It is contended by the plaintiffs in this case that such warning was not given by either ringing the bell or sounding the whistle. If you so find from a preponderance of the evidence in this case, then, notwithstanding the fact that an efficient lookout was maintained by an employé, or the employés upon the train, your verdict should be for the plaintiffs. But if you find that such warning was given, either by ringing the bell or sounding the whistle at the distance mentioned, and just prior to the injury complained of, and that an efficient lookout was maintained at the time, and that, by the exercise of the degree of care mentioned to you in an instruction given to you and the use of the means at the command of the engineer, the damage could not be avoided, your verdict should be for the defendants.¹⁷

§ 4373(2). Connecticut

You are instructed that the railroad commissioners having legally ordered the whistle dispensed with for this crossing, the defendant cannot be held liable for its compliance with this order, and its failure to blow this whistle for this crossing at the ——— rod point. The sole duty of the railroad with regard to general statutory signals was to ring its engine bell from the ——— rod point to the crossing.¹⁸

§ 4373(3). Illinois

The jury are instructed that it was the duty of the defendant, in approaching the ——— street crossing, either to ring a bell or sound a whistle, sounding until the said crossing was reached; and if you find from the evidence that the plaintiff was injured as charged in the declaration, that the defendant failed in the duty so to ring or whistle as heretofore stated, and that in failing to perform its duty in that regard the defendant was negligent, and that such

¹⁷ Hale & Scott v. St. Louis & S. F. R. Co., 193 S. W. 790, 128 Ark. 203.

¹⁸ Freedman v. New York, N. H. & H. R. Co., 71 A. 901, 81 Conn. 901, 15 Ann. Cas. 404.

negligence was the cause of the injury to the plaintiff, then you will find the issues for the plaintiff, provided you also believe from the evidence that the plaintiff at the time of the injury was in the exercise of ordinary care for his own safety.¹⁹

You are instructed that, if you believe from the evidence that the defendant's agents or servants in charge of the engine in question omitted to ring the bell or sound the whistle continuously for the distance of ——— rods before reaching the highway crossing, such omission constitutes a presumptive case of negligence on the part of the defendant; and if you further believe from the evidence that ——— was struck and injured at the railway crossing in question, as charged in the declaration, in consequence of the omission to ring the bell or sound a whistle, and that he was himself exercising all reasonable care and caution in that behalf for his personal safety, then the defendant is liable to the plaintiff, as administrator, for the loss and damage sustained by the widow and the children of the deceased in their means of support by reason of such injury, if any such loss or damage has been proved.²⁰

§ 4373(4). *Kentucky*

The court instructs the jury that it was the duty of the defendants or their agents in charge of the engine at the time and place referred to in the evidence to give reasonable notice or warning of the approach of said engine to the public highway crossing in evidence, and to exercise such care to avoid injuring the plaintiff while using said crossing as ordinarily prudent persons in the operation of an engine would exercise under circumstances similar to those proven in this case, and if the jury believe from the evidence that the defendant's agents in charge of said engine negligently failed to observe any of the duties incumbent upon them as herein set out, or if defendants or their agents in charge of the engine failed to give reasonable warning of the train's approach and by reason thereof the plaintiff's mule and wagon was struck and the plaintiff was injured, the law is for the plaintiff, and the jury should so find.²¹

The court instructs the jury that, if you believe from the evidence in this case that prior to the accident it had been customary for the trains to give signals of their approach to the ——— crossing, and that this custom had prevailed to such an extent that persons using the crossing had reason to rely on such signals being given, and the train in question failed to give reasonable signal

¹⁹ *Chicago, B. & Q. R. Co. v. Pollock*, 62 N. E. 831, 195 Ill. 156.

²⁰ *Chicago & A. R. Co. v. Pearson*, 56 N. E. 633, 184 Ill. 386.

²¹ *Chesapeake & O. Ry. Co. v. Bland*, 188 S. W. 498, 171 Ky. 430.

of its approach to the crossing, and by reason of such failure the decedent was struck and hurt, you will find for the plaintiff in damages such a sum as you believe from the evidence will reasonably compensate the estate of the deceased for the destruction of her power to earn money, not exceeding the sum of \$——. Unless you so believe you will find for defendant.²²

The court instructs the jury that a signal of the train's approach was reasonable, which was ordinarily sufficient to give notice of its coming to persons who were themselves exercising ordinary care for their safety and in possession of their ordinary faculties.²³

You are instructed that it was the duty of defendant, its agents, servants, and employes in charge of said train in approaching the crossing in question to give reasonably timely warning by bell or whistle or other signal of its approach to the crossing in order to have enabled deceased, if using ordinary care for his own safety, to have avoided being struck; and if the jury believe that they failed to give such warning, and as the result thereof said —— was struck, whilst using ordinary care for his own safety, at said crossing, and killed, they ought to find for the plaintiff in any amount which in their judgment will reasonably compensate the estate of decedent for the loss of his power to earn money, if any, not to exceed \$——, the amount claimed in the petition.²⁴

§ 4373(5). Nebraska

You are instructed that section —— of chapter —— of the statutes of ——, which applies to this action, is as follows: "A bell of at least —— pounds weight or a steam whistle shall be placed upon each locomotive engine, and shall be rung or whistled at the distance of at least —— rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street." Now in this case if you find from the evidence that, as the engine of the defendant railroad company approached the public crossing where the accident happened, the whistle was not sounded nor the bell rung as required by the statute, and that the accident complained of was caused by the failure so to ring the bell or blow the whistle, and without any fault or negligence on the part of the plaintiff or his employe or servant who was at that time in charge of the property injured, then you shall find for the plaintiff.²⁵

²² Louisville & N. R. Co. v. Engleman's Adm'x, 141 S. W. 374, 146 Ky. 19.

²³ Louisville & N. R. Co. v. Engleman's Adm'x, 141 S. W. 374, 146 Ky. 19.

²⁴ Louisville & N. R. Co. v. Ueltsch's Ex'rs, 97 S. W. 14, 29 Ky. Law Rep. 1136.

²⁵ Whitlow v. Missouri Pac. R. Co., 143 N. W. 941, 94 Neb. 649.

§ 4373(6). Ohio

The jury are instructed that if they find from the evidence that the defendant's servants in charge of the train that killed said ——— gave signals by whistling once, and no more, at such distance, if it exceeded ——— rods from ——— street, that said ——— would naturally think that he could safely cross before the train arrived at ——— street if he heard such a whistle, and that he did hear it, and should further find that no bell was rung, and that said train was going at a greater rate of speed than men of ordinary care and prudence in like employment would have run it under like circumstances and conditions, and that said ———, as a reasonable man, was thereby deceived and led to believe that he could cross the tracks of said defendant's railroad in safety, and that if, attempting under these circumstances to cross said tracks, without fault or negligence on his part, he was, on account of carelessness upon the part of the servants of said defendant in operating said train at an unusual and dangerous rate of speed, struck and killed, then plaintiff would be entitled to recover, if such carelessness was the sole cause of his injuries.²⁶

§ 4373(7). Oklahoma

You are further instructed that, if you believe by a fair preponderance of the evidence that the plaintiff approached the crossing with that degree of care and caution that an ordinarily prudent man would exercise under like circumstances, and the defendant failed, neglected, and refused to use that degree of care that an ordinarily prudent man would use under like circumstances and conditions, and the defendant carelessly and negligently approached said crossing in the manner and way alleged in plaintiff's petition, and that the defendant did not ring the bell or sound the whistle, and if you believe that the failure of the defendant on approaching said crossing to ring the bell or sound the whistle was negligence, and that such negligence was a direct and proximate cause of the injuries sustained by the plaintiff herein, then you will find for the plaintiff in any sum you may think him entitled to, not to exceed the sum of \$———. ²⁷

You are further instructed that, if you believe by a preponderance of the evidence in this cause that the plaintiff, on or about the ——— day of ———, was riding along ——— street in a wagon, and that the said ——— street was a public highway of the city of ———, and that said public highway crosses the railroad track of the defendant, and as plaintiff came to said crossing the defendant

²⁶ Schweinfurth v. Cleveland, C., C. & St. L. Ry. Co., 54 N. E. 89, 60 Ohio St. 215.

²⁷ Ft. Smith & W. R. Co. v. Moore (Okla.) 169 P. 904.

negligently and carelessly ran one of its locomotives up and across said highway at said crossing at a high and dangerous rate of speed, or negligently and carelessly omitted while so approaching said crossing to give out any signals by ringing the bell or sounding the whistle to warn the public of the approach of said train to said crossing, and that by reason of the failure of the defendant to give such warning and without contributory negligence on the part of the plaintiff, as will be herein defined to you, said locomotive struck the wagon in which plaintiff was riding and overthrew said wagon, and threw the plaintiff out upon the ground, with such force as to injure her, then in that event your verdict should be for the plaintiff for whatever damages you may find her to be entitled, not exceeding the sum sued for in this action.²⁸

You are instructed that it is the plaintiff's theory in this case, in support of which he has offered evidence, that he was going to the ——— railroad depot, and that before going upon the track of defendant's railroad he stopped and looked and listened, and that because of the obstruction of a high bank on the east side of the street he could not see the approaching engine as it was backing west; that he never heard the whistle blow or the bell ring; that in the exercise of due care and caution he proceeded to cross the track, and while doing so, because of the failure of the defendant's agents and employes to give any signal of the approaching engine, and to exercise ordinary care to avoid collision, his wagon was struck and he was knocked or thrown out of the same or forced to jump therefrom; and that at the time defendant's engine struck the wagon in which he was riding and caused the injuries he complains of plaintiff was in the exercise of due care. If you find by a fair preponderance of the evidence that this contention is true, and that as a result of the failure of the engineer to ring the bell or sound the whistle before crossing the street, and to apply the emergency brakes after plaintiff was discovered by the engineer, or apprised of the fact of his presence by his brakeman or other employes, in time to stop the train, provided that in the exercise of ordinary care and caution the defendant could have stopped the train and prevented the accident, and that but for such negligence on the part of the defendant's employes the accident would not have happened, and you further find that the plaintiff's injuries were not due to his own lack of care in seeking to avoid the collision with the train by first stopping, looking, and listening before going upon the track, then you should find for the plaintiff.²⁹

²⁸ Missouri, O. & G. Ry. Co. v. Adams, 153 P. 200, 52 Okl. 557.

²⁹ Missouri, O. & G. Ry. Co. v. Parker, 151 P. 325, 50 Okl. 491.

§ 4373(8). Texas

You are instructed that it is the duty, under the law, of persons operating railway trains to exercise ordinary care in the operation thereof, under all the facts, circumstances, and surroundings, to avoid accidents and injuries to persons and vehicles crossing their tracks over roads or highways; and our laws require that the persons operating the engine of such train blow the whistle and ring the bell at a distance of at least ——— rods before reaching a crossing, and to keep the bell ringing until such crossing is passed, and their failure to do so is negligence.³⁰

You are instructed that, if you believe from a preponderance of the evidence that on or about the ——— day of ———, the plaintiff was walking on the west side of ——— street, going south, and while in the exercise of ordinary care for his own safety, plaintiff was struck and knocked down by a car or cars, as alleged by him, and received the injuries alleged in his petition; and you further find that defendant was negligent in moving its cars across said street without giving notice or warning to plaintiff, if it did fail to give such notice or warning, or that defendant was negligent in propelling its car or cars across ——— street without ringing a bell or blowing a whistle, if it did fail to ring a bell or blow a whistle, or that defendant was negligent in backing said cars across said street and injuring plaintiff, without giving notice or warning to him of the approach of said cars if it did so back said cars without giving notice or warning of the approach of said cars, or that defendant was negligent in backing said cars across said street on said track without some person being at said crossing to give notice that said cars were to be backed across said street, if you find that it did fail to have some person at said crossing to give notice that said cars would be backed across said street, and if you further find that defendant was negligent in any or all of the particulars heretofore mentioned, and that such negligence, if any, was the proximate cause of the injury to plaintiff, then you will find for the plaintiff, unless you find for the defendant under subsequent paragraphs of this charge.³¹

You are further instructed that it was the duty of the defendant, when starting its engine towards the crossing in question (the evidence showing that such starting point was within ——— feet of the crossing), to cause the bell on the engine to be rung after starting its engine, and to keep said bell ringing until the crossing should have been passed, or the engine stopped; and the fail-

³⁰ Beaumont, S. L. & W. Ry. Co. v. Myrick (Civ. App.) 208 S. W. 935.

³¹ Rio Grande, E. P. & S. F. Ry. Co. v. Starnes (Civ. App.) 185 S. W. 366.

ure to do this on part of the employés of the defendant would be negligence.³²

You are instructed that the plaintiff sues the defendant company for damages he says was done him by defendant's railway engine and train on ———, by reason of personal injuries to himself caused by the agents and servants of defendant in negligently and without the use of proper care on their part in propelling the engine and cars, whereby he was run over, and seriously and permanently hurt and injured, without fault or negligence on his part. The defendant denies the allegation of plaintiff, and says it used all proper care and prudence in propelling its train on the occasion referred to, and alleges, if plaintiff was injured as alleged, it was caused by his own negligence and want of proper and ordinary care on his part, and therefore it is not liable therefor.³³

You are instructed that the law requires all companies operating railway trains to provide each locomotive engine with a bell and steam whistle, and that such whistle shall be blown or such bell rung at the distance of at least ——— rods (which is ——— feet) from the place where the public road shall cross a railway track, and also that such bell shall be rung and kept ringing until the engine shall have crossed said public road or stopped; and in this case, if you find from the evidence that those in charge of the engine of defendant failed to blow the whistle or ring the bell, as stated above should be done, and that, by reason of such failure to comply with the law, plaintiff was run over and injured, then he would be entitled to such damages as you may find from the evidence he may have sustained, provided you find plaintiff exercised due diligence and care to prevent such injury, as the law of contributory negligence has been heretofore given you in this charge. In passing upon the question of the negligence of the parties in charge of defendant's engine and train, you may consider the time and place at which the injury may have been given, its surroundings, the rate of speed at which the train was being run, and whether or not the proper signals were given by the said parties in charge of said train.³⁴

§ 4373(9). Virginia

The court instructs the jury that if they believe from the evidence that the engineer blew the whistle and rung the bell as required by law and as stated in another instruction in this case, then they should find for the defendant. But the jury are further instructed

³² Missouri, K. & T. Ry. Co. of Texas v. Magee, 50 S. W. 1013, 92 Tex. 816.

³³ Galveston, H. & S. A. Ry. Co. v. Duelm (Civ. App.) 23 S. W. 596.

³⁴ Galveston, H. & S. A. Ry. Co. v. Duelm (Civ. App.) 23 S. W. 593.

that even if they believe from the evidence that the whistle was not blown and the bell was not sounded as required by law, it does not necessarily follow from the mere omission to do these things that the jury should find for the plaintiff.³⁵

The court further instructs the jury that it was the duty of the defendant company, and of its agents and servants who were in control of and operating its engine and train of cars, on approaching the highway crossing under consideration, to sharply sound the whistle of its said engine at least twice, at a distance of not less than — yards nor more than — yards from said crossing, and to ring the bell of said engine or sound said whistle continuously or alternately until the said engine reached said crossing; and a failure to discharge that duty would be negligence.³⁶

The court further instructs the jury that, independently of the duty of the defendant and its agents and servants as set forth in instruction No. —, it was the duty of the defendant company and of its said agents and servants to exercise ordinary care to give reasonable and timely warning to persons passing over the highway and approaching and about to pass over said crossing of the approach of its said engine and train of cars to said crossing, in order to warn persons on said highway and about to pass over said crossing of its approach, so as to enable them to avoid exposing themselves to injury from said engine and train; and a failure on the part of the defendant to discharge that duty would be negligence.³⁷

The court instructs the jury that under the law of —, — being an incorporated city, the defendant had the right to omit the sounding of the whistle in approaching the — street crossing, where the accident occurred; and, if the jury believe from the evidence that the accident was caused by the failure to sound the whistle, the defendant was not negligent, and they must find for the defendant.³⁸

The court instructs the jury that if they believe from the evidence in this case that an ordinance of the city of — prohibited the sounding of whistles upon the engine, which is charged to have caused the accident in question, at the — street crossing, or at the point designated as the whistling post, then the failure to blow such whistle was not negligence.³⁹

³⁵ *Southern Ry. Co. v. Vaughan's Adm'r*, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

³⁶ *Southern Ry. Co. v. Vaughan's Adm'r*, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

³⁷ *Southern Ry. Co. v. Vaughan's Adm'r*, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

³⁸ *Southern Ry. Co. v. Cooper*, 36 S. E. 388, 98 Va. 299.

³⁹ *Southern Ry. Co. v. Gooper*, 36 S. E. 388, 98 Va. 299.

§ 4374. Same—Duty to signal as dependent on whether crossing is over a public highway

Now, when we come to the signal statute, the language of the statute is that they must ring the bell or blow the whistle for at least — yards before they reach the crossing where it crosses any public highway or street or traveled place. Now was this a public highway, street, or traveled place? If it was a mere private way, a mere farm road, it was not, unless the public were accustomed to travel it to such an extent as to make it a traveled place where people would be expected to be seen by any man of ordinary reason and prudence. If it was a traveled place and it was a crossing, or if it was a public road, then it was the duty of the railroad company in approaching that crossing to blow the whistle or ring the bell and continue to do one or the other for at least — yards before it crossed it, and failure to do that, to observe that statutory signal, is negligence per se. That would be negligence, and if that negligence was the proximate cause of the plaintiff's injury, and the plaintiff did not by gross negligence contribute to his own injury as a proximate cause without which it would not have happened, the railroad would be liable; but, in order for it to have been their duty to have rung the bell or blown the whistle for — yards before reaching the crossing, you must decide by the greater weight of the evidence that it was a public road, or a highway or street, or at least a traveled place. Now, if it was either, then it was the duty of the railroad to ring that bell for — yards, before reaching that crossing or blow the whistle, one or both. Now, gentlemen, if it was a public road, or street, or traveled place, then the inquiry is: Was the bell rung for — yards, or was the whistle blown so as to give warning of the approach of the train? And a failure, I say, to have done one or the other, to have complied with the statute in that respect, would be negligence per se, and if that failure was the proximate cause of the injury to plaintiff and he did not contribute to his own injury by gross negligence, if he was injured on a crossing, then he would be entitled to recover.⁴⁰

§ 4375. Same—Violation of statute or ordinance

You are instructed that a failure on the part of the defendant, as its train approached a crossing at a public highway, to sound two long blasts followed by two short blasts of the steam whistle on the locomotive engine, at least — yards from the crossing, as required by the act of the Assembly, would constitute negligence on the part of the company per se, but such failure on the part of

⁴⁰ *Sanders v. Charleston & W. C. Ry. Co.*, 77 S. E. 289, 93 S. C. 543.

the defendant would not relieve the traveler on the highway from the exercise of reasonable and ordinary care in approaching the crossing, if the presence of the crossing was known or under all the circumstances, should have been known to him; nor would the defendant be liable by reason of such failure if the injuries complained of were caused by the negligence or careless conduct of the deceased at the time of the accident. But if the defendant failed to make use of the warning required by the statute at the time of the accident, and if the accident occurred by reason of such failure, then and in that event the defendant would be liable for the death of ———, if he did not by his own negligence or want of care contribute in some degree thereto.⁴¹

§ 4376. Speed as evidence of negligence

§ 4376(1). Alabama

The court instructs the jury that the general statutes of our state do not regulate the rate of speed that a railroad company shall run its cars; yet the failure of the law to regulate the rate of speed does not authorize a railroad company to run its trains at a wanton, reckless, and dangerous rate of speed over a public crossing in an incorporated town or village, a point where the people cross and recross the public crossing in numbers and frequently.⁴²

§ 4376(2). Connecticut

You are instructed that ordinarily the liability of a railroad cannot be found from speed alone, even though the speed be great, for negligence, as a general rule, cannot be inferred from speed alone. If the signals required by law are given, no liability to damage is attached to the railroad from the fact of the speed alone, except in certain cases, which are exceptional cases, and the speed then becomes an important element in a charge of negligence. As for instance, if the circumstances be exceptional, and known to the railroad, or the peril of the plaintiff's intestate was known to the defendant. Doubtless in some cases, as our courts say, the company might be liable for the neglect of the engineer to slacken the speed of his train if by doing so he might have avoided a collision. As, if he was informed that a person was approaching the crossing in such a condition, or under such circumstances, as to indicate that he was heedless of the danger signals; or, if other sounds were prevailing, as of a thunder storm, which might render the sound of the signals indistinguishable. In such cases the company might properly be charged with the consequences of the personal negligence of the engineer.⁴³

⁴¹ *Nailor v. Maryland, D. & V. Ry. Co.* (Del.) 97 Atl. 418, 6 Boyce, 145.

⁴² *Memphis & C. R. Co. v. Martin*, 23 So. 231, 117 Ala. 367.

⁴³ *Freedman v. New York, N. H. & H. R. Co.*, 71 A. 901, 81 Conn. 601, 15 Ann. Cas. 464.

§ 4376(3). Iowa

You are instructed that the plaintiff claims that the defendant company, through its employes, was negligent in that it allowed the train in question to approach the crossing, where the accident occurred, noiselessly, without signals or warnings, and at a high rate of speed. Now, there is no positive provision of law requiring signals or warnings of the approach of a train to a crossing, excepting that above set out requiring the sounding of the whistle twice, sharply, at least — rods before reaching the crossing, and the ringing of the bell continuously thereafter until the crossing is passed. There is no law limiting the rate of speed at which trains may be run at places like the crossing in question. It cannot be said as a matter of law that any rate of speed would, in and of itself, be negligence. But the defendant company was required to so run and manage its train as it approached the crossing in question, and to give such signals on the approach of its train to the crossing as would protect persons passing over said crossing from unnecessary danger, when such persons were using reasonable care on their part by a vigilant use of their senses of sight and of hearing to learn of the approach of the train and to avoid injury. If it appears from the evidence that at the time in question, by reason of obstructions along the highway or defendant's right of way preventing those approaching the crossing on the highway from seeing or hearing the approach of the train from the northward, and that by reason of the speed at which the defendant's train approached the crossing, ordinary care and prudence on defendant's part in protecting persons who were attempting to pass over said crossing from unnecessary danger required that signals other and additional to those required by the statute should be given so as to warn persons near the crossing of the approach of the train and enable them to avoid injury when exercising reasonable care on their part, then it was the duty of the defendant company to give such additional signals, and a failure so to do would be negligence. But, as before stated, it cannot be said that any rate of speed in approaching the crossing in question would be, in and of itself, negligence.⁴⁴

§ 4376(4). Michigan

You are instructed that a high rate of speed is not, in itself, negligence. The question for your determination is whether or not those in charge of the passenger train on approaching the crossing operated the train with reasonable and ordinary care. In determining this, you are at liberty to consider all the testimony as to the speed of the train and warning by bell and whistle, or lack

⁴⁴ *Wiar v. Wabash R. Co.*, 144 N. W. 703, 162 Iowa, 702.

thereof, and, in fact, all other facts and circumstances that have any bearing upon it.⁴⁵

Now, gentlemen of the jury, there is a little variance in the testimony as to the speed of the car at the time of the collision. The business of the country demands of railroads rapid transit of persons and property, and it cannot be said that the speed which has been testified to in this case is of itself, as a matter of law, a negligent speed when running through the country outside of villages or cities or other thickly settled communities. It is, however, your duty to take into consideration all of the circumstances surrounding the operation of the car at the time in question. It is for you to say, as a matter of fact, whether or not the speed of the car was such a speed as a careful and prudent person would have used under all of the circumstances surrounding the case. If you find that it is such a speed as would be used by a careful and prudent person in the operation of a car at that time and place, then that act cannot be an act of negligence on the part of the servant of the defendant company, and the defendant company is absolved from all liability resulting therefrom. A person in the operation of a highly speeding object in going through woods and over public highways must exercise the care that such conditions require, and the question for you to find out is, Did the servant of the defendant company do that? If he did, he discharged his duty, and if he did not, and if, by reason of his failure to discharge his duty or to act in this respect as a prudent and careful person would do, under all of the circumstances, the plaintiff was injured while exercising due care on his part, the plaintiff is entitled, at the hands of the defendant, to recover for his full damages, if damage resulted to him by reason of this fact.⁴⁶

§ 4376(5). New York

The jury are instructed that, if you find from the evidence that defendant did give a proper signal, either by ringing the bell or blowing a whistle, on approaching the crossing mentioned in the evidence, adequate to the rate of speed at which the train was going and sufficient to warn travelers on the highway, then you cannot find a verdict against the defendant predicated solely on the speed at which this train was going when it reached such crossing.*

⁴⁵ *Ommen v. Grand Trunk Western Ry. Co.*, 169 N. W. 914, 204 Mich. 392.

⁴⁶ *Rathbone v. Detroit United Ry.*, 169 N. W. 884, 203 Mich. 695.

* *Hunt v. Fitchburg R. Co.*, 47 N. Y. S. 1034, 22 App. Div. 212.

§ 4377. Same—Violation of ordinance**§ 4377(1). United States**

You are instructed that, if you find from the evidence in this case that the railroad train which killed —— was moving at a rate of speed forbidden by the city ordinances, the law authorizes you to infer negligence on the part of the railroad company as one of the facts established by the proof.⁴⁷

§ 4377(2). Illinois

The court instructs the jury that if they believe, from a preponderance of the evidence, that the deceased was killed within the corporate limits of the village of —— by a car of the defendant company while he was in the exercise of ordinary care for his own safety, and that the defendant company was at the time running its said car at a greater rate of speed than —— miles an hour, then the law presumes the death of the said —— to have been caused by the negligence of the defendant or its agents.⁴⁸

The court instructs the jury that if they believe, from a preponderance of the evidence, that the deceased, ——, was killed within the corporate limits of the city of —— by a railroad train of the defendant company while she was in the exercise of ordinary care for her own safety, and that the defendant company was at the time running its said train at a greater rate of speed than —— miles an hour, and that such unlawful speed was the proximate cause of the death of the deceased that then the law presumes the death of the said —— to have been caused by the negligence of the defendant or its agents.⁴⁹

§ 4377(3). Indiana

You are instructed that, if you find from the evidence that the view of the approaching train was obstructed by buildings, trees, and cars on defendant's railroad at such crossing to a traveler on such street from the north, and at the time of the injury a valid ordinance of the city of —— was in force limiting the rate of speed of defendant's trains to —— miles an hour in said city, and that the train which injured plaintiff was at the time of the injury running at the rate of —— or —— miles an hour, then the defendant was guilty of negligence; and if you find that such negligence produced the plaintiff's injury without any negligence on the plaintiff's part which contributed to the injury, then your verdict should be for the plaintiff.⁵⁰

⁴⁷ *Grand Trunk Ry. Co. of Canada v. Ives*, 12 S. Ct. 679, 144 U. S. 408, 36 L. Ed. 485.

⁴⁸ *Gibbons v. Aurora, E. & C. R. Co.*, 104 N. E. 1063, 263 Ill. 266.

⁴⁹ *Dukeman v. Cleveland, C., C. & St. L. Ry. Co.*, 86 N. E. 712, 237 Ill. 104.

⁵⁰ *Pennsylvania Co. v. Horton*, 31 N. E. 45, 132 Ind. 189.

§ 4377(4). *Texas*

You are instructed that, if you believe from the evidence that the agents or servants of the defendant the ——— Railway Company, in charge of and operating the train which it is alleged collided with the street car upon which plaintiff's wife was a passenger, in approaching the crossing of the street over which said street car was being operated, failed to keep a proper lookout for cars or other vehicles which might be approaching the crossing, or that such agents or servants of said railway company were running said train at a greater rate of speed than allowed by the ordinances of said city, and if you further believe from the evidence that the collision with said street car resulted from such negligence on the part of the said agents or employes of said ——— Railway Company, and that the collision would not have occurred but for such negligence on the part of said employes, you should find for the plaintiff, as against said defendant the ——— Railway Company, though you should also believe that the driver of the street car was also guilty of negligence in the management of said car, and that his negligence, if any, contributed to the alleged injury. Unless you believe from the evidence that the servants or agents of said railway company, in charge of and operating said defendant's train, were so negligent as alleged, and that such negligence on their part, of itself or in connection with the negligence, if any, of the driver of said street car, caused the collision with said car, you should find for defendant.⁵¹

§ 4378. *Duty to stop car or engine*§ 4378(1). *Kentucky*

I further instruct you, gentlemen, that those in charge of defendant's engine were under no duty to stop or check it unless the conduct of the plaintiff, when they saw or by the exercise of ordinary care could have seen him, was such as to lead an ordinarily prudent person to believe that he did not know of the approach of the engine and intended to go or to remain upon the track, but it was their duty to make an effort to stop the engine when they saw, or by the exercise of ordinary care could have seen, that fact, if you believe it to be a fact from the evidence in this case.⁵²

§ 4378(2). *Michigan*

You are instructed that, if the track was clear and there was nothing in the situation, position, or movement of the road roller

⁵¹ *Gulf, C. & S. F. Ry. Co. v. Pendery* (Civ. App.) 27 S. W. 213.

⁵² *Kellogg & Co. v. Louisville & N. R. Co.*, 175 S. W. 1032, 164 Ky. 531; *Bauer v. Illinois Cent. R. Co.*, 100 S.

W. 933, 156 Ky. 183; *Hummer's Ex'x v. Louisville & N. R. Co.*, 108 S. W. 885, 128 Ky. 496, 32 Ky. Law Rep. 1315.

to suggest danger to the motorman until such time as he got so close to the crossing as to render it physically impossible to stop before reaching it, the speed of his car considered, provided you find that such speed was the proper speed under all of the circumstances surrounding the operation of the car, then the motorman would not be held negligent in failing to stop his car in time to avoid the collision, and neither would the speed of his car, if lawful and proper before the obstruction or danger became apparent, be rendered negligent and improper by reason of the fact that he could not stop the car in the distance intervening.⁵³

§ 4378(3). Texas

The jury are instructed that, if you find from the evidence that defendant, its servants or employés, while operating the train negligently failed to keep a lookout for wagons and teams approaching its track upon — street, or if you find that defendant's servants or employés kept a lookout and did discover plaintiff's team approaching defendant's track, and coming into the cut ahead of the moving locomotive from behind physical objects, if any, that prevented the driver from seeing the locomotive, and if you find that such servants and employés negligently failed to use all reasonable care, consistent with the safety of its train and the passengers thereon, to stop the train and avoid the accident, and if you find that such negligence on the part of defendant's employés and servants was the proximate cause of the injury sued for, you should find for the plaintiff, for such amount as you may find it was damaged by such negligence, unless you find from the evidence the plaintiff or its employé was guilty of such contributory negligence as would disentitle it to recover, as defined in paragraph — of this charge, in which event you will find for defendant.⁵⁴

§ 4379. Duty to have watchman or flagman

You are instructed that it was not the duty of the defendant to have or keep a watchman or flagman at every crossing of its tracks over a public street of a city or town to warn persons traveling in the street and using or about to use the crossing of the approach of trains to pass over the crossing at the same time; and whether or not it was the duty of the defendant to maintain a watchman or a flagman for this purpose, at the public crossing of its tracks over — avenue in the city of —, at the time in question, depends on a proper decision of these questions, to wit: Whether the circumstances and conditions, if any in evidence, existing at and surrounding the crossing in question at and before said time,

⁵³ Rathbone v. Detroit United Ry.,
169 N. W. 884, 203 Mich. 695.

⁵⁴ St. Louis Southwestern Ry. Co.

of Texas v. Roach-Manigan Paving
Co. of Texas (Civ. App.) 221 S. W.
1017.

and the use of the crossing by the public traveling in the street, while exercising ordinary care for their safety in crossing the railway at said crossing, and the passing over the crossing of engines and cars moving on the defendant's railway, rendered the said crossing extraordinarily hazardous and peculiarly dangerous to the public, who used the said crossing at the place in question, and who used ordinary care for their safety in so doing; and whether the defendant knew of such circumstances, conditions, and danger, if any there were, at and before the time in question; and whether an ordinarily prudent person, in the same or similar circumstances, would have stationed and maintained a watchman or flagman at said crossing to warn persons using or about to use the crossing of the approach of engines or cars on the railway about to pass over the crossing at the same time. If either of these questions should be answered in the negative, then it was not the defendant's duty to maintain a watchman or flagman at the said crossing, and the defendant would not be liable; but, if all of these said questions should be decided in the affirmative from the evidence, then it was the defendant's duty to maintain a watchman or flagman at the said crossing to give the aforesaid warnings.⁵⁵

You are charged that, plaintiff's attorneys having stated to the court that plaintiff would not rely upon any of the grounds of negligence alleged in his petition other than the failure of defendant to keep a watchman at the crossing, you will therefore in your deliberations consider none of the other grounds of negligence set out in the petition. And in this connection you are charged that, before you can find for plaintiff on this issue, you must believe from a preponderance of the evidence that the crossing at which plaintiff's wife was injured was so peculiarly dangerous that an ordinarily prudent person could not use the street in safety, in the absence of a flagman to signal the approach of the company's trains; that defendant knew, or in the exercise of ordinary care could have known, that the crossing was so peculiarly dangerous that such a person could not use the street in safety unless a flagman was employed to signal the approach of trains, and that an ordinarily prudent person would have employed a watchman at said crossing to signal the approach of its trains; and that, if defendant had had a watchman at the crossing at the time of the accident, plaintiff's wife would not have been injured.⁵⁶

§ 4380. Same—Ability of watchman

You are instructed that, if you find from the evidence that the defendant had placed a watchman at the crossing where plaintiff

⁵⁵ St. Louis Southwestern Ry. Co. of Texas v. Waits (Tex. Civ. App.) 164 S. W. 870.

⁵⁶ St. Louis Southwestern Ry. Co. of Texas v. Waits (Tex. Civ. App.) 164 S. W. 870.

was injured, then the watchman so placed at the crossing by the defendant should be physically capable of reasonably discharging the duties of such watchman; and if you find from the evidence that the watchman placed at said crossing by defendant on the day plaintiff was injured, by reason of his age, or physical debility, if you find from the evidence this to be the fact, was incapacitated to reasonably discharge the duties of such watchman, and that if he had been physically able to perform the duties of watchman he could have warned the boy in time to have prevented the collision by the exercise of ordinary care on his part, and that by reason of such physical incapacity a collision occurred between the engine of the defendant and the vehicle in which plaintiff was riding, and the plaintiff's injury was the result thereof, then your verdict will be for the plaintiff, provided you find from the evidence plaintiff was exercising reasonable care and caution to protect himself from injury.⁵⁷

§ 4381. Duty of flagman to give warning

§ 4381(1). Kentucky

The court instructs the jury that it was the duty of the flagman at the intersection of the railroad track with ——— street to give persons approaching said crossing warning of the approach of trains, so as to give them a reasonable opportunity to avoid being injured in crossing the track; and if the jury believe from the evidence that at the time and place complained of by plaintiff the defendant company through its flagman failed to discharge this duty, and by reason thereof the plaintiff, while exercising ordinary care for his own safety, was injured in his person or property in attempting to cross the track, the jury should find for the plaintiff.⁵⁸

§ 4381(2). New York

The jury are instructed that, if you believe from the evidence that the flagman shouted to plaintiff when he started to cross defendant's tracks and warned him not to cross, then the flagman did his whole duty.*

§ 4382. Violation of ordinance requiring gates at crossing

The court instructs the jury that under the ordinance of the city of ——— it was the duty of the defendant to provide and erect vertical arm gates at this crossing of its track over ——— street, and it was the further duty of the said defendant to erect and maintain

⁵⁷ McNamara v. Chicago, Ry. Co., 103 S. W. 1093, 12⁶ 152.

⁵⁸ Cross v. Illinois Cent. R. Co., 110 W. 290, 33 Ky 482.
Kratka v. B
S. 751, 11 147

the said gates, and to provide for the closing of them at the approach of engines or trains so as to prevent accident and the failure to perform the duty set forth above is negligence; and if you believe from the evidence that the defendant failed to perform the said duty and the said failure was the proximate cause of the accident to the plaintiff, without negligence on her part, then you must find for the plaintiff.⁵⁹

§ 4383. Circumstances increasing diligence required to prevent accidents

§ 4383(1). Florida

You are instructed that a railroad company operating its trains on the thoroughfare of a village must use greater care than in less frequented localities, and any neglect of any precautions proper in the peculiar circumstances of the locality constitutes negligence.⁶⁰

§ 4383(2). Kentucky

The court instructs the jury that if they shall believe from the evidence that the crossing at ——— street was used by many persons, and that it was more than ordinarily dangerous to persons using it, then it was the duty of the defendant, running its trains over the said crossing, in addition to the usual and ordinary signals, to provide such signals as were reasonably necessary to give notice of the train's approach to the crossing; and if it failed to provide such signals as were reasonably necessary at that crossing, and by reason of such failure the said ——— received the injuries complained of, and he did not help to cause or bring about his injuries by negligence on his part, but for which he would not have been injured, then the law is for the plaintiff, and they should so find.⁶¹

§ 4383(3). South Dakota

The court instructs the jury that a railroad company running and operating a locomotive engine upon the streets of a city must use greater care and diligence to prevent injuries to persons than is required of it in running and operating such engine in less frequented and populous localities, and in certain localities in a city greater precaution may be required of it than in other localities in the same city. For example, in a locality where there are several railway tracks running across a street, greater care may be required of a railway in running its engine across said street, where

⁵⁹ *Atlantic Coast Line R. Co. v. Tyler*, 98 S. E. 641, 124 Va. 484.

⁶⁰ *Florida Cent. & P. R. Co. v. Foxworth*, 25 So. 338, 41 Fla. 1, 79 Am. St. Rep. 149.

⁶¹ *Southern Ry. Co. in Kentucky v. Winchester's Ex'x*, 105 S. W. 167, 127 Ky. 144.

said several tracks cross, than in running it across a street, where but one track crosses; all other conditions being equal. If you find that defendant was running its engine across a street at a place where, or in the near vicinity of which, four railway tracks other than the one on which the said engine was being run crossed the same street, then the defendant was bound to use such care and caution to prevent injury to a person traveling on foot along said street at or near to said place, as prudent and discreet persons would have used and exercised under like circumstances, and if you find that the plaintiff was struck and injured by defendant's engine at such a place, and that the injury was caused by the negligence of the defendant, or of its agents in charge of the said engine, by its or their failure to use such care and caution, and that by the exercise of such care and caution on its part or of its said agents the accident causing such injury could have been avoided, the plaintiff is entitled to recover, if you further find that the plaintiff was, at the time of the accident, using due care and caution required of her by these instructions.⁶²

§ 4384. Same—Obstruction of view or sound as increasing care required

See, also, post, § 4287.

§ 4384(1). Arkansas

You are instructed that, while the fact that there was a freight train standing on the side track, the engine of which partially obstructed the crossing and was making a loud noise, if such were the facts, would impose upon deceased a greater degree of care for his own safety in approaching said crossing, still, if these conditions existed and the defendant was responsible for them, this would impose upon the defendant company a corresponding greater degree of care in so operating its trains that, if deceased was rightfully using the crossing and in the exercise of ordinary care for his own safety, he might not be injured in so doing.⁶³

§ 4384(2). Delaware

You are instructed that it is likewise the duty of the defendant in the movement of its trains over its tracks across a public highway to exercise reasonable care and diligence to warn travelers upon such highway of the approach of its trains, in order to prevent accidents at such crossings, and if there are obstructions in and about such crossing which prevent a train of cars from being seen as a traveler upon the highway approaches the crossing, the degree

⁶² Merrill v. Minneapolis & St. L. Ry. Co., 129 N. W. 468, 27 S. D. 1.

⁶³ St. Louis, I. M. & S. Ry. Co. v. Chamberlain, 150 S. W. 157, 105 Ark. 180.

of care required is increased according to the liability of danger at such crossing. Both the traveler and the company are charged with the same degree of care—the one to avoid being injured, and the other to avoid inflicting injury.⁶⁴

§ 4384(3). Virginia

The court instructs the jury that a higher degree of caution is required, at a highway crossing, of both the traveler on the highway and of the railroad company, where the view is obstructed and the contour of the land is such as to render less audible the noises of the moving train, than if the view was not obstructed and the contour of the land was such as to render more audible the noises of a moving train; the degree of caution required on the part of both the traveler and the railroad company being in proportion to the danger from the existing conditions. And it is for the jury to determine from the evidence what were the facts in this case, and whether or not the decedent and the defendant, either or both, exercised the required degree of care under the circumstances.⁶⁵

§ 4385. Same—Duty to give signals additional to the statutory ones

§ 4385(1). United States

You are instructed that, if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city much used and necessarily frequently presenting a point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger, and that owing to the near situation of houses, barns, fences, trees, bushes, or other natural obstructions which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature, it was reasonable that the railroad company should provide special safeguards to persons using the crossing in a prudent and cautious manner, the law authorizes you to infer negligence on its part for any failure to adopt such safeguards as would have given warning, although you have a statute in ——— which undertakes by its provisions to secure such safeguards in the way the statute points out. The duty may exist outside the statute to provide flagmen or gates or other adequate warnings or appliances, if the situation of the crossing reasonably requires that, and of this you are to judge, and it depends upon the general rule that the company must use its privilege of crossing the streets on its surface grade with due and reasonable care for the

⁶⁴ *Nallor v. Maryland, D. & V. Ry. Co.*, 97 A. 418, 6 Boyce, 145; *Trimble v. Philadelphia, B. & W. R. Co.*, 89 A. 370, 4 Boyce, 519.

⁶⁵ *Southern Ry. Co. v. Vaughan's Adm'r*, 88 S. E. 306, 118 Va. 602, L. R. A. 1916E, 1222, *Ann. Cas.* 1918D, 842.

rights of other persons using the highway with proper care and caution on their part.⁶⁶

It may be, gentlemen of the jury, that it is your duty to find that those signals were given; but it would not follow, because they were given, that therefore the railroad company had performed all of its duty as applied to this particular case, and it may or it may not have been all that it ought to do, according to the circumstances associated with this particular situation. Whether or not a signal by two long blasts and two short blasts of the whistle — or — feet back of this crossing, coupled with the rate of speed at which the train was running, was a sufficient notice and warning to persons about to cross that track, is a question for you to determine in your own good judgment, under the instruction and definition I have given you as to what is ordinary care under the circumstances of a particular situation; and the same rule of care is to be applied by you to the conduct of the boy when he was approaching the crossing.⁶⁷

§ 4385(2). Iowa

The jury are instructed that it cannot be said that the defendant company, was required by law to give any signals other or different from those provided by the statute as the train approached the crossing, unless, by reason of obstructions to seeing and hearing the train as it approached the crossing and the speed at which the train approached the crossing, such additional signals were necessary in order to protect persons approaching the crossing from unnecessary danger from the approach of the train, when such persons, upon their part, were exercising reasonable care by a vigilant use of their senses of sight and hearing to observe and know of the approach of the train to the crossing. If it appears from the evidence that the signals required by the statute (that is, the sounding of the whistle twice, sharply, at least 60 rods before reaching the crossing, and the ringing of the bell continuously thereafter until the crossing was passed) were sufficient to apprise persons of the approach of the train, when such persons were exercising reasonable care upon their part in looking and listening for the train, then the law would not require that the defendant should give any other or additional signals to those required by the statute. And negligence cannot be imputed to the defendant company by reason of the speed at which it runs its train at the crossing, if in approaching the crossing it gave such signals or warnings of the approach of the train to the crossing as were reasonably sufficient

⁶⁶ *Grand Trunk Ry. Co. of Canada v. Ives*, 12 S. Ct. 679, 144 U. S. 408, 36 L. Ed. 485.

⁶⁷ *Erie R. Co. v. Weinstein* (C. C. A., Ohio) 166 Fed. 271, 92 C. C. A. 189.

to apprise persons approaching the crossing of the approach of the train to the crossing so that such persons could avoid injury by the exercise of reasonable care upon their part. What signals were in fact given by the employes of the defendant in charge of said train as the train approached the crossing, and whether they were sufficient, when considering the surroundings at the crossing and the speed of the train, to apprise persons approaching the crossing of the approach of the train, so that such persons could avoid injury by vigilant use of their senses of sight and hearing, are all questions of fact to be decided by you from all of the evidence bearing thereon. Unless it does appear from the evidence that the employes of the defendant in charge of the train in question failed to give the statutory signals or failed to give such signals additional thereto as ordinary prudence would have dictated were necessary in order to apprise persons approaching the crossing of the approach of the train in time so that such persons could avoid injury by the exercise of reasonable care upon their part, then, in my judgment, the evidence will fail to show negligence upon the part of the defendant in this case, and in that event your verdict should be for the defendant.⁶⁸

§ 4385(3). *Kentucky*

The court instructs the jury that, if you believe from the evidence that this crossing, because of its location and surroundings at the time of the accident, was unusually dangerous to travelers, and that the statutory signals were not sufficient to give reasonable notice of the approach of the train, and that fact was known by the defendant, or by the exercise of ordinary care could have been known by it, then it was the duty of its servants in charge of the train to use such other means to prevent injury to travelers at said crossing as, in the exercise of a reasonable judgment, might be considered necessary by an ordinarily prudent person operating a train.⁶⁹

The court instructs the jury that it was the duty of the employes of the defendant railroad company, in charge of its engine, in approaching the turnpike crossing described in the petition and evidence, to sound the whistle or ring the bell at a point not less than _____ rods north of the crossing, and to sound the whistle or ring the bell continuously or alternately from that point to the crossing, and if the jury believe from the evidence that this crossing was over a much-traveled thoroughfare and because of its location and surroundings unusually dangerous to travelers, and that the sounding of the whistle and ringing of the bell was not sufficient to give reasonable notice of the approach of the train to the crossing, and

⁶⁸ *Wiar v. Wabash R. Co.*, 144 N. W. 703, 182 Iowa, 702.

⁶⁹ *Louisville & N. R. Co. v. Locker's Adm'rs*, 206 S. W. 780, 182 Ky. 578.

the defendant knew this, or by the exercise of ordinary care could have known it, then it was the further duty of the defendant and its servants in charge of the train at the time to use such other means to prevent injury to travelers at said crossing as in the exercise of ordinary judgment might be considered necessary by ordinarily prudent persons operating a train; and if the jury believe from the evidence that the defendant and its employés, in charge of its train at the time it struck and killed the decedent, failed to ring the bell or sound the whistle as herein set out, or to provide other methods to warn the traveling public of its approach to said crossing, if the jury believe the facts of this case required of the defendant and its servants in charge of its engine, in the exercise of ordinary care, to employ other means of warning of the approach, and as a direct result of such negligence, if any, on the part of the defendant and its servants, the decedent was killed then the law is for the plaintiff, and the jury should so find, unless they believe as in instruction No. ____.⁷⁰

The jury are instructed that it was the duty of defendant and the employés in charge of the engine and train that struck and killed _____, to sound the engine whistle or ring the engine bell at a point not less than _____ rods east of the crossing at which he was struck and killed, and to sound the whistle or ring the bell continuously or alternately from that point to the crossing, and if the jury believe from the evidence that because of the location of the crossing at which _____ was killed, and the amount of public travel thereon, and because the building or other structures of the defendant company, in proximity to the crossing, obstructed the view and hearing of approaching trains, the crossing was unusually dangerous to travelers, and that the sounding of the whistle and ringing the bell as directed was not sufficient to give reasonable notice of the approach of trains to the traveling public at said crossing, and this was known to defendant, or by the exercise of ordinary care could have been known by it, then it was the further duty of defendant, and the persons in charge of its train, to use such other means to prevent injury to travelers at said crossing as in the exercise of a reasonable judgment by ordinarily prudent persons operating the railroad, might be considered necessary, and if the jury believe from the evidence that the defendant and the employés in charge of the train that struck _____ failed to discharge the duty imposed by ringing the bell or sounding the whistle, as herein set out, or to provide the other methods herein set out, if considered necessary for the reasons herein stated, by the persons operating the said road, and further believe that deceased lost his

⁷⁰ Louisville & N. R. Co. v. Treanor's Adm'r, 200 S. W. 634, 179 Ky. 337.

life by the negligence and carelessness of defendant and said employes, if any has been proven, then they should find for plaintiff, unless they believe the state of facts existed that are set out in instruction No. _____.⁷¹

§ 4386. Same—Care required as dependent on whether country open or settled up

§ 4386(1). Michigan

You are instructed that it is the theory and claim of the defendants that the defendant's employes upon the passenger train were not guilty of any negligence; that they operated the train at a proper and reasonable speed under the particular circumstances; that the commerce of the country demands rapid transit; and that the speed of the passenger train was such as careful and prudent men, engaged in railroading, would maintain under just such circumstances. Right here I want to say to you there does not seem to be any question about the rule with reference to speed in the country, upon purely country crossings. There is practically no limit to it, and the courts recognize it. It is not negligence for a railroad to operate through the open country, over ordinary country crossings at a rate of _____, _____, or _____ miles an hour. All train schedules are planned and framed upon practically that basis, and the business and commerce of the country demands that sort of speed, the public recognizes it, and the courts hold in view of that the public must also recognize, when they approach a railroad crossing in the country at any point, that they may expect and should expect, at any time, a passenger train, or a freight, for that matter, to be coming along at the rate of _____ or _____ or _____ miles an hour, and they are all charged with notice of that.⁷²

You are instructed that when trains leave the open country and approach settled districts, then the question of speed becomes one of what care and caution ordinarily prudent men would exercise under such circumstances.⁷³

You are instructed that it is for you to say what the character of this particular crossing was; if it was, to all intents and purposes an open country crossing, then you would not be at liberty to consider the question of the high rate of speed as an element of negligence. It is for you to say what its character was, what the surroundings were, what the conditions presented there were on the occasion in question; how much of a settlement there was there; how much traffic there was there; what do the facts show

⁷¹ *Louisville & N. R. Co. v. Lucas' Adm'r*, 98 S. W. 308, 30 Ky. Law Rep. 359.

⁷² *Ommen v. Grand Trunk Western*

Ry. Co., 169 N. W. 914, 204 Mich. 392.

⁷³ *Ommen v. Grand Trunk Western Ry. Co.*, 169 N. W. 914, 204 Mich. 392.

as to what the conditions were. You have heard the testimony; you must say what it is.⁷⁴

You are instructed that, even at that crossing, or at any crossing, it would not follow that a speed of ———, or ———, or ——— miles per hour would, in and of itself, be negligence, or be negligent. It would not, as a matter of law, standing by itself, constitute negligence. It is a question to be determined in view of the facts and circumstances surrounding it, and the conditions presented. It must be found in the light of those surrounding circumstances and conditions, and you must say whether or not, in the light of those circumstances and conditions, this train was operated, not only with reference to speed, but with reference to signals, in a prudent manner, and in a manner that ordinarily prudent men would have operated it under the same circumstances, or in an imprudent manner, or a careless, reckless manner.⁷⁵

The court instructs the jury that under the evidence in this case the question of the defendant's liability is to be determined by the rules which govern the operation of steam railways in the open country rather than by rules governing the operation of cars in the streets and highways of cities, villages or thickly populated communities. The railway company had the right to operate its cars at a high rate of speed, and the rate of speed alone is not in and of itself negligence. Interurban cars are not limited in the rate of speed that they may run across highways, provided proper care is taken in approaching the same.⁷⁶

§ 4386(2). Missouri

The jury are instructed that at the time said ——— was injured the law imposed upon its servants, agents, and employes of the defendant, while running, conducting, or managing the locomotive and train of cars in question, the following duties: That they should not move the same, while within the city limits of the city of ——— at a greater rate of speed than ——— miles an hour; that they should not run and move said locomotive and train of cars within the city of ———, between sunset and sunrise, without having at least one large lamp, headlight, or lantern in a conspicuous place in front of the same, facing the direction in which the same was moving; that they should, immediately upon entering the city of ———, cause the bell on the engine to be rung, and keep the same ringing until the same should have crossed ——— street. And if the jury believe from the evidence that the agents,

⁷⁴ *Ommen v. Grand Trunk Western Ry. Co.*, 169 N. W. 914, 204 Mich. 392.

⁷⁵ *Ommen v. Grand Trunk Western Ry. Co.*, 169 N. W. 914, 204 Mich. 392.

⁷⁶ *Rathbone v. Detroit United Ry.*, 169 N. W. 884, 203 Mich. 695.

servants, and employés of defendant, while running, conducting, or managing said locomotive and train of cars upon the occasion referred to, failed to perform any one or more of the duties specified in this instruction, such failure was negligence. And if you believe from the evidence that, in consequence of such negligence in any one or more of the particulars hereinbefore mentioned, the deceased received the injuries which resulted in his death, your finding should be for the plaintiff, unless you further believe from the evidence that the deceased was guilty of negligence which contributed to the injury. And the burden of proving contributory negligence on the part of ——— rests on the defendant, and unless the defendant has proven such contributory negligence by a preponderance of the evidence you cannot find for the defendant on that ground.⁷⁷

The jury are instructed that if they believe from the evidence that ——— street, at the point where the railroad tracks used by the defendant cross it, was a public street of the city of ———, and a thoroughfare used by the public for the purpose of travel to such an extent as to greatly enhance the danger of collisions and accidents on said crossings, then it was the duty of the servants, agents, and employés of defendant, in managing or running said locomotive and train of cars, to exercise a degree of care in the operation of said train commensurate with the danger of collisions reasonably to be apprehended at that location. And if the jury further believe from the evidence that the agents, servants, and employés of defendant failed to exercise such commensurate degree of care in the movement of such locomotive and train of cars as it approached and passed over said crossing, either by moving the same at, considering the locality, a dangerous rate of speed, or without a large lamp, headlight, or lantern, in a conspicuous place in front of said locomotive, facing the direction in which the same was moving, or without keeping the bell upon such locomotive ringing from the time said locomotive reached the city limits until it had crossed said ——— street, such failure in any of said particulars constituted negligence; and if you believe from the evidence that such commensurate degree of care on the part of the agent, servants, and employés of defendant in moving said train required that there should be a light upon said locomotive or train of cars sufficient to warn travelers up said ——— street of its approach, and also required that there should be a bell upon said locomotive sufficient or adequate, when rung, to give timely notice of the approach of such locomotive and train to such trav-

⁷⁷ *Weller v. Chicago, M. & St. P. Ry. Co.*, 64 S. W. 141, 164 Mo. 180, 86 Am. St. Rep. 592.

eler, and if you further believe from the evidence that said locomotive and train had no sufficient light, or that said locomotive had no such sufficient or adequate bell, you are instructed that such failure to exercise such a degree of commensurate care in any one or more of the particulars herein mentioned constituted negligence. And, in passing upon the question as to whether the agents, servants, and employés of the defendant were or were not negligent in running or managing said locomotive and train in any of the particulars aforesaid, you should take into consideration all the facts and circumstances which you may find from the evidence existed at the time when, and at the place where, the injury occurred. And if you further believe from the evidence that, in consequence of such negligence in any one or more of the respects hereinbefore mentioned, the said ——— received the injuries from which he died, you will find your verdict for the plaintiff, unless you further believe from the evidence that the deceased was guilty of negligence which contributed to the injury.⁷⁸

§ 4387. Same—Rate of speed as dependent upon whether view of traveler obstructed

You are instructed that, if the defendant discharges its duty of keeping its right of way adjacent to a public road that crosses its right of way free from obstruction, such as trees and shrubs, and discharges all the other duties imposed upon it, then as far as a traveler on a public road about to cross its track is concerned it can run its cars at as high rate of speed as is desired, and the rate of speed, no matter how high it may be, is not an act of negligence so far as such traveler is concerned, and cannot be the basis of an action for negligence by such traveler; but, if the defendant negligently permits trees and shrubbery to stand upon its right of way adjacent to a public road that crosses its track, so that the view of a traveler as he approaches the track is obstructed thereby, then it is the duty of the defendant to use due care in the operation of its cars having in mind such obstruction, and to run them at such a rate of speed in approaching such highway crossing as to avoid doing unnecessary damage to those lawfully and properly using the same or about to use the same.⁷⁹

§ 4388. Blocking street as negligence

You are instructed that the use of the highways and streets by the traveling public belongs as much to the public as the track does to the railway company; and for the company to block up

⁷⁸ *Weller v. Chicago, M. & St. P. Ry. Co.*, 64 S. W. 141, 164 Mo. 180, 86 Am. St. Rep. 592.

⁷⁹ *Schaefer v. Arkansas Valley Interurban Ry. Co.*, 104 Kan. 394, 179 P. 323.

the highway without absolute necessity, or to render its use so dangerous as to deter the traveling public, or to keep them in constant fear of life and limb, would be a material and unlawful interference with their rights; and if the jury find, from the greater weight of the evidence, that the defendant in this case so blocked up and obstructed a public highway in the town of ———, this would be evidence of negligence, and if such negligence caused the killing of the plaintiff's intestate, then the jury will answer the first issue "Yes." ⁸⁰

§ 4389. Care required where crossing blockaded

The court instructs the jury, if you find from a preponderance of the evidence that P. on the day of the injury alleged in plaintiffs' petition started on a lawful errand along ——— street to a point beyond the intersection of said street by defendant's track, and that he found said street blocked by the cars belonging to or operated by defendant, and that said street was so blocked by a standing car or cars, and if you further believe from the evidence that, owing to the time and circumstances of the blockade, if any, defendant's agents in charge of the operation of its cars at the time in question, in the exercise of ordinary care in the discharge of their duties, might reasonably have anticipated that persons desiring to cross at the point alleged would be reasonably expected to be found at or near the west end of the string of cars in an effort to go around same, and that as a means of proceeding on his journey the said P. went down and along said string of standing cars, if any, and attempted to cross the track of said defendant company at the end of said string of cars, if any, and if you further find from the evidence that at or about the time said P. attempted to cross said track at the end of said string of cars, if you find that he did, the defendant's agents and servants propelled said string of cars in such a manner as to cause one of said cars to run over said P., and that at the time or about the time of propelling said cars, if you find they did, said defendant company's agents and servants failed and neglected to use reasonable care to keep a lookout for persons who might be in a dangerous position on said track, and that said P. thereby suffered the injury complained of, and if you further find that the failure, if any, on the part of defendant's agents and servants to use reasonable care to keep a lookout as aforesaid, under all the facts and circumstances in evidence, constituted negligence on the part of the defendant's agents and servants, and that such negligence, if any, was a proximate cause of the injury to the plaintiff, P., and he was so struck and hurt without fault or negligence on his part that caused or

⁸⁰ *Edwards v. Carolina & N. W. R. Co.*, 52 S. E. 234, 140 N. C. 49.

contributed to his injury, then you will find for the plaintiff P., unless you find for the defendant against the said P., under the other portions of this charge or under special charges, if any, submitted by the court. But if, on the other hand, you do not believe from the evidence that ——— street was blockaded at the time P. attempted to cross defendant's tracks at said point, if he did so attempt, or that, if blockaded, you do not believe it was blockaded for such length of time and under such circumstances as that the defendant's operatives, in the exercise of ordinary care in the discharge of their duties, might have reasonably anticipated that persons desiring to cross at the point alleged would by reason of the blockade, if any, be found at or near the west end of the string of cars, in an effort to go around same, or if you do not believe that the plaintiff P., in an effort to go around the west end of said string of cars, if any, was run over by the same being propelled against him, or do not believe that about the time of propelling said cars against the said P., if you find they did, the agents and servants of the defendant in charge of said cars failed to use reasonable care to keep a lookout for persons who might be in a dangerous position on said track, then, in either, any, or all of these events, you will let your verdict be in favor of the defendant.⁸¹

§ 4390. Sudden movement of freight cars by pushing other cars against them

You are instructed that, if you believe and find from the evidence that on the ———, defendant had some box cars standing on the north track, or track nearest its said depot, and west of said plank crossing, without any engine attached to them, and that while ——— was walking along said plank crossing, going north from the west end of the said Union Depot to the depot of defendant, and just as he got about the middle of the railroad track on which said box cars were standing the servants of the defendant in charge of one of its engines attached to other freight cars, west of said crossing backed said freight cars east on the track where said box cars were standing, and struck said box cars with great force, and suddenly moved said box cars east against the said ———, and knocked him down, and passed over him, and killed him, as alleged in plaintiff's petition; and if you further find from the evidence that the servants of defendant in charge of said engine and cars failed to exercise ordinary care to observe the said ——— in attempting to pass over said railroad track along said plank crossing, and to avoid striking and injuring him; and if you find that the placing and leaving of said box cars on the

⁸¹ *Houston Belt & T. Ry. Co. v. Price* (Tex. Civ. App.) 192 S. W. 359.

railroad track without an engine attached to them, and the striking of them with the other cars and engine as alleged, if so struck, and the failure, if any, on the part of the defendant's said servants to use ordinary care to observe said — in attempting to cross said railroad track, was negligence, and that, but for such negligence, if any, the said — would not have been struck by the said cars and killed; and if you further find from the evidence that plaintiffs have suffered any pecuniary damages by reason of the said —'s death, then you will return a verdict for plaintiffs against the defendant for such sum, as actual damages, as the evidence may show them entitled to under the instructions hereinafter given you.⁸²

§ 4391. Right to assume that persons near track will keep out of danger

§ 4391(1). California

The jury are instructed that there is no conflict in the evidence that at all the times Mrs. — was approaching along the pathway to the crossing of the track she was in a position of absolute safety up to the time she stepped in front of the train, and there is no rule of law which would charge any of defendant's employes with knowledge that while she was in such position of safety she would change her position of safety for one of peril. On the contrary, the employes of defendant had a right to assume that Mrs. — was in possession of her faculties and would retain her place of safety and not recklessly expose herself to danger. And even if you believe that Mrs. — gave no indication of knowledge of the approaching train, still the defendant's employes were not bound to assume that she would heedlessly leave a place of safety and put herself upon the track and in danger of her life. And you are instructed, if you believe from the evidence that any of defendant's employes saw Mrs. — approaching the train on — street, that such employe had the right to presume that Mrs. — was in possession of her ordinary faculties and alert to the danger which might ensue from passing trains, and that she would not attempt to cross in view of the train, and that therefore such employe was not required to check the speed of the train in order to enable Mrs. — to cross in front of it, or to ascertain whether or not she was about to do so.⁸³

§ 4391(2). Michigan

You are instructed that the motorman in approaching the highway crossing had a right to believe that any person intending to

⁸² St. Louis Southwestern Ry. Co.,
of Texas v. Bowles, 72 S. W. 451, 32
Tex. Civ. App. 118.

⁸³ Matteson v. Southern Pac. Co., 92
P. 101, 6 Cal. App. 318.

use the highway for the purpose of crossing the track would use reasonable care and caution to ascertain and determine whether or not a car was coming. It appears from the testimony in this case that the car, the car upon which the plaintiff was riding, if going at the rate of ——— miles an hour, could not be stopped in less than ——— or ——— feet, and that when going faster more distance would be required to make the stop. After you have determined the rate of speed at which the car was going, you will then have to determine the distance from the crossing that the motorman had a view of the same, and if you believe from the evidence that the length of view was sufficient to enable the motorman to stop his car so as to avoid striking any obstacle which was on or in dangerous proximity to the track at the time the observation was made, and that no such obstacle was on or in dangerous proximity to the track at such time, then I charge you, gentlemen of the jury, that the motorman had the right to continue on toward the crossing without slackening speed, in reliance on the belief that no one would proceed on or near the track until his car had passed the crossing, and if, on reliance in such belief, the motorman got so near the crossing before he saw or by the exercise of a high degree of care he should have seen, the danger, that it was practically and physically impossible for him to stop his car, then he would not be negligent, and plaintiff could not recover against the railway in this case. If the jury believe that the motorman saw, or should have seen, the driver of the traction engine when he went on or approached the track, if they believe the driver did so, the motorman had a right to believe and to act upon the belief, that the driver would not undertake to drive his train on or over the track until the car had passed the crossing, and if the motorman saw, or should have seen, the traction engine standing still at a safe distance from the track, he had a right to believe that it would remain stationary, and that it would not be driven upon the track before the car passed the crossing. The motorman under such circumstances could not be required to check or slacken the speed of his car in anticipation of any act of control of the engine which would cause it to leave a place of safety and go into a place of danger in or near the track ahead of the car, and if, while so operating his car, he got so close to the crossing before he saw, or should by the exercise of due care and caution have seen, that the engine was proceeding toward the track as to make it impossible to stop the same by the use of every possible means and device at hand before striking the engine, then I charge you, gentlemen of the jury, that the motorman could not be held to have been guilty of any negligence, and the plaintiff could not recover against the railroad company. In ap-

proaching a crossing the duty rests upon the person operating a car to give warning.⁸⁴

§ 4391(3). North Carolina

The court instructs the jury that, if a human being is upon or near a railroad track and apparently in possession of his senses, the engineer is justified in assuming up to the last minute that such person will exercise his faculties and senses for his own safety and get out of the way, and the engineer is not required to stop his train or slacken the speed.⁸⁵

The court instructs the jury that it is a well-settled rule that, where railroad employes in charge of a train see a person on or near the tracks in advance of the train, unless they know or can see from his condition or surrounding circumstances that he will not or cannot retire to a place of safety in time to prevent an accident, they have a right to presume that such person is of sound mind and good hearing and eyesight, and that he will retire to or stop in a place of safety in time to prevent injury from an approaching train of which he has knowledge or of which he, by the exercise of due care or the use of his senses, should have knowledge.⁸⁶

The court instructs the jury that if the servants and agents of a railroad company see a person approaching the tracks in an automobile, they have the right to assume up to the last minute that such person will stop the automobile in time to avoid a collision, and the engineer is not bound to stop the train or slacken its speed, unless he can or does see that such person in the automobile is of unsound mind or not in possession of his senses or cannot stop his automobile.⁸⁷

§ 4392. Duty as to persons discovered standing on track

The court instructs the jury that, if you believe from the evidence that on the occasion in question the employes of the defendant on the switchboard of the engine that is alleged to have struck plaintiff saw plaintiff standing on defendant's track in such position as that he was in danger of being struck by said engine, and if you further believe from the evidence that it reasonably appeared to said employes, and they believed, that plaintiff would probably not leave the track and get out of the way of the en-

⁸⁴ *Rathbone v. Detroit United Ry.*, 169 N. W. 884, 203 Mich. 695. This was an action by a passenger upon a street car against the street car company to recover for injuries resulting from a collision between such car and a traction engine.

⁸⁵ *McMillan v. Atlanta & O. Air*

Line Ry. Co., 90 S. E. 683, 172 N. C. 853.

⁸⁶ *McMillan v. Atlanta & C. Air Line Ry. Co.*, 90 S. E. 683, 172 N. C. 853.

⁸⁷ *McMillan v. Atlanta & C. Air Line Ry. Co.*, 90 S. E. 683, 172 N. C. 853.

gine before it reached him, and that said employés realized the perilous situation of plaintiff in time by the use of means they had at hand to have avoided striking and injuring plaintiff, and if you further believe from the evidence that said employés failed to use such care in the use of the means, if any, they had at hand, to avoid striking and injuring plaintiff as an ordinarily prudent person would have used under the same or similar circumstances, and if you further believe from the evidence that in such failure, if any, said employés were guilty of negligence as that term has been hereinbefore defined, and if you further believe from the evidence that such negligence, if any, was the direct and proximate cause of plaintiff's injuries, then you will find for the plaintiff, and assess his damages under instructions hereinafter given you.⁸⁸

§ 4393. Duty to avoid frightening persons

The court instructs the jury that if they find from the evidence in this case that on the ——— day of ———, she was traveling along and upon the ——— street crossing of the defendant company in the city of ———, that said ——— street crossing was then and there a public crossing of said city, and that the said crossing was at said time and place blocked by an engine and train of the said defendant company, standing over the whole of said crossing, that the plaintiff waited several minutes for the said train to move off of said crossing so she could pass over the same, and that while so waiting for said train and engine to move off of said crossing the agents and servants of the defendant then and there in charge of said train requested and invited the plaintiff to pass around the front of said engine, and further find that the plaintiff and her companion, in pursuance of said request and invitation, if the jury find the same, started to cross around in front of said engine, and that while the plaintiff was crossing over the track upon which said train and engine was then and there standing, and about five feet in front of said engine, the said agents and servants of the defendant company caused the whistle of said engine to be blown in an unusual and unnecessary manner, and at the same time caused an unusual and unnecessary amount of steam to escape from the cylinder cocks of said engine, thereby frightening the plaintiff, and if the jury further find that the plaintiff then and there fell upon one of the rails of said tracks as a natural and probable consequence of said fright, and was thereby injured, the plaintiff is entitled to recover, provided, the jury further find that, in passing around in front of said engine and at

⁸⁸ Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Tex. Civ. App.) 136 S. W. 279.

the time of the alleged injury, the plaintiff was in the exercise of due care and caution on her part.⁸⁹

§ 4394. Care required as to runaway team

The court charges the jury that if they believe from the evidence that the plaintiff's team was running away, and plaintiff was doing and did do all in his power to stop them from the time they began running away until they were struck by the train, and from the nature and circumstances of the place the plaintiff could not reasonably do otherwise than allow the team to go upon the railroad track, and could not reasonably do otherwise than to remain in the wagon, and that the mules ran away without fault or negligence on his part, and that they began running away before plaintiff arrived at a point where it was his duty to stop, look, and listen, and that the engineer on the train saw the team so approaching the track, and did not use all reasonable means after so seeing the team to avoid the injury, and that, had he used such means, the injury to the plaintiff would have been averted or lessened, then they must find for the plaintiff.⁹⁰

§ 4395. Injury to child by sudden movement of cars at crossing

The court instructs the jury that if you believe and find from the evidence in this case that ——— was, at the time of his death, a minor and unmarried, and that the plaintiffs are husband and wife and the father and mother, respectively, of the said ———, and that the defendant is, and was on the ——— day of ———, a railroad corporation engaged in the business of a common carrier of passengers and freight for hire, and that as such it was on said day, by its conductor, engineer, agents, servants, or employés, in the control and operation of the locomotive, car, or train of cars mentioned in the evidence, and that the crossing at ——— avenue is a public highway extending upon and over the tracks of defendant's railroad, then the court instructs you that it was the duty of the defendant to anticipate the presence of persons upon its said track on said crossing; and if you believe and find from the evidence that on said ——— day of ———, a car or train of cars of defendant was standing upon said track near said crossing of ——— avenue, and that said ——— was upon said crossing and near to or upon said track, and that said car or train of cars was suddenly and violently moved forward upon said crossing by defendant's servants or agents in charge of said car or train of cars, without looking to see whether any person was at the time upon said crossing in danger of being injured by the sudden moving

⁸⁹ Baltimore & O. R. Co. v. Harris, 88 A. 282, 121 Md. 254.

⁹⁰ Southern Ry. Co. v. Hobbs, 43 So. 844, 151 Ala. 335.

of said car upon said crossing, and without any warning that they would be so moved, and that by reason thereof one of said cars struck and ran over the said ——— and inflicted injuries upon him directly causing his death, and if you further find and believe that the plaintiffs were not guilty of negligence in the care and custody of their child contributing to the death of said ———, and that said ——— did not climb upon and hang from said car, then your verdict should be for plaintiffs.⁹¹

§ 4396. Acts in emergencies

The court instructs the jury that the law recognizes the fact that the nerves and muscles of men are not so co-ordinated that there can be instantaneous action to meet an emergency, and if you believe from the evidence the plaintiff's automobile was suddenly stopped on the track, you cannot find for the plaintiff, unless you believe that the plaintiff has proved by the preponderance of the evidence that in contemplation of the entire situation after the danger became known to the motorman or ought to have been discovered by him, by the exercise of ordinary care, he, the motorman, negligently failed to do something which he had a last clear chance to do to avoid the accident.⁹²

§ 4397. Unavoidable accidents

§ 4397(1). Texas

You are instructed that, if you believe from the evidence, in this case that the train of the defendant was upon the crossing, or so near said crossing that by the use of ordinary care the accident could not have been avoided at the time plaintiff's horse came to said crossing, and that said horse ran against said train and received the injury complained of, then you will return a verdict for the defendant.⁹³

§ 4397(2). Virginia

The court instructs the jury that if they believe from the evidence that, when ——— approached the tracks of the ——— Company at ——— Crossing, a train on the ——— Railroad was passing over said crossing on the south-bound track going south; that said ——— stopped to allow said train to pass, and, immediately after said train had passed, proceeded over said south-bound track in the rear of said train and on to the north-bound track, immediately in front of an engine and tender moving on said north-bound track, the approach of which could have been seen by him, if he

⁹¹ *Compton v. Missouri Pac. Ry. Co.*, 147 S. W. 842, 165 Mo. App. 287.

⁹² *Norfolk Southern R. Co. v. Smith*, 94 S. E. 789, 122 Va. 302.

⁹³ *Ludtke v. Texas & N. O. R. Co.*,

(Civ. App.) 132 S. W. 377. It was contended that, if speed had not been excessive, the train would not have been at particular place at the time of the accident.

had looked in that direction, and that when he stepped upon said north-bound track he was so near to said engine and tender that it could not, in the exercise of ordinary care, have been stopped in time to have avoided striking him—then they should find for the defendant in this action.⁹⁴

§ 4398. Proximate cause as essential element of cause of action

§ 4398(1). Arkansas

The jury are instructed that if the plaintiff was in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendant, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendant is liable.⁹⁵

§ 4398(2). Illinois

The jury are instructed that it is not sufficient, to entitle the plaintiff to recover in this case, to show a negligent breach of duty on the part of the defendant, but it devolves upon the plaintiff to show further, that such breach of duty was the proximate or immediate or real cause of the injury to the plaintiff's property; that in no case can a recovery be had for a negligent breach of duty, unless the evidence shows that such negligent breach of duty was the proximate or immediate cause of the injury occurring.⁹⁶

§ 4398(3). Kentucky

You are instructed that, if the jury believe from the evidence that the decedent was struck upon the public crossing referred to in the testimony, and even if the jury should believe from the evidence that the engine bell was not rung nor the whistle sounded at a distance of at least ——— rods from the crossing, nor such bell rung nor whistle sounded continuously or alternately until the engine reached the crossing, yet if such warning of the train's approach to the crossing was given that the decedent, in the exercise of ordinary care, could have known of its coming, then the defendant is not liable, and the jury should so find.⁹⁷

§ 4398(4). North Carolina

The jury are instructed that, if you find from the evidence that the negligence of both the driver and the defendant company, both acting together, both concurring, both contributing to the result, caused the death of ———, then both the driver and the defendant

⁹⁴ *Southern Ry. Co. v. Abbe's Adm'r*, 98 S. E. 31, 124 Va. 379.

⁹⁵ *Louisiana & A. Ry. Co. v. Ratcliffe*, 115 S. W. 396, 88 Ark. 524.

⁹⁶ *Combs v. Baltimore & O. S. W. R. Co.*, 147 Ill. App. 105.

⁹⁷ *Louisville & N. R. Co. v. Ueltschi's Ex'rs*, 97 S. W. 14, 29 Ky. Law Rep. 1136.

company would be liable, and it matters not which one the plaintiff sued, and in that event you will answer the first issue, "Yes." ⁹⁸

§ 4398(5). *South Carolina*

The court instructs the jury that, if the negligence of the defendants be the direct and proximate cause of the injury alleged to have been sustained by the plaintiff, then the defendants are liable for damages to the plaintiff. No actual collision is alleged in the suit, and it is not necessary to prove a collision, but if the defendants were guilty of lack of ordinary care and of negligence in approaching the crossing, and by such negligence placed the plaintiff in a position of peril, and created an overweening necessity, impressing him with an imminent danger, and such necessity be not brought upon himself by his own negligence, as the proximate cause, and he use the means at hand to escape an impending and overweening danger, and be injured as the result of the negligence of the defendants, there would be a natural and proximate injury as the result of defendants' negligence. ⁹⁹

§ 4398(6). *Virginia*

The court instructs the jury that the duty of ——— to look out for his own safety was as great as the duty of the defendant to look out for him, and the court instructs the jury that the negligence of the defendant, if it was negligent, did not excuse ——— from the reciprocal duties he owed to care for his own safety, and that no negligence of the defendant would entitle the plaintiff to recover, unless it was the sole, proximate cause of the death of ———. ¹

2. *Crossings Other Than Public Crossings*

§ 4399. *Duty to discover persons at customary crossing*

§ 4399(1). *United States*

You are instructed that, if the jury find that plaintiff was passing the crossing in question upon an express or implied invitation or inducement of defendant, or by its mere permission, he was rightfully there. ²

The jury are instructed that, if the jury find that the defendant had, without objection, permitted those employed at its quarry and the public to cross the track, at the point where the injury occurred, though not in itself a public crossing, it owed the duty of reasonable care towards those using the crossing. ³

⁹⁸ *Pusey v. Atlantic Coast Line R. Co.*, 106 S. E. 452, 181 N. C. 143.

⁹⁹ *Douglass v. Southern Ry. Co.*, 62 S. E. 15, 82 S. C. 71. The buggy of plaintiff was overturned in an effort to escape.

¹ *Morton's Ex'r v. Southern Ry. Co.*, 71 S. E. 561, 112 Va. 398.

² *Owens v. Pennsylvania R. Co. (C. C., Pa.)* 41 F. 187.

³ *Owens v. Pennsylvania R. Co. (C. C., Pa.)* 41 F. 187.

§ 4399(2). Arkansas

You are instructed that, if you find from the evidence that at the time of the injury complained of, and long prior thereto, the defendant company was permitting and had permitted the public to use the place on its track where plaintiff was attempting to cross as a crossing, without objection, then plaintiff was not a trespasser in attempting to cross the track at said point, and the defendant and its employes owed him the duty of exercising ordinary care not to injure him while attempting to cross the track at said point.⁴

§ 4399(3). Kentucky

You are instructed that, if you believe from the evidence that the defendant's tracks between ——— street and its depot in ———, were habitually used by the public in going to and from ——— street to its depot, with the knowledge and acquiescence of the defendant, then it was the duty of the defendant to use ordinary care to discover the presence of such persons on its said tracks, and to use ordinary care to avoid injuring them after discovering their peril. And if, upon the occasion in question, you believe from the evidence that while plaintiff was walking along defendant's said tracks the defendant, its agents, or servants failed to use ordinary care to discover the presence of plaintiff, or failed to use ordinary care to avoid injuring plaintiff after the discovery of his peril, and that by reason of such failure, if any, on the part of the defendant, its hand car was run against plaintiff, and plaintiff was thereby injured, you will find for the plaintiff. If, however, you believe that plaintiff went upon defendant's tracks at a time and place when defendant, by the exercise of ordinary care, could not have discovered plaintiff's peril in time to avoid injuring him, you will find for the defendant.⁵

§ 4399(4). Texas

The court instructs the jury that, bearing in mind the foregoing definitions and instructions, if you believe, from a preponderance of the evidence, that, before and at the time plaintiff received the injuries complained of in her petition, it was the custom of the people residing in the ——— part of the town of ——— to cross the tracks of the defendant at or near the point of the accident, and that paths and places of entry had been made for that purpose so as to make the same a common passageway for pedestrians across defendant's right of way, tracks, and yard at said point, and

⁴ Prescott & N. W. R. Co. v. Franks, 163 S. W. 180, 111 Ark. 83, Ann. Cas. 1916A, 773. It was objected to this instruction that the jury might think that other warning than the statutory

signals were required. Such an objection could have been obviated by a request for a specific charge.

⁵ Louisville & N. R. Co. v. Berry, 111 S. W. 370, 33 Ky. Law Rep. 850.

that such custom and such use of said paths and passageways was with the knowledge, consent, and acquiescence of the defendant company, and that, in an attempt to cross over defendant's track at an opening between cars, the said cars were, by defendant's employés, and without the exercise of ordinary care on their part, suddenly moved backwards and towards the plaintiff, without a signal or warning of any kind to her, and that, before she could escape from her then position of peril, she received her injuries in the manner and form complained of in her petition, or if you believe from the evidence that the defendant's conductor and brakeman, or either of them, knew of the presence of plaintiff and her father before said accident, and knew, or had reason to believe, that they would probably undertake to cross over said track and between the cars, and said employés failed to exercise ordinary care in moving said cars, to prevent the accident, and you further find that such act or omission of defendant's said employés was negligence, as hereinbefore defined, and that such negligence was the proximate cause of plaintiff's injuries, then you will find for the plaintiff, unless you find that she was guilty of contributory negligence under the instructions herein given you.⁷

§ 4399(5). Virginia

The court instructs the jury that if they believe from the evidence that the place at which the accident complained of occurred had been in daily use as a walkway or crossway for a long time by a large number of persons in that vicinity, and that its use was well known to the defendant, it was then the duty of the defendant company to use reasonable care to discover —, if on the cross-ties of the track on which the train was proceeding and in danger at the place mentioned, and that if the said defendant did not use such care, and that by its failure so to do the said accident occurred, then they must find for the plaintiff, even though the said plaintiff was guilty of contributory negligence, provided they believe from the evidence that the servants of the said defendant in charge of its engine did not do all they could consistently with their own safety, to avoid the injury after the said danger to the said — was known, or might have been discovered by the said servants of the defendant by the exercise of ordinary care in keeping a lookout for persons at the point where the accident occurred.⁸

⁷ Ft. Worth & D. C. Ry. Co. v. Winger (Civ. App.) 151 S. W. 586.

⁸ Norfolk & W. Ry. Co. v. Carr, 56 S. E. 276, 106 Va. 508.

§ 4400. Precautions to be observed on approaching private or farm crossing**§ 4400(1). United States**

The jury are instructed that, although there was no statutory obligation on the part of the defendant to ring a bell upon approaching the crossing in question, they might find it negligence to omit this when running its train across such crossing at a time when the view of the train was so far obstructed by the cars which had been permitted to remain upon the side tracks as to render the use of the crossing peculiarly hazardous.⁹

The jury are instructed that, if the jury find, from the evidence, that plaintiff was duly careful, and was crossing at the point in question rightfully, any injury to him through the defendant's omission of a reasonable precaution will render the defendant liable in damages.¹⁰

The jury are instructed that, if the whistle of the engine was not sounded, nor any other usual notice given of the approach of the train, the plaintiff had a right to presume that the track was clear; and unless the jury are satisfied, by affirmative proof, that the plaintiff did not use ordinary care, the defendant is liable for the consequences of plaintiff's injuries.¹¹

§ 4400(2). Missouri

The court instructs the jury that the defendant railroad company is not bound to whistle or ring the engine bell when approaching a private or farm crossing, and, further, that said defendant railroad company may regulate the speed of trains approaching private crossings as it may desire, by its own regulations; but nevertheless the jury are instructed that said defendant railroad company, knowing that said private crossings are likely to be used by persons passing over and upon the railroad track, are bound, when approaching said crossings, to keep a proper lookout and to use all reasonable precautions when approaching said private or farm crossing to prevent injury to any one on or approaching such crossings.¹²

3. Contributory Negligence**§ 4401. Duty, in general, of traveler approaching crossing****§ 4401(1). United States**

You are instructed that, if you find that plaintiff's decedent was familiar with this crossing and its dangers, one and all of them, that he frequently used it, and knew how to act in using

⁹ *Owens v. Pennsylvania R. Co.* (C. C., Pa.) 41 F. 187.

¹⁰ *Owens v. Pennsylvania R. Co.* (C. C., Pa.) 41 F. 187.

¹¹ *Owens v. Pennsylvania R. Co.* (C. C., Pa.) 41 F. 187.

¹² *Morgan v. Wabash R. Co.*, 60 S. W. 195, 159 Mo. 262.

it to protect himself, and that under the special circumstances which you find he failed to act as a prudent and cautious man should have acted from beginning to end, or that he omitted some precaution that a prudent man ought to have taken, whereby he lost his life, the plaintiff cannot recover. He should use all his faculties of seeing and hearing; he should approach cautiously and carefully—should look and listen, and do everything that a reasonably prudent man would do before he attempted to make the crossing. Scrutinize his actings and doings under the light of the then situation, the nature and character of the crossing, the fact of the difficulty of observation, the time of day and the probability of danger from passing trains, the fact that there were other railroads side by side, that another train on one of these was actually approaching and passing, the noise and confusion, possibly the noise and confusion of signals, and every fact and circumstance bearing on the case to influence his conduct then and there, under those circumstances and not any other circumstances, and say upon your fair and impartial judgment whether he acted as a reasonable and prudent man should have acted, and with the due care and caution demanded by the exigencies of the occasion. If he did so act, and the railroad company was negligent, his administrator is entitled to your verdict. If he did not so act, the railroad company is entitled to your verdict, whether it was negligent or not. If it was not negligent, it is entitled to your verdict, no matter how ——— acted.¹³

You are instructed that by ordinary care is meant that care a person of common prudence takes of his own concerns, or that degree of care which men of common prudence exercise about their own affairs. In determining what would be ordinary care in a particular case, reference must be had to the circumstances surrounding such case or occurrence.¹⁴

§ 4401(2). *Alabama*

The court instructs the jury that, because of the character and momentum of the defendant's train, the law would not require it to stop its train and give precedence to Mrs. ———, who was on foot, to make the crossing first. It was the duty of Mrs. ——— to wait for the train to pass before she attempted to cross, and if she could, by the exercise of due diligence, have discovered the approach of defendant's train, and if she attempted to cross in front of defendant's train knowing of its approach, or if by the exercise of due diligence she could have discovered its approach,

¹³ Grand Trunk Ry. Co. of Canada v. Ives, 12 S. Ct. 679, 144 U. S. 408, 38 L. Ed. 485.

¹⁴ Owen v. Pennsylvania R. Co. (C. C., Pa.) 41 F. 187.

she would be the author of her own misfortune, and could not recover in this action, unless the jury should believe from the evidence that, upon the manifestation of Mrs. ——'s peril, those who controlled defendant's train failed to use due diligence to prevent the injury, or that they wantonly or intentionally injured her.¹⁵

§ 4401(3). *Illinois*

You are instructed that the law did not require of the deceased the exercise of an extraordinary degree of care. All that was required of him was the exercise of ordinary care, and what is ordinary care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances.¹⁶

The jury are instructed, as a matter of law, that both the plaintiffs and the defendant, the railway company, had an equal right to cross the street at the point where the accident happened, and that the law imposes upon both parties the duty of using reasonable and prudent precaution to avoid accident and danger; and, while it was incumbent upon the railway company to run its train on the occasion referred to, and to give the required signal by ringing the bell for —— rods before reaching the crossing, it was also the duty of the plaintiffs to look out for the approach of that train, and to observe all reasonable precautions before attempting to cross the railway track.¹⁷

The jury are instructed that the law did not require the exercise of extraordinary care by deceased, but only required ordinary care, such as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances.¹⁸

§ 4401(4). *Kentucky*

The court instructs the jury that in using the railroad and street crossing, mentioned in the evidence, both parties were required to exercise the same degree of care; that it was the duty of the plaintiff to use such care as may usually be expected of a sober person of ordinary prudence under like circumstances, to learn of the approach of the train, and to keep out of its way; and, if he failed to exercise such care, and but for this would not have been struck, the defendant is not liable, although there was also a want of proper care on its part as set out in instruction No. ——.¹⁹

The court instructs the jury that it was the duty of the dece-

¹⁵ *Memphis & C. R. Co. v. Martin*, 23 So. 231, 117 Ala. 367.

¹⁶ *Chicago & A. R. Co. v. Pearson*, 56 N. E. 633, 184 Ill. 386.

¹⁷ *Chicago & N. W. Ry. Co. v. Hatch*, 79 Ill. 137.

¹⁸ *Chicago, & A. R. Co. v. Louderback*, 125 Ill. App. 323.

¹⁹ *Chesapeake & O. Ry. Co. v. Hogg*, 197 S. W. 840, 177 Ky. 425.

dent, ———, in approaching the tracks of the defendant railway company, and in attempting to cross the same, to use such care as may be usually expected of an ordinarily prudent person, under like or similar circumstances, to learn of the approach of the train and to keep out of its way; and if they believe from the evidence that the said ——— failed to exercise such care for his own safety, and but for such failure, if any, upon his own part, he would not have been injured, then the law is for the defendants, and the jury should so find even though they may believe from the evidence that the defendants or its employés were negligent as set out in instruction No. ———.²⁰

The court instructs the jury that it was the duty of the deceased, on approaching the crossing, to use such care as may be usually expected of an ordinarily prudent person, to learn of the approach of the train and keep out of its way; that, if the crossing was especially dangerous, it was incumbent on her to exercise increased care, commensurate with the danger; and if you believe from the evidence that she failed to exercise such care, and but for this would not have been injured, then the law is for the defendant, and you should so find, even though you may believe from the evidence that the defendant, or its employés were negligent as set out in instruction No. ———.²¹

The court instructs the jury that "ordinary care," as used in these instructions, is that degree of care which a person of ordinary prudence would exercise for his or her own safety under the same or similar circumstances.²²

You are instructed that, if the decedent was approaching the crossing in question, it was his duty to exercise such care as persons of ordinary prudence usually exercise under similar circumstances to avoid being struck by any train that might be approaching; and if the jury believe from the evidence that he either knew, or, by the exercise of reasonable and ordinary care, could have known of the train's approach, and notwithstanding this went upon the crossing, and was in consequence thereof struck by the train, and that but for such conduct the accident would not have occurred, he was guilty of contributory neglect, and the defendant is not liable, even if the jury should also believe that the persons in charge of the train failed to give sufficient warning of its approach.²³

²⁰ *Chesapeake & O. Ry. Co. v. Warnock's Adm'r*, 150 S. W. 29, 150 Ky. 74.

²¹ *Louisville & N. R. Co. v. Engleman's Adm'r*, 141 S. W. 374, 146 Ky. 19.

²² *Louisville & N. R. Co. v. Engleman's Adm'r*, 141 S. W. 374, 146 Ky. 19.

²³ *Louisville & N. R. Co. v. Ueltsch's Ex'rs*, 97 S. W. 14, 29 Ky. Law Rep. 1136.

§ 4401(5). Missouri

You are instructed that negligence on the part of the deceased which will prevent the plaintiff recovering in this action must be such as directly contributed to his injury, and consists of the want of ordinary care. Ordinary care means that degree of care which may be reasonably expected of ordinarily prudent persons in the situation of plaintiff's husband at and just before the time the accident occurred, and, in determining whether the deceased was using such care, you should take into consideration all the circumstances surrounding him at the time.²⁴

§ 4401(6). New York

The jury are instructed that if the deceased approached the crossing, knowing the position of the railroad, and that trains were frequently run thereon at such a rate of speed that he was unable to stop his horse before actually getting upon the track, and that speed contributed to cause the collision, the plaintiff cannot recover.²⁵

§ 4401(7). Oklahoma

You are instructed that at a point where a railroad crosses a street or highway a railroad company and a traveler upon such street or highway are each required to exercise the same degree of care; the railroad to avoid striking the traveler; and the traveler to avoid placing himself in a position where he may be struck by a train. The law provides that the care required of each must be commensurate with the danger or risk involved in using the particular crossing. As between the traveler on the street or highway and the train on the railway, the train has the right of way over a crossing as against the traveler. It is therefore the duty of the traveler approaching a crossing to stop, if a train is approaching the crossing in plain view and near the crossing, until the train has passed, unless it reasonably appears that he can with safety cross the railroad before the train reaches the crossing. With reference to whether the plaintiff, through its agent and driver, ———, was guilty of contributory negligence, you must bear in mind that the law required of it the same degree of care and prudence for the safety of its property that it required the railroad company to exercise to avoid the accident. No matter how negligent the railroad company may have been in running the train in question, if the plaintiff's agent and driver, ———, failed to look for the approaching train at a point where, if he had looked, he could have seen it in time to have avoided the accident,

²⁴ *Weller v. Chicago, M. & St. P. Ry. Co.*, 64 S. W. 141, 164 Mo. 180, 86 Am. St. Rep. 592.

²⁵ *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.

or if he looked, and failed to see it when he ought to have seen it, by proper vigilance, and if you find from the evidence that such omission was negligent, then you may find that it brought the accident upon itself, and is not entitled to recover. You are further instructed that every person of ordinary intelligence is bound to know that a crossing of a railroad track over a public highway, where trains are frequently passing, is a place of more than ordinary danger, and it becomes his legal duty to use corresponding care and caution to avoid accidents, and, while it is true that the public have a right, to be upon a public highway for the purpose of crossing over such tracks, it is the duty of all persons crossing such tracks to do so with reasonable dispatch. You are further instructed that, if you find from the evidence that the plaintiff's driver, ———, was familiar with this crossing and its danger, that he frequently used it, and knew how to act in using it to protect himself, and that under the special circumstances you find that he failed to act as a prudent and cautious man should have acted from beginning to end, or that he omitted some precaution that a prudent man ought to have taken, as a result of which the accident happened, and without which the accident would not have happened, then plaintiff cannot recover. You are further instructed that, if you find from the evidence that the negligence of the employés of the defendant, if negligence has been shown on defendant's part, and that of the plaintiff, if negligence has been shown on plaintiff's part, were concurrent and continued down to the very moment the accident happened, then and in that event the defendant would not be liable, and plaintiff cannot recover herein.²⁶

§ 4401(8). Texas

The jury are instructed that the fault or negligence on the part of plaintiff which would preclude him from recovery, if there was negligence both upon his part and upon the part of the company, its agents or employés, is not the least degree of fault or negligence, but it must be such a degree as to amount to a want of ordinary care on his part, under all the circumstances, at the time of the injury.²⁷

§ 4401(9). Virginia

The court further instructs the jury that it was the duty of the decedent, ———, on approaching the said crossing and before attempting to pass over the same, to exercise ordinary care and caution in his movements and to use his senses of seeing and hearing, to ascertain whether or not a train of the defendant was approaching the said crossing in sufficiently close proximity thereto to en-

²⁶ St. Louis & S. F. R. Co. v. Model Laundry, 141 P. 970, 42 Okl. 501.

²⁷ Texas & N. O. Ry. Co. v. Carr (Civ. App.) 42 S. W. 126.

danger him while crossing over; and if he ascertained, or by the exercise of ordinary care could have ascertained, that it was in sufficiently close proximity to endanger him, it was his duty not to undertake to cross over until the train had passed; and a failure to discharge these duties, or either of them, would be negligence.²⁸

The court instructs the jury that ordinary care does not require one absolutely to refrain from exposing himself to danger. It does require, however, such watchfulness and precaution to avoid coming in contact with danger as a person of ordinary prudence would use under like circumstances, in view of the danger to be avoided.²⁹

§ 4402. Duty to stop, look, and listen

§ 4402(1). United States

The jury are instructed that, if they believe that the plaintiff could have seen the approaching engine if he had looked, and yet did not do so, or if he did look, and yet did not see the engine, when it was plainly visible, then, in either of such cases, he was guilty of contributory negligence, and the verdict must be for the defendant.³⁰

§ 4402(2). Arizona

The jury are instructed that, even if you find it to be true that the decedent did not stop, look, and listen before going upon the railroad crossing, such omission did not in itself make him guilty of contributory negligence as a matter of law. The test is rather whether, under all the circumstances disclosed, he exercised ordinary care for his own safety.³¹

§ 4402(3). California

The jury are instructed that the sole purpose of signals at crossings or on trains, such as the ringing of bells or the sounding of whistles or the presence of lights or of the presence of gates or of flagmen or of the stationing of employes at any particular portion of the track or train, so far as the same relates to persons approaching a railroad crossing for the purpose of crossing the same, is to warn such person of the presence of a railroad track and of an approaching train. And the jury are instructed in this connection that if they believe from the evidence that, even if defendant was negligent in failing to provide any or all of the foregoing

²⁸ *Southern Ry. Co. v. Vaughan's Adm'r*, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

²⁹ *Southern Ry. Co. v. Vaughan's Adm'r*, 88 S. E. 305, 118 Va. 692, L.

R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

³⁰ *Owens v. Pennsylvania R. Co. (C. C., Pa.)* 41 F. 187.

³¹ *Davis v. Boggs*, 199 P. 116.

modes of warning at any of the times mentioned in the complaint herein to ——— while she was approaching defendant's track on ——— street for the purpose of crossing the same, still if you further believe from the evidence that at any time while ——— was on ——— street approaching said track, and while she was still in a position of safety, she could by listening have heard defendant's approaching train, or by looking have seen it, and without so doing attempted to cross defendant's track and was injured, then your verdict must be for the defendant.³²

§ 4402(4). Delaware

You are instructed that if a traveler, who knows, or by the reasonable use of his senses might know, of the presence of a railroad crossing, drives up to and upon the same, not only without looking, but without listening to ascertain if any cars are approaching, and a collision and injury or death occurs to him from a passing train, which would have been prevented had the traveler exercised the proper and ordinary prudence, care and caution mentioned, such traveler would be guilty of contributory negligence, and recovery could not be had from the railroad company for such injury or death.³³

You are instructed that the law regards a railroad crossing as a place of danger. The very presence of such a crossing is notice to the person, approaching or attempting to cross it, of the danger of colliding with a passing engine or train. And because of the danger, there is imposed upon such person the duty of reasonable care and caution, and the reasonable and ordinary use and exercise of his senses of sight and hearing for his own and others' safety and protection; and he is required, at least, to look and listen for an approaching engine or train before venturing to cross the track. And if, as it has been said, he fails to exercise such ordinary care, whatever danger he could thereby have discovered and avoided, he incurs the peril of, if he proceeds, and for an injury arising under such fault he is left without remedy.³⁴

§ 4402(5). Illinois

The court instructs the jury that, if you believe from the evidence that ordinary care on the part of ——— for his own safety required him, before stepping upon the track where he was fatally injured, at the time and place in question and under all the circumstances in evidence, to look for the purpose of ascertaining whether a train was approaching along said track and not to

³² *Matteson v. Southern Pac. Co.*, 92 P. 101, 6 Cal. App. 318.

³³ *Nailor v. Maryland, etc., R. Co.*, 97 A. 418, 6 Boyce, 145.

³⁴ *Trimble v. Philadelphia, B. & W. R. Co.*, 89 A. 370, 4 Boyce, 519.

advance upon said track without so looking; and if you believe, from the evidence, that said ———, if he had looked, could by the exercise of ordinary care have ascertained the approach of said train along said track in time to have avoided injury; and if you believe from the evidence that said ——— did not so look to ascertain the approach of said train, and that he was struck and killed in consequence and because of such failure, if he did so fail to look and ascertain—in such case the court instructs you to find the defendant not guilty.³⁵

The jury are instructed that every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of neglect unless he approaches it as if it were dangerous. If ———, the driver of the team in question, knew the crossing where the accident complained of occurred was a dangerous one, he was bound to know that a train might be approaching; and if he did not look or listen to ascertain if one was coming, but, on the contrary, drove directly on the track, and the accident resulted, he was guilty of such negligence as precludes the plaintiffs from recovering in this case, unless the plaintiffs have gone further and proven to the satisfaction of the jury that the railway company upon such occasion was guilty of gross negligence.³⁶

The jury are instructed that it is not the exercise of ordinary care and prudence for a person to drive with a horse directly onto a railroad crossing, known to him at the time to be dangerous, without making an effort, by stopping or listening, or otherwise, to ascertain whether a train is approaching, or whether it is safe to drive on the track with his team.³⁷

The jury are instructed that it is the duty of every person, when going upon or across a railroad track, to look in each direction to see if cars are approaching, and a failure to do so amounts to a want of ordinary care.³⁸

The jury are instructed that, if the jury believe from the evidence that under all the facts and circumstances surrounding said ———, shown by the evidence, when he was driving along the said highway mentioned by the witnesses, approaching in near proximity to the crossing of said highway and said railroad, ordinary care and caution required that he should stop and look and listen, to ascertain whether any car was approaching said crossing on said railroad within such distance as to make it dangerous or unsafe to drive upon the said railroad at such crossing, then it was

³⁵ *Fowler v. Chicago & E. I. R. Co.*, 85 N. E. 298, 234 Ill. 619.

³⁶ *Chicago & N. W. Ry. Co. v. Hatch*, 79 Ill. 137.

³⁷ *Chicago & N. W. Ry. Co. v. Hatch*, 79 Ill. 137.

³⁸ *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 567.

the duty of the said ——— to stop, look, and listen before driving upon the said railroad at said crossing; and if the jury believe from the evidence that the said ——— neglected or failed to do so, and that, if he had so stopped, looked, and listened, he would have discovered or ascertained the approach of said car in time sufficient to have avoided the injury, then the plaintiff cannot recover in this case.³⁹

§ 4402(6). *Indiana*

The court instructs the jury that it was the duty of the plaintiff, while driving on such public highway, when approaching the railroad crossing, to realize and have in mind that he was approaching a place of danger, and to be on the alert and use his sense of sight, look both ways, and use his sense of hearing and listen, to ascertain for himself whether or not a train or locomotive was approaching, and whether or not he could safely cross the track. If his view was obstructed, in whole or in part, then it was his duty to all the more carefully use his senses of sight and hearing, and, if necessary in the exercise of ordinary care, to stop, look both ways, and listen for approaching locomotives or trains, in order to determine whether he could safely cross the track. In proportion as the danger was increased by the view being obstructed, in that proportion should he have increased his care in attempting to pass upon or over the track. It was his duty to use the care and caution commensurate with the known danger surrounding him as he approached the crossing, and to take all reasonable precaution to avoid injury to his automobile by passing locomotives and trains. It cannot be said as a matter of law that in approaching the crossing in question he should have looked and listened for approaching locomotives and trains at any particular time, or that he should have looked in one direction at a particular time, and in another direction at a particular time. He was required to look and listen at such times and at such places and in such directions as a person exercising ordinary prudence would have done under similar circumstances.⁴⁰

You are instructed that the plaintiff was bound to use ordinary care, under the circumstances shown to have existed in this case. He was bound to approach the railroad carefully, and to look and listen for the approach of trains; and if the evidence shows that he did this with that degree of care that an ordinarily prudent person would have exercised under all the circumstances, and was unable to hear or see the train approaching until it was too late

³⁹ *Ohlwein v. Osborne*, 176 Ill. App. 324.

⁴⁰ *Lake Erie & W. R. Co. v. Sanders* (App.) 125 N. E. 793.

to avoid the collision, then he was not guilty of contributory negligence.⁴¹

You are instructed that there is no law requiring a man, in the lawful use of a public street approaching a railroad crossing, to stop his vehicle before crossing, but he is bound to use such care, under all the circumstances, as a man of ordinary care must have exercised under like circumstances; and, if you find that ——— exercised such care at the time of and preceding the injury, he was not guilty of contributory negligence.⁴²

§ 4402(7). Iowa

The jury are instructed that, if you find from the evidence that plaintiff could have seen the approaching train by looking in the direction of it before he reached the crossing, and in time to have avoided the collision by ordinary care, and omitted to do so, such omission was negligence, and you should find for defendant.⁴³

The jury are instructed that, if you find from the evidence that the plaintiff knowing the position of the railroad track, and that trains were run frequently thereon, approached the crossing without looking in the direction from which the train was coming, and without stopping his team to listen for an approaching train, until he was so close that he was unable to stop his horses before getting upon the track, and in consequence thereof the collision occurred, the plaintiff cannot recover.⁴⁴

§ 4402(8). Maryland

The jury are instructed that, if the jury shall believe from the evidence that the equitable plaintiff, G., was well acquainted with the crossing where the injury complained of happened, and the approaches thereto, and their surroundings, and that a person driving towards said crossing on the public road from ———, after getting to the city side of ——— street, can hear trains approaching from ——— to said crossing until he reaches the crossing, and from that point, till he crosses ——— street has a clear view of trains so approaching after they reach ——— street, and that from ——— street to the crossing, a person so driving can, except at a few points, see a train so approaching with sufficient distinctness to be aware that something is approaching on the railroad track from that direction, and that if G., on the day in question, had looked and listened, he would have been aware of the approach of the train in time to avoid the danger, then the plain-

⁴¹ *Pennsylvania Co. v. Horton*, 31 N. E. 45, 132 Ind. 189.

⁴² *Pennsylvania Co. v. Horton*, 31 N. E. 45, 132 Ind. 189.

⁴³ *Haines v. Illinois Cent. R. Co.*, 41 Iowa, 227.

⁴⁴ *Haines v. Illinois Cent. R. Co.*, 41 Iowa, 227.

tiff is not entitled to recover in this action, and the verdict of the jury must be for the defendant.⁴⁶

§ 4402(9). *Michigan*

You are instructed that every person is supposed to use his senses, both of sight and hearing, in self-protection whenever there may be reasonable cause to apprehend danger. He must do all that an ordinarily prudent man ought to do or might be expected to do in any given circumstances. Thus a railroad track is, in itself, a warning of danger, and every person should stop, look, and listen before attempting to cross. Failure to do this is held to be negligence in and of itself, as a matter of law. So strongly has this rule been enforced that, even where there is a view of the track only for a short distance, and the approach of the train could have been seen by stopping, looking, and listening before actually reaching the track, the traveler in the highway has been held guilty of contributory negligence, as a matter of law, when injured in such a case, unless he is misled by flagman, trainmen, or otherwise.⁴⁷

The court instructs the jury that, if you find from the evidence that when the deceased and his companion, Mr. W., had reached a point in the highway which was somewhere in the neighborhood of _____ feet, or _____ or _____ rods, from the track, as estimated by various witnesses, he stopped his horse and looked and listened for the train, then started up again, and, as he started, Mr. W. looked out of the glass at the back of the buggy, where he could only see a few rods of the track, and the parties then passed onto the track, without any further looking in the direction of the approaching train, or any further attempt to find whether there was an approaching train, then such acts constituted contributory negligence, and plaintiffs could not recover.⁴⁸

The jury are instructed that the track itself is a warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and, if either cannot be rendered available, the obligation to use the other is the stronger to ascertain before attempting to cross it whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly and carelessly upon the track without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence.⁴⁹

⁴⁶ *Philadelphia, W. & B. R. Co. v. State*, 8 A. 272, 66 Md. 501.

⁴⁷ *Ommen v. Grand Trunk Western Ry. Co.*, 169 N. W. 914, 204 Mich. 392.

⁴⁸ *Proper v. Lake Shore & M. S. Ry. Co.*, 99 N. W. 283, 136 Mich. 352.

⁴⁹ *Thomas v. Chicago & G. T. Ry. Co.*, 49 N. W. 547, 86 Mich. 496.

§ 4402(10). *Missouri*

The jury are instructed that it was the duty of plaintiff, while approaching said railroad track, and before driving upon the same, to use his eyes and ears to look and listen for an approaching train; and if the jury believe from the evidence that plaintiff, if he had so looked and listened, could have thereby seen or heard the train in time to have avoided collision with it, and the injuries complained of, then your verdict must be for the defendant, notwithstanding the jury may further believe from the evidence that defendant's servants failed to give signals by bell or whistle of the train's approach.⁵⁰

§ 4402(11). *New York*

The jury are instructed that simply looking in one direction and making one glance as a man approaches a place of danger is not sufficient. This is especially so with the plaintiff in this case, because he was familiar with the surroundings. The duty was continuous upon him, when he started to approach that crossing, to be alert and vigilant at all times; that is, a man, when he approaches a crossing, simply by a casual glance, does not fulfill the duty of vigilance, but when he is approaching a place of danger he must be continually alert to guard against the danger which he apprehends is liable to come upon him. That duty was insistent and urgent upon this plaintiff at all the times when he was approaching this crossing. I leave it to you, as a question of fact, to determine whether he fulfilled that duty, and you are to consider it as careful, sensible men. Did he fulfill the duty that was insistent and present with him at all times of being continually vigilant after he looked towards that train towards the west, and when he approached this crossing? Should he have looked in the other direction again? Was his failure to do so negligence? That is a circumstance for you to take into consideration.*

§ 4402(12). *Pennsylvania*

You are instructed that, if the jury believe from the testimony that the plaintiff neglected to stop, look, and listen from a point at which she could see the railroad tracks and approach of engine east from the railroad crossing, and that she proceeded in her automobile in face of manifest danger until the front wheels of her automobile crossed the north rail of the west-bound track, where it was stopped still, and in which position it remained until struck by defendant's engine, she was guilty of negligence and cannot recover.⁵¹

⁵⁰ *Kenney v. Hannibal & St. J. R. Co.*, 15 S. W. 983, 105 Mo. 270.

* *Manley v. New York Cent. & H.*

R. R. Co., 57 N. Y. S. 182, 39 App. Div. 144.

⁵¹ *Knepp v. Baltimore & O. R. Co.*, 105 A. 636, 262 Pa. 421.

§ 4402(13). *Tennessee*

The court instructs the jury that, in order to help you determine whether and to what extent there was any such contributory negligence, I charge you that it is the duty of a person about to cross over railroad tracks to be mindful of the fact that trains do run and pass upon such tracks; and hence it is their duty generally, to look and listen for an approaching or passing train, and, if necessary, in order that they may be in the use and employment of ordinary care, to stop. Their duty is both to look and listen to the extent of freeing themselves from negligence, and, the less opportunity there is to do one of them, the greater the necessity to do the other. How far he is to go in exercising his faculties of looking and listening is a question for the jury to determine under all of the evidence relating to the situation and condition of the premises, as to obscuring of the view, proximity of the locomotive in question to a foregoing train, or preceding train, and the other facts and circumstances in the case; the rule being this: One must take notice that trains move upon the track, and must exercise reasonable care and caution, as a reasonably prudent man would employ or use under similar circumstances, to protect him from harm or injury.⁵²

§ 4402(14). *Texas*

The jury are instructed that, if you believe from the evidence that on the occasion in question the defendant, ———, could have ascertained the approach of defendant's train to said crossing in time to have avoided the accident, by listening for said train, and that he did not listen, or by looking for said train, and that he did not look, or by both looking and listening, and that he did not look and listen, and that in failing to so look and listen, if he did so fail, he failed to use that degree of care that an ordinarily prudent person would have used under the same or similar circumstances, then you will find for the defendant on account of the death of ———, unless you find for the plaintiff on the issue of discovered peril.⁵³

The court instructs the jury that, if you shall believe that when the train approached the crossing the bell was rung or the whistle was blown at such time and place as was reasonably calculated to warn persons using or about to use said crossing, and that by listening the deceased could have heard the same in time to have avoided collision with said train, or if you believe that by looking he could have seen said train in time to have avoided such collision, and he failed to do either (if you find the facts so to be), and

⁵² *Tennessee Cent. R. Co. v. Morgan*, 175 S. W. 1148, 132 Tenn. 1.

⁵³ *Texas & N. O. R. Co. v. Pearson* (Civ.App.) 224 S. W. 708.

that by reason thereof he was struck and thereby killed, and you further believe that by his failure (if any) to so look and listen he was guilty of contributory negligence, then I charge you that your verdict should be for the defendant company, even though you should find that defendant was guilty of negligence under paragraph — of this charge.⁵⁴

You are instructed that if you believe from the evidence that plaintiff went upon defendant's railroad track, and walked thereon, and failed to look and listen for an approaching engine, and that, by failing to look and listen for an approaching engine, he failed to use such care as a reasonably prudent man would have used under the circumstances, and that such failure contributed to the injuries, if any, he received, you will find for the defendant, although you may believe from the evidence that the defendant was itself guilty of negligence.⁵⁵

§ 4402(15). Utah

The court instructs the jury that a person, before attempting to cross a railroad track, and when an approaching train is in full view, is chargeable with seeing what he could have seen if he had looked, and with hearing what he would have heard if he had listened. In other words, where he apparently looks and listens, but does not see or hear the approaching train, it will be presumed that he did not look or listen at all, or, if he did, that he did not heed what he saw or heard.⁵⁶

§ 4402(16). Virginia

The court instructs the jury that it is not the duty of the engineer of a railroad engine or train to stop when he sees a person standing near the track in a place of safety. He has the right to assume that the person will not go upon the track in front of a moving engine or train in plain view but will remain in a place of safety, and the duty of the engineer to stop his train or slow down does not arise until the engineer sees that the person is about to go upon the track in front of his engine or train, and if the jury believe from the evidence that — was standing near the track in a place of safety, and then went upon the track in front of the engine and train of the — Company, the approach of which could have been seen by him if he had looked in that direction, and so near thereto that it could not be stopped in time to avoid injuring him, then the said — was guilty of such negligence on his part as bars a recovery in this action, and they should find for the defendant in this suit.⁵⁷

⁵⁴ *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

⁵⁵ *Texas Midland R. R. v. Tidwell* (Civ. App.) 49 S. W. 641.

⁵⁶ *Lawrence v. Denver & R. G. R. Co.*, 174 P. 817, 52 Utah, 414.

⁵⁷ *Southern Ry. Co. v. Abbe's Adm'r*, 98 S. E. 31, 124 Va. 379.

The court instructs the jury that, though they may believe from the evidence that the defendant company did not have the gate on the west side of the ——— avenue crossing lowered on the occasion of the approach of the engine and tender at the time of the accident, when plaintiff's decedent went upon said crossing, yet the said failure on the part of the defendant company did not relieve the plaintiff's decedent, ———, from exercising care and caution in attempting to go across the railroad tracks at said crossing, that it was the duty of plaintiff's decedent, ———, before attempting to cross the tracks at said crossing, to look in both directions and to listen for approaching trains, and that, if she did not do this, but went upon the tracks without looking and listening, in such a position as to be struck by the tender of engine ———, then she was guilty of such negligence as precludes any recovery.⁵⁸

The court instructs the jury that, though they may believe from the evidence that an ordinance of the city of ——— required the defendant to have a gate at the ——— street crossing, with a man in charge of the same, and to lower said gate whenever a train attempted to cross said street, and though they may believe from the evidence that the defendant company failed to provide said gate keeper at the crossing in question, or to have said gate lowered on the occasion of the accident, and though they may believe that the defendant company failed to have at the front of the train as it approached said crossing a light, or to signal its approach by bell or otherwise, yet the said failures on the part of the company did not relieve the plaintiff's intestate, ———, from exercising care and caution in attempting to avoid injury from the approaching train; that it was the duty of said ———, before attempting to cross said track, or while standing on or near said track, to look in both directions, and to listen for approaching trains; and that if said ——— stepped upon said track without looking and listening, or stood in such close proximity to said track, without looking and listening as to be struck by said train, then said ——— was guilty of such contributory negligence as precludes any recovery, and the jury must therefore find for the defendant.⁵⁹

The jury are instructed that, while it is the duty of the defendant receivers to give notice of the approach of its trains to a crossing, by the ringing of its bell, the blowing of the whistle, or otherwise, and that its failure to give such notice is negligence, that there are also reciprocal duties imposed on the plaintiff's intestate; that a traveler cannot go upon the track, even at a public crossing, without exercising ordinary care and caution; that the

⁵⁸ *Norfolk & W. Ry. Co. v. Sink's Ex'r*, 87 S. E. 740, 118 Va. 439.

⁵⁹ *Rangley's Adm'r v. Southern Ry. Co.*, 30 S. E. 386, 95 Va. 715.

track itself is a proclamation of danger, and that it is the duty of any one going upon it to use his eyes and ears. He should both look in either direction from which the train could come, and listen to ascertain if it is approaching, and, if his faculties warn him of the near approach of a train, it is his duty to keep off the track; and that if a traveler fails to so look and listen, as duty requires of him, and attempts to cross the track in front of a moving train, and is caught before he can get across, and killed, his own act and his own negligence so contribute to the injury that a recovery therefor cannot be sustained, and the jury must find for the defendant.⁶⁰

The jury are instructed that, if they believe from the evidence that the said engine approached said crossing without blowing a whistle for said crossing or ringing its bell, and if the gong at the said crossing failed to ring, and that such conduct was negligence on the part of the railroad company, and further believe that the said ——— came out of the cut, towards the crossing, at a fast rate of speed, on a bicycle, that he did not look nor listen, and that the said bicycle and the said locomotive came into a collision at said crossing, then the said ——— was guilty of such contributory negligence as to prevent recovery, and a verdict must be found for the defendant receivers, unless after the defendants saw, or could, by the use of ordinary care, have seen, his peril, they could afterwards, by the use of ordinary care, have prevented the accident.⁶¹

§ 4403. Same—Place of looking and listening

You are instructed that it is not sufficient to enable the plaintiff to recover, if it appears that he stopped at a distance of ——— feet from the crossing, and being then unable, on account of a snow squall, to see the train which he had heard whistle started his horses, and drove at a trot onto the track, without again looking for the train. If, under such circumstances, he drove onto the track, and injury ensued, he was guilty of contributory negligence, and cannot recover, even though the jury find that the defendant was also negligent in not giving proper signals for the crossing.⁶²

The jury are instructed that it was the duty of the plaintiff, after his attention had been called to an approaching train, to look and listen for such train at such distance from the crossing as to enable him to ascertain whether or not he could safely pass over the same without collision, and that, if they find that he did not so look

⁶⁰ *Kimball v. Friend's Adm'x*, 27 S. E. 901, 95 Va. 125.

⁶¹ *Kimball v. Friend's Adm'x*, 27 S. E. 901, 95 Va. 125.

⁶² *Grand Trunk Ry. Co. of Canada v. Cobleigh* (C. C. A., Vt.) 78 F. 784, 24 C. C. A. 342.

and listen, he would be guilty of such contributory negligence as would prevent his recovery in this action, provided that such want of care contributed to produce the injury.⁶³

You are instructed that it is the duty of a person about to cross the tracks of a railway to stop, look, and listen, before attempting to do so, at a point where, without danger to himself, he can have the best view of the track; and, if the jury believe that the plaintiff did not so stop and listen, he was guilty of contributory negligence, and cannot recover in this action.⁶⁴

§ 4404. Same—Duty to look both ways

The jury are instructed that, if you believe from the evidence that there was a space of from ——— to ——— feet next to the crossing in which the plaintiff could, by looking up the track, have a plain and unobstructed view of the train that struck him, and if you further believe from the evidence that he looked to the ——— and did not look at all in the direction of the approaching train that struck him, and that in so doing, or omitting to look, he failed to use reasonable care and caution for his own safety and protection, you should find defendant not guilty.⁶⁵

§ 4405. Same—Right to give greater attention in one direction than another

You are instructed that while it is the duty of a person about to cross a railway track to look both up and down the track, and listen for trains from each direction, yet if it appears to him before crossing, as a reasonably prudent person, under the surrounding circumstances, that greater danger is to be apprehended from one end of the track than the other, he may give more attention to that end of the track from which he as a reasonably prudent person under all the circumstances apprehends the greater danger.⁶⁶

§ 4406. Same—Circumstances excusing failure to look and listen

The court instructs the jury that, although they may believe from the evidence that plaintiff may have known, as a boy ——— or ——— years of age, that trains were being operated on the track of the defendant over the crossing in question, yet, if the jury believe from the evidence that from the time he was about ——— years of age until about a year before the accident plaintiff lived in ———, and did not have any knowledge in reference to said railroad track during said interval, that during the period

⁶³ *Grand Trunk Ry. Co. of Canada v. Cobleigh* (C. C. A., Vt.) 78 F. 784, 24 C. C. A. 342.

⁶⁴ *Owens v. Pennsylvania R. Co.* (C. C., Pa.) 41 F. 187.

⁶⁵ *Ravatt v. Cleveland, C., O. & St. L. R. Co.*, 128 Ill. App. 220.

⁶⁶ *St. Louis, I. M. & S. Ry. Co. v. Tomlinson*, 94 S. W. 613, 78 Ark. 251.

of about one year preceding the accident the plaintiff passed over said crossing about ——— or ——— times, and that at each time he crossed it during said latter period up to the time of the accident the track was covered with sand and dirt, the rails appeared to be rusty, that the road was a public highway and the tracks of the defendant crossed it at the same level, and that the railroad company did not maintain at said crossing the signal board described in instruction No. ———, and that the conditions within his knowledge were such as to lead a reasonably prudent man to believe that trains were no longer run over said track, and that plaintiff did so believe, then the jury are instructed that plaintiff was not guilty of contributory negligence in going upon the track in question without looking and listening for a train or taking any precaution for his safety, unless the jury believe from the evidence that he actually heard any warning signal that may have been given in time to avoid the accident, or that he had actual knowledge of the approach of the said train, in time to have escaped it.⁶⁷

As one of the elements in determining whether plaintiff knew or ought to have known that trains were being run on said track at the time of the accident, the jury are instructed that he had the right, if he were then without knowledge such as would inform a reasonably prudent man to the contrary, to assume that the railroad company would obey the statute law of Virginia, and place a signal board such as is described in instruction No. ———, at said crossing, if it were using said track for the operation of trains thereon, if the jury shall believe from the evidence that the road was a public highway and crossed the tracks of the defendant at the same level.⁶⁸

§ 4407. Same—Running away of team as excuse for failure to look and listen

The court charges the jury that if you believe from the evidence in this case that the plaintiff's team ran away and became unmanageable some distance before he reached the railroad crossing where he received his injuries, and on account of this fact, while his team was running away and was unmanageable, he could not stop his team and listen for the train, yet if you further believe that an ordinarily prudent man, under like circumstances and conditions, would have stopped his team and looked or listened for the train at some point before the point where the team ran away and became unmanageable, then the plaintiff was guilty of negligence in

⁶⁷ Atlantic Coast Line R. Co. v. Church, 92 S. E. 905, 120 Va. 725.

⁶⁸ Atlantic Coast Line R. Co. v. Church, 92 S. E. 905, 120 Va. 725.

not stopping and listening for such train at such point, and cannot recover in this suit.⁶⁹

§ 4408. Failure to heed customary acts of flagman indicating that train was coming

The jury are instructed that, if the jury shall find from the evidence that the equitable plaintiff, G., was in the habit of driving along the ——— turnpike road, and across the line of the ——— Railroad, where the same crosses the turnpike, at least once or twice a week, and that there was always a flagman on duty at the crossing to warn travelers on the turnpike of approaching trains, and that it was the habit of the flagman, when a train was approaching, to leave his box and go to a point in the turnpike just east of the railroad track, and from there to give warning of the approach of such train, and that said G. knew that such was the habit of the flagman, and that just before the accident mentioned in this case happened, and when said G. was still so far away from the crossing that he could have stopped his team with perfect safety until the train which struck him had gone by (if the jury shall so find), said G. saw the flagman come out from his box and go to such position east of the track, then this was in itself a warning of danger to said G., and it was his duty to stop until he had reasonable ground to suppose that it was safe for him to cross, and, if the jury believe that had he done so, the injury complained of would not have happened, and shall further find that he did not do so, then the plaintiff is not entitled to recover in this action, and the verdict of the jury must be for the defendants.⁷⁰

§ 4409. Failure to heed warning of flagman

The jury are instructed that, if the jury shall believe from the evidence that, when the equitable plaintiff was some ——— feet away from the crossing, the flagman warned him of the approach of the train, and that he thereupon stopped his team, and that he afterwards started his team toward the crossing, and that, when he had got within about ——— or ——— feet of the crossing, the flagman again warned him, and he again stopped, and that afterwards he started again and attempted to drive across the tracks, and in so doing his team was struck by the train, then the plaintiff is not entitled to recover in this action, and the verdict of the jury must be for the defendants.⁷¹

⁶⁹ Southern Ry. Co. v. Hobbs, 43 So. 844, 151 Ala. 335.

⁷⁰ Philadelphia, Wilmington & B. R. Co. v. State, 8 A. 272, 66 Md. 501.

⁷¹ Philadelphia, Wilmington & B. R. Co. v. State, 8 A. 272, 66 Md. 501.

§ 4410. Duty of motorist to ascertain location of crossing

You are instructed that, if the operator of an automobile along a public highway knows or has reason to know that the highway crosses a railroad in the immediate vicinity,*without knowing the location of the crossing of the public road and the railroad, he must proceed on his way at a reasonable rate of speed and in a reasonably careful manner, making use of his senses to ascertain the location of the crossing. If under such circumstances he does not proceed along the road as a reasonably prudent man would have done under all the circumstances and a collision occurs between the automobile and a passing train, he would be guilty of contributory negligence.⁷²

§ 4411. Circumstances increasing care required from traveler

The court instructs the jury that it was the duty of the decedent, on approaching the crossing to use such care as may be usually expected of an ordinarily prudent person to learn of the approach of the train and keep out of its way, and if the crossing was especially dangerous, and he knew it, it was incumbent upon him to exercise increased care commensurate with the danger, and if he failed to exercise such care, and but for this would not have been injured, then the law is for the defendant, and the jury should so find, even though they may believe from the evidence that the defendant or its employes were negligent as set out in instruction No. _____.⁷³

§ 4412. Duty to stop, look, and listen as affected by obstruction of view

See, also, ante, § 4402(6).

§ 4412(1). Delaware

You are instructed that if, as a person approaches the crossing, his line of vision is obstructed, he must exercise his senses of sight and hearing; that is, he is bound, at least, to look and listen for approaching trains in time to avoid collision with them, and if he does not look and listen, and for this reason does not see or hear an approaching train until it is too late to avoid a collision, and he is thereby injured, he is guilty of negligence, and cannot recover therefor. When the view at the crossing is obstructed, greater care is necessary than in places where the view is unobstructed.⁷⁴

You are instructed that, if a person drive up to a railway crossing and upon it, not only without at least looking, but without listening to ascertain if any cars are approaching, and a collision

⁷² Nailor v. Maryland, D. & V. Ry. Co. (Del.) 97 A. 418, 6 Boyce, 145.

⁷³ Louisville & N. R. Co. v. Treanor's Adm'r, 200 S. W. 634, 179 Ky. 337.

⁷⁴ Trimble v. Philadelphia, B. & W. R. Co., 89 A. 370, 4 Boyce, 519.

and injury occurs to him from a passing train, which would have been prevented had the person so injured exercised the proper and ordinary prudence, care and caution mentioned, such person would be guilty of contributory negligence, and could not recover from the railroad company for such injury. When the view at the crossing is obstructed, greater care is necessary than in places where the view is unobstructed.⁷⁵

§ 4412(2). Kansas

The jury are instructed that, where the view of the plaintiff on the highway approaching the crossing of the railroad of the defendant is obstructed so that he cannot see an approaching train until within about ——— feet of the track, greater care should be exercised by the plaintiff than if no such obstruction existed; and, in case you find that the view was so obstructed that he could not have seen an approaching train until within about ——— feet of the track, then it would be incumbent upon the plaintiff to use greater care than though there were no obstruction, and he should make a vigilant use of his sense to determine whether there is a present danger in crossing, and the question as to whether he should have stopped and assured himself that there was no danger is one for you to decide. If you find that he should have stopped and made sure that there was no danger in crossing, and that he did not take this precaution, then you are instructed that the plaintiff cannot recover, and that it is your duty to return a verdict in favor of the defendant.⁷⁶

§ 4412(3). Maryland

The jury are instructed that, if the jury shall find from the evidence that G. was well acquainted with the crossing in question, and its surroundings, and that between ——— street and the crossing on the north side of the turnpike road, there is a hedge that somewhat obstructs the view of trains approaching the crossing from ———, to persons driving along the turnpike, but that such persons, by stopping and looking through the hedge, can, except at a few points, distinguish through the same trains approaching from ——— after they leave ———, a point ——— feet away from the crossing, and that if G. had done so he could have seen the train mentioned in this case approaching in time to have avoided the accident, and that he did not do so, then the plaintiff is not entitled to recover in this action, and the verdict of the jury must be for the defendants.⁷⁷

⁷⁵ Trimble v. Philadelphia, B. & W. R. Co., 89 A. 370, 4 Boyce, 519.

⁷⁶ St. Louis & S. F. R. Co. v. Brock, 67 P. 538, 64 Kan. 90.

⁷⁷ Philadelphia, W. & B. R. Co. v. State, 8 A. 272, 66 Md. 501.

§ 4412(4). Michigan

The court instructs the jury that every person is supposed to use his senses, both of sight and hearing, in self-protection whenever there may be reasonable cause to apprehend danger. A person approaching a railroad track, a railroad crossing, must stop, look, and listen, and must use his senses of sight and hearing. If, however, his vision, his view, is obscured by smoke or steam, or both, after stopping and after endeavoring to use his sense of sight, and being unable to do so, he has a right, I say, to rely upon his sense of hearing, but his duty to use his sense of hearing is greater than if he had the full use of his sense of sight. In other words, a man is not absolutely barred from crossing a railroad track because he cannot see, because his vision may be obscured by steam or smoke or both, but, if his vision is obscured so he is unable to see, then his duty to use his other senses is greater; he must exercise more care and more caution in the use of the sense, the use of which is available to him.⁷⁸

§ 4412(5). Pennsylvania

You are instructed that the duty of an automobile driver, approaching a grade railroad crossing where there is restricted vision, to stop, look, and listen, and do so at a time and place where stopping, and where looking, and where listening will be effective, is a positive duty, and failure to do so is negligence per se, and, if he is unable to get a sufficient view from his automobile, then it is his duty to get out of it and go forward on foot to a place where such sufficient view is afforded.⁷⁹

§ 4412(6). Virginia

The court instructs the jury that the duty of an automobile driver approaching tracks where there is restricted or obstructed vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty. And if the jury believe from the evidence in this case that ——— failed in this duty, then he was guilty of such contributory negligence as will prevent a recovery in this action.⁸⁰

The court instructs the jury that, even though they may believe from the evidence that a view of the track on which the defendant's engine was approaching the crossing was partially obstructed by cars left standing on the side tracks, yet that fact did not lessen

⁷⁸ *Ommen v. Grand Trunk Western Ry. Co.*, 169 N. W. 914, 204 Mich. 392.

⁷⁹ *Knepp v. Baltimore & O. R. Co.*, 105 A. 636, 262 Pa. 421.

⁸⁰ *Southern Ry. Co. v. Vaughan's Adm'r*, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

the caution required of the plaintiff in attempting to cross, but, on the contrary, imposed on him a higher degree of caution.⁸¹

§ 4413. Conduct of defendant as affecting care required—Unusual speed

The jury are instructed that the fact that the train was behind time, and was running faster than its usual speed at the crossing, to make up time, did not excuse the plaintiff or her father from exercising the care and caution required of them when the train was on time, and running its usual rate of speed at that crossing.⁸²

§ 4414. Duty to look and listen as affected by failure of defendant to give warning

§ 4414(1). Delaware

You are instructed that one about to cross a railroad track by the public highway, where the liability to collision is great, will be held precluded, by his contributory negligence, from a recovery for an injury, if he drives upon the track without looking for an approaching train, even though the railway company has neglected to sound the alarm which the statute requires of it at such places.⁸³

§ 4414(2). Indiana

The court instructs the jury that the fact that a railroad company maintains warning bells at a railroad crossing and at a time when trains approach such crossing the bells are not rung, or no warning is given, does not excuse a traveler approaching the crossing from exercising diligence for his own safety and looking and listening for trains in all directions from which they might approach to avoid a collision therewith, and if he fails to exercise such diligence, notwithstanding the bells are not ringing, or no warning is given, if by the exercise of diligence in looking and listening he could have ascertained that a train was approaching and avoid a collision therewith, and he fails to do so, he is guilty of negligence and, if injured, cannot recover.⁸⁴

§ 4414(3). Texas

You are instructed that it is the duty under the law of persons approaching a railroad crossing to exercise ordinary care under all the circumstances and surroundings to determine whether or not he may cross with safety. This duty on the part of such persons approaching such railroad crossing must be exercised with-

⁸¹ Atlantic & D. Ry. Co. v. Rieger, 28 S. E. 590, 95 Va. 418.

⁸² Cincinnati, I., St. L. & C. Ry. Co. v. Howard, 24 N. E. 892, 124 Ind. 230, 8 L. R. A. 593, 19 Am. St. Rep. 96.

⁸³ Trimble v. Philadelphia, B. & W. R. Co., 89 A. 370, 4 Boyce, 519.

⁸⁴ Lake Erie & W. R. Co. v. McFarren, 122 N. E. 330, 188 Ind. 113.

out reference to a failure on the part of operatives of the train to perform the duties incumbent upon them, and the failure to exercise such ordinary care is negligence on the part of such person approaching a railroad crossing.⁸⁵

§ 4415. Right to presume that warning will be given of approach of train

The court instructs the jury that, if you believe from the evidence that the plaintiff was at the time of the accident familiar with the railroad and street crossing where the accident occurred, that he knew that there was an alarm bell on a pole near to the railroad at the intersection of the railroad crossing and ——— street, used to give warning to persons passing along ——— street over defendant's tracks, of the approach of locomotives or trains to the crossing, and knew that this bell when sounded was sounded by some person or persons or was sounded automatically as a train or locomotive approached said crossing, then I instruct you that if said bell or gong was not sounded the plaintiff had a right to rely upon the fact that no train or locomotive was coming from either direction over said track close to said crossing.⁸⁶

§ 4416. Right of traveler to rely on signal of flagman

You are instructed that if, because of the distance between where the plaintiff found the flagman acting as such and the track where she was injured, and because there were tracks between the flagman and such track that were so fully protected by gates that they did not need to be flagged, a reasonably prudent person would not have assumed that the flagman was flagging the track at which the plaintiff was injured, then I charge you that the plaintiff should not have assumed that the flagman was flagging such last-named track, and she ought not to have relied, when she came to cross such track, on the signal given by the flagman.⁸⁷

§ 4417. Right to presume that requirements of ordinance as to speed and warnings will be obeyed

§ 4417(1). Indiana

I instruct you that the plaintiff in this cause had a right to presume that the defendant would obey the said ordinance and cause the bell attached to its locomotive to be rung as its locomotive approached the said crossing. I instruct you that the plaintiff had a right to presume that the defendant would obey said ordinance and would not operate its locomotive over its railroad tracks within

⁸⁵ *Beaumont, S. L. & W. Ry. Co. v. Myrick*, (Civ. App.) 208 S. W. 935.

⁸⁶ *Lake Erie & W. R. Co. v. McFarren*, 122 N. E. 330, 188 Ind. 113.

⁸⁷ *Louisville & N. R. Co. v. Stewart*, 29 So. 562, 128 Ala. 313.

the incorporate limits of the city of — at a greater rate of speed than — miles per hour. Whether or not the bell was rung is a question of fact for you to determine; whether or not said locomotive was operated over said railroad tracks within the incorporate limits of the city of — at a greater rate of speed than — miles per hour is a question of fact for you to determine. If you find from the evidence that the bell was not rung, and if you further find from the evidence that said locomotive was operated over the railroad tracks within the incorporate limits of the city of — at a greater rate of speed than — miles per hour, then I instruct you that, in determining the question as to whether or not the plaintiff was exercising reasonable care in approaching the crossing, you may consider that he had a right to presume that a warning would be given him of the approach of the locomotive to the crossing by the ringing of the bell, and that the locomotive approaching the crossing was not being operated at a greater rate of speed than — miles per hour.⁸⁸

The court instructs the jury that, if you find from the evidence that at the time in controversy in this case there was in force an ordinance in the city of —, making it unlawful for a railroad company to run a locomotive engine in such city, at a greater rate of speed than — miles per hour, and if you further find from the evidence that at the time in controversy in this case there was in force an ordinance in the city of —, making it unlawful for a railroad company to run a locomotive engine in such city without ringing the bell during the time in which said locomotive engine was in operation, then I instruct you that the plaintiff had a right to presume and rely upon said presumption that the defendant in running its locomotive engine in the city would not run it in violation of the provisions of the ordinance.⁸⁹

§ 4417(2). Missouri

You are instructed that while it was the duty of — to look and listen before stepping upon the track, yet, if you find from the evidence that she did see the train, then she had the right to presume, unless she knew to the contrary, that the person in charge of said train would run the train at a rate of speed not exceeding — miles per hour, and to act upon said presumption.⁹⁰

§ 4418. Duty to heed results of observation

§ 4418(1). Illinois

The court instructs the jury that, if you believe from the evidence that just before driving upon the defendant's track the de-

⁸⁸ Lake Erie & W. R. Co. v. McFarren, 122 N. E. 330, 188 Ind. 113.

⁸⁹ Lake Erie & W. R. Co. v. McFarren, 122 N. E. 330, 188 Ind. 113.

⁹⁰ Sullivan v. Missouri Pac. Ry. Co., 23 S. W. 149, 117 Mo. 214.

ceased heard the electric bell at the crossing in question, or saw the reflection of the headlight of defendant's car in the street ahead, or would have heard said bell, or seen the reflection of said light, had he been in the exercise of ordinary care, and nevertheless drove onto the track without stopping, then you should find the defendant not guilty.⁹¹

§ 4418(2). Iowa

The court instructs the jury that it was the duty of the plaintiff to take reasonable precautions to ascertain if a train was coming which might endanger him at the crossing, and to make reasonable use of his senses by listening for signals or the noise of the train when within a reasonable distance from the crossing, and when he arrived at a point from which a train could be seen, by looking in the direction from which a train might come, and, if the train in question was at the time in plain sight or hearing from the point where it was the plaintiff's duty to so look or to so listen for trains, and so circumstanced as to suggest reasonable probability of danger, an attempt to cross the track would be negligence which would defeat his recovery of damages for injury thus received.⁹²

§ 4418(3). Kentucky

The court instructs the jury that if they believe from the evidence that the decedent, ———, when he attempted to cross the tracks of the defendant company, knew of the approach of the train described in the proof, and was injured in attempting to cross ahead of said train, then the law is for the defendants, and the jury will so find, even though they may believe from the evidence that the defendant company and its employes were negligent as set out in instruction No. ———.⁹³

§ 4418(4). Virginia

The court instructs the jury that the track of a railway company is of itself a proclamation of danger to a traveler, and that he must not only use his eyes and ears, looking and listening in both directions, but he must, when about to cross a track, look and listen, so as to make these acts reasonably effective. If such looking and listening does or would warn him of the near approach of a train, then it is his duty to keep off the track until the train has passed, and to go on the track under such circumstances is negligence, and he cannot recover.⁹⁴

⁹¹ Ohlwein v. Osborne, 176 Ill. App. 324.

⁹² Case v. Chicago Great Western Ry. Co., 126 N. W. 1037, 147 Iowa, 747.

⁹³ Chesapeake & O. Ry. Co. v. Warnock's Adm'r, 150 S. W. 29, 150 Ky. 74.

⁹⁴ Morton's Ex'r v. Southern Ry. Co., 71 S. E. 561, 112 Va. 398.

§ 4419. Accident due to error of judgment of traveler

The jury are instructed that, if the evidence in this case shows that ———, the driver, took the risk of crossing in front of the engine before it could strike him, and in this he was mistaken, that he miscalculated, and, from any cause of his own, was not able to pass safely in front, the plaintiffs must bear the loss, and the jury must find for the defendant.⁹⁵

§ 4420. Crossing track on invitation of flagman

You are instructed that, if you believe from the evidence that the flagman signaled the plaintiff to cross the track, then this circumstance was an invitation on the part of the defendant to plaintiff and the public to cross, and an assurance that the track could be crossed in safety, and the plaintiff was not guilty of negligence in attempting to cross, unless the jury believe from the evidence that he failed to use ordinary care for his own safety and protection; and, if the jury believe that the defendant's flagman did signal plaintiff to cross, yet, if they further believe that plaintiff failed to exercise ordinary care for his own safety, then the law is for the defendant, and the jury should so find.⁹⁶

§ 4421. Attempting to cross track while switch engine passing back and forth

The court instructs the jury that, if you should find from a preponderance of evidence that the plaintiff was in a wagon upon the streets or highways at the crossing of defendant's railway track in question, and that defendant's switch engine, which had been blocking the crossing, moved down the track and onto another track, the switch of which had been thrown for its entry thereon, and which was seen by the plaintiff, and while said engine was distant about ——— feet, and to plaintiff it appeared, from the conduct of the engine crew and other surrounding facts and circumstances, that the engine would not immediately return, and that he would have time to cross, he had a right to go upon said crossing, unless you should further believe that plaintiff in so acting upon such appearances was exposing himself to a danger that was obvious, such that a person of ordinary intelligence and prudence would not have acted upon in similar circumstances.⁹⁷

The jury are instructed that, even if it should be proven that the defendant company occupied or blocked the road crossing in question by the switching of its engine or cars an inconvenient, or unreasonable length of time, yet as a matter of law such action

⁹⁵ Chicago & N. W. Ry. Co. v. Hatch, 79 Ill. 137.

⁹⁶ Cross v. Illinois Cent. R. Co., 110 S. W. 290, 33 Ky. Law Rep. 432.

⁹⁷ Louisiana & A. Ry. Co. v. Ratcliffe, 115 S. W. 396, 88 Ark. 524.

on the part of defendant would not justify or excuse the plaintiff for unnecessarily going into a place of danger; and, if the jury believe from a preponderance of the testimony that the plaintiff, while the defendant company had said crossing occupied in switching back and forth, attempted to cross the track of defendant, and thereby put himself in a place of obvious danger and was injured, then he was guilty of contributory negligence, and your verdict should be for the defendant.⁹⁸

The jury are instructed that it is the duty of any one before crossing, or attempting to cross, a railway track to exercise due care, which is ordinarily the duty to stop and look and listen for any approaching train, and the same duty rests upon any one in crossing a railroad track where a car or engine is being properly switched back and forth upon said track at a crossing, and if the jury believe from a preponderance of the evidence that the plaintiff saw the car or engine of defendant being switched back and forth upon its track at a crossing, and negligently attempted to cross said track or tracks of defendant company upon which said car or engine was being switched back and forth, then such attempt to cross said track or tracks was contributory negligence on the part of the plaintiff, and at his own peril, and the verdict must be for the defendant.⁹⁹

§ 4422. Crossing between cars

You are instructed that if, on the day plaintiff claims to have been injured, defendant's passenger train was on one side of the ——— street crossing, and a Pullman car on the other side, leaving the space between said cars of about ——— or ——— feet, and that their positions were open and obvious to the plaintiff, and that the engine to said train had its steam up, and that the same was known to the plaintiff, and if you believe that under said conditions and locations of said train and its engine and the said Pullman car that it was negligence in the plaintiff to try and cross between them, and that such negligence contributed to the injuries he received, then you are instructed to find a verdict for the defendant.¹

§ 4423. Entering upon cars obstructing crossing for purpose of crossing track

You are instructed that, if a railroad company obstructs a highway for an unreasonable length of time, unless it is without fault, and a person enters upon its cars for the sole purpose of cross-

⁹⁸ Louisiana & A. Ry. Co. v. Ratcliffe, 115 S. W. 396, 88 Ark. 524.

⁹⁹ Louisiana & A. Ry. Co. v. Ratcliffe, 115 S. W. 396, 88 Ark. 524.

¹ Galveston, H. & S. A. Ry. Co. v. Simon (Tex. Civ. App.) 54 S. W. 309.

ing the railroad track, he assumes only such risks as arise under the expectation that he has the right to entertain that the railroad will do what the law requires it to do—that is, ring the bell or blow the whistle for at least ——— seconds before the moving of the engine—and only such risks as may be attendant upon his own negligence; and whether he was guilty of gross or willful negligence, or of a violation of the law, is to be determined by the jury upon consideration of the facts and circumstances surrounding the case.²

§ 4424. Care required in attempting to go around string of standing cars blocking crossing

In this connection the court further charges you that, if you believe from the evidence that P., on the occasion in question, went down ——— street to the railroad crossing, and there found the crossing blocked, and thereafter moved alongside of the railway track to a point on the railway company's property at the end of a string of standing cars, and that at such point he looked and could not see the end of the standing string, although noting that it extended over and beyond ——— street, and if you further believe that after so looking he attempted to cross the track, and if you further believe that such attempt under the attending circumstances was negligence on his part, in that event you will return a verdict in favor of the defendant.³

You are instructed that, if you believe from the evidence that P. attempted to cross the defendant's track in order to go around a string of standing cars, and if you further believe that he went so near said standing string of cars as to make it more dangerous than had he gone across the track somewhat farther, and believe that in going as near as he did to the end of the standing cars P. was guilty of negligence, your verdict must be in favor of the defendant.⁴

§ 4425. Position of safety gates as affecting action of traveler

§ 4425(1). Illinois

The court instructs the jury that every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of negligence unless he approaches it as if it were dangerous. And if the jury believe, from the evidence, that the safety gates at the crossing in question were down and the deceased went upon the tracks underneath the gates, and in so doing failed to exercise due

² Weaver v. Southern Ry. Co., 56 S. E. 657, 76 S. C. 49, 121 Am. St. Rep. 934.

³ Houston Belt & T. Ry. Co. v. Price (Tex. Civ. App.) 192 S. W. 359.

⁴ Houston Belt & T. Ry. Co. v. Price (Tex. Civ. App.) 192 S. W. 359.

care for his personal safety, and in consequence thereof was struck by an engine and killed, then his administratrix cannot recover in this action, and your verdict should find the defendant not guilty.⁵

§ 4425(2). **Kentucky**

You are instructed that it was the duty of the plaintiff in passing along ——— street and approaching its intersection with the railroad track on ——— street to exercise ordinary care for his own safety, and in the exercise of such care it was the duty of the plaintiff not to pass under or beyond the crossing gates, if they had been lowered before he reached said intersection. It was also plaintiff's duty, in the exercise of ordinary care for his own safety, to observe and heed such warnings, if any were given him, of the approach of said engine, and if you believe from the evidence that reasonably sufficient warnings were given of the approach of the engine to ——— street, and the plaintiff heard, or by the exercise of ordinary care could have heard, such warnings and failed to observe or heed them, his failure so to do was negligence on his part, or, if you shall believe from the evidence that the gates were down and he went under them, as he approached the track, this was negligence, and if such negligence on his part, if any there was, so contributed to bring about his injury that but for such negligence he would not have been injured, the law of the case is for the defendant, and you should so find, although you may believe from the evidence that the defendant railway company's employes were negligent, as submitted to you in the first instruction; provided, however, if you shall further believe from the evidence that the plaintiff went upon the track upon which the engine was backing, or so near the said track as to be in peril from the approach of the engine, and his presence at such place and his peril were seen, or by the exercise of ordinary care could have been seen, by the engineer or brakeman on the engine in time for them, by the exercise of ordinary care on their part, to have avoided colliding with him and injuring him, and they negligently failed so to do, the law is for the plaintiff, and you should so find.⁶

§ 4425(3). **New York**

The jury are instructed that it is the duty of a person standing within the gates at a railroad crossing and in a place of safety, and knowing that a train may be approaching from either direction at any moment, if he sees the gates go down, not to proceed across the track until the gates are raised, and if he does so proceed be-

⁵ *Carlin v. Grand Trunk Western Ry. Co.*, 90 N. E. 201, 243 Ill. 64, 134 Am. St. Rep. 354.

⁶ *Bauer v. Illinois Cent. R. Co.*, 160 S. W. 933, 156 Ky. 183.

fore the gates are raised, and is struck by a train, he is guilty of contributory negligence as a matter of law.*

The jury are instructed that, even if the gates were up, it was the duty of ——— to use due care; but it is for you to say whether the gates were raised enough to warrant ——— in believing that the raising of them was a declaration to him that the way was safe and to go ahead, and to what extent the degree of vigilance required of him was thereby lessened.†

§ 4426. Effect of knowledge of traveler of defects in crossing

You are instructed that, if you find from the evidence that the said crossing was in an unsafe condition, as alleged and claimed by plaintiff's petition, and you further find that its unsafe condition was known to the plaintiff or his wife at the time he attempted to drive over the same, and if you further believe that a person of ordinary prudence, situated as plaintiff was, and with such knowledge as he or his wife had, would not have attempted to drive over said crossing, then you will find for the defendant.‡

§ 4427. Acts in sudden emergencies

§ 4427(1). South Carolina

The court instructs the jury that, if the plaintiff be placed in a position of peril by the negligence of the defendants, and there be a sudden emergency calling for him to act under peculiar circumstances, he would not be held to exercise the same degree of caution as in other cases, for regard must always be had to the exigencies of the person's position under all the circumstances of each particular occasion. Where human life or human safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort made in good faith to preserve the one or secure the other, unless the circumstances under which the effort was made show recklessness or rashness.§

§ 4427(2). Texas

In passing upon the question of contributory negligence, I charge you that, if you believe from a preponderance of the evidence that the defendant was guilty of negligence in the issue submitted to you, in the manner charged, and that as a proximate result of such negligence (if any) the plaintiff was placed in a dangerous situation, where he must adopt a perilous alternative, or where, in the terror of an emergency for which he was not responsible (if you so find), and for which the defendant was responsible (if you so

* *Hatch v Lake Shore & M. S. Ry. Co.*, 145 N. Y. S. 781, 159 App. Div. 596.

† *Pulcino v. Long Island R. Co.*, 109 N. Y. S. 1076, 125 App. Div. 629.

‡ *St. Louis Southwestern Ry. Co. of Texas v. Hawkins*, 108 S. W. 736, 49 Tex. Civ. App. 545.

§ *Douglass v. Southern Ry. Co.*, 62 S. E. 15, 82 S. C. 71.

find), he acted wildly or negligently, and suffered in consequence, such negligent conduct, under such circumstances (if any), is not contributory negligence, for the reason that persons in great peril, when not caused by their acts, are not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances.⁹

§ 4428. Same—Emergency created by fault of defendant

You are instructed that the plaintiff's right to recover is not affected by the fact that he may have contributed to his injury, if he was not in fault in so doing. If the plaintiff's share in the transaction was innocent, and not incautious, it furnishes no excuse for the defendant. If you find that the plaintiff was suddenly put in peril by the negligence of the defendant, without having sufficient time to consider all the circumstances, he is to be deemed excusable for omitting some precautions or making an unwise choice under this disturbing influence; and, even if you find that, in his bewilderment, being otherwise innocent of contributory negligence, he ran into danger by trying to cross the track ahead of the cars, such action on his part would not be contributory negligence.¹⁰

§ 4429. Duty of occupant of vehicle, approaching crossing, to warn driver

The jury are instructed that it was the duty of all the persons in the automobile mentioned in the evidence to look and listen carefully for the approach of a train after the automobile started over the crossing, even although the jury may find that the watchman lifted the gate for them to cross; and if the jury find from the evidence that the train or locomotive which struck the automobile in which the deceased was riding could have been seen by the deceased in time to have warned the driver of the automobile of the train's approach in time for the said driver of the automobile to have stopped the automobile before reaching the track on which the train was approaching, and that the deceased did not do so or attempt to do so, then the verdict of the jury must be for the defendant.¹¹

§ 4430. Care required from children

§ 4430(1). Illinois

The jury are instructed that the rule of law as to negligence in children is that they are required to exercise only that degree of

⁹ *San Antonio & A. P. Ry. Co. v. Peterson*, 49 S. W. 924, 20 Tex. Civ. App. 495.

¹⁰ *Antonlan v. Southern Pac. Co.*, 100 P. 877, 9 Cal. App. 718.

¹¹ *McAdoo v. State*, 111 A. 476, 136 Md. 452.

care and caution which persons of like age, capacity, and experience might be reasonably expected to naturally or ordinarily use in the same situation, and under the like circumstances. In this connection you are instructed that the parents or persons having the control of such children must not have been guilty of want of ordinary care in allowing them to be placed in such circumstances.¹²

§ 4430(2). *Indiana*

You are instructed that it is the undisputed evidence that plaintiff's son, ———, at the time he sustained the injuries which caused his death, was a boy ——— years of age, with all his limbs and organs in natural condition, of average intelligence, and familiar with the crossing of ——— street and ——— Railroad tracks. It is the law that such a boy is required to exercise such an amount of care as is in accord with his maturity, experience, and capacity as he approaches a railroad crossing, and that the amount of care so to be exercised by him is to be determined by the jury upon the proof of all the facts and circumstances in the testimony; but there is no presumption that such a boy has not the ability to exercise some amount of care as he approaches a railroad crossing.¹³

§ 4430(3). *Missouri*

You are instructed that plaintiff had not the right to rely alone upon the servants of the defendant protecting him from danger, while approaching said crossing, but he was required to exercise ordinary care for his own protection; that is, such care and caution as a reasonably prudent person of the age, capacity, and experience of plaintiff would reasonably be expected to exercise under like and similar circumstances.¹⁴

§ 4430(4). *Oklahoma*

The court instructs the jury that it is the duty of every person, when going upon or across a railroad track at a public crossing, to look in each direction to see if cars are approaching, and a failure to do so is a want of ordinary care. As a matter of law, both the plaintiff and the defendant railway company had a right to cross the road at the point where plaintiff claims the accident happened, and the law imposes on both parties the duty of using reasonable and prudent precaution to avoid accident and danger; but the conduct of a child of ——— years is not of necessity to be judged by the same rules which govern that of an adult. While it is the general rule in regard to an adult or grown person that, to entitle him to re-

¹² *Illinois Cent. R. Co. v. Slater*, 21 N. E. 575, 129 Ill. 91, 6 L. R. A. 418, 16 Am. St. Rep. 242.

¹³ *Plummer v. Indianapolis Union*

Ry. Co., 104 N. E. 601, 56 Ind. App. 615.

¹⁴ *McNamara v. Chicago, R. I. & P. Ry. Co.*, 103 S. W. 1093, 126 Mo. App. 152.

cover damages for an injury resulting from the fault or negligence of another, he must have been free from fault, such is not the rule in regard to a child of tender years. Care and caution required of a child is according to its maturity and capacity, and he is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising; and in this case it was incumbent upon the railway company, while running its cars across said crossing at or near ———, on the occasion referred to, to give signals and warning of the approaching of its said cars by ringing the bell and blowing the whistle before reaching said crossing, to give notice of its coming, and if you believe from the evidence in this case that the plaintiff went upon and across the tracks of the said defendant at said crossing at the time as alleged in plaintiff's petition, and that he looked in each direction and listened for approaching trains, and that none were seen or heard approaching, and that he thereupon entered upon said crossing, and that while passing over the tracks of the defendant, and without warning from said defendant or its employes running its said train, and without fault upon the part of the plaintiff, considering his age and tender years, he was suddenly struck by an engine of the defendant that was being run over and across said crossing, cutting off some of the toes and a part of plaintiff's left foot and otherwise injuring and bruising him, then you should find for the plaintiff.¹⁵

§ 4430(5). Texas

The court instructs you that there can be no recovery in this case if plaintiff, by negligence on his part, contributed to bring about the injuries sustained. The standard of care required of a minor in law is that he shall exercise ordinary care, by which is meant the degree of care which a person of ordinary prudence, of his age, intelligence, and experience, would have exercised under the same or similar circumstances, and a failure to exercise that degree of care will be deemed negligence.¹⁶

§ 4431. Care required from deaf person

The jury are instructed that, the deceased being deaf and unable to hear, it was his duty to exercise great care and caution in the use of his remaining senses to avoid danger from the train.¹⁷

§ 4432. Effect of intoxication of traveler

You are instructed that, if you believe from the evidence that deceased was drunk at the time of the accident, and that his drunk-

¹⁵ Chicago, R. I. & P. Ry. Co. v. Baroni, 122 P. 926, 32 Okl. 540.

¹⁶ Houston Belt & T. Ry. Co. v. Price (Civ. App.) 192 S. W. 359.

¹⁷ Hummer's Ex'x v. Louisville & N. R. Co., 108 S. W. 885, 128 Ky. 486.

enness diminished his physical ability to guard against and avoid the collision with the defendant's train, or that on account of such drunkenness his mental faculties were blunted and rendered less acute than they otherwise would have been, and if you further believe from the evidence that if deceased had been in full possession of his natural physical and mental power, unaffected by such drunkenness, he would have avoided the collision and injury, and that such injury was caused by reason of the diminution of either his physical or mental powers on account of such drunkenness, and that on account of such drunken condition the deceased did not exercise such care and prudence as a man of ordinary prudence and care would have used under similar circumstances, and that the want of such care was the proximate cause of his injury, then plaintiffs are not entitled to recover.¹⁸

§ 4433. Imputing negligence of driver of vehicle to guest

§ 4433(1). Alabama

Gentlemen of the jury, the court charges you that contributory negligence is defensive matter. The defendant in this case will file special pleas setting up this defense to the first count of the complaint, which charges simple negligence in general terms. The burden of proof is on the defendant to establish its special pleas to your reasonable satisfaction by the evidence in the case. The evidence tends to show that the plaintiff, a woman, on or about the time mentioned in the complaint, was approaching defendant's track for the purpose of crossing the same, at a public road crossing in said county, in a buggy drawn by a horse driven by plaintiff's father. The alleged negligence of plaintiff's father, if you find from the evidence that he was negligent as the court has defined that term, is not imputable to the plaintiff in this case, unless you are reasonably satisfied from the evidence that the plaintiff's father was acting as her agent in driving said vehicle at the time, thereby making his acts, in view of the law, her own, or unless you are reasonably satisfied from the evidence that the plaintiff was at the time in a position to exercise authority or control over her father, the driver, or unless you are reasonably satisfied from the evidence that plaintiff and her father were at the time engaged in a joint enterprise, or in carrying out a common purpose, neither one having exclusive control over the vehicle in which they were riding.¹⁹

§ 4433(2). Maryland

The jury are instructed that if the jury find that the death of K. was caused by the negligence of the agent or agents of the defend-

¹⁸ Galveston, H. & S. A. Ry. Co. v. Harris, 53 S. W. 599, 22 Tex. Civ. App. 16.

¹⁹ Louisville & N. R. Co. v. Calvert, 54 So. 184, 170 Ala. 565.

ant, and not from the want of ordinary care and prudence on the part of K. directly contributing thereto, and further find that at the time of the accident referred to the said K. was not the owner and did not control the automobile truck in which he was riding, and that he exercised no control over the driving and management thereof, but that said automobile, if they so find, was being operated by another, then, even if they find the said other person was guilty of negligence in the manner in which he managed and drove the said truck which contributed to the happening of the accident, as a matter of law, the negligence of the said other person cannot be imputed to the deceased, K., and forms no bar to the right of recovery of the plaintiff in this case against the defendant.²⁰

You are instructed that, if the jury believe that the plaintiff was injured by the negligence of the defendant, as stated in the declaration, then it is no defense to this action that the carriage in which she was riding was driven negligently, and that such negligence contributed to the injury complained of, provided the jury believe that the conveyance in which she was riding was driven by a certain —, who had hired the same for his own use, and upon his own responsibility, and that the plaintiff was merely a passenger occupying a seat in said conveyance by his invitation, and that she exercised no control over said —, and interfered in no manner whatever with his management of said conveyance.²¹

§ 4433(3). Missouri

The court instructs the jury that, if you believe from the evidence that plaintiff was in a vehicle with one C., and that said C. had complete control of the vehicle and was controlling the movements and driving the same at and before the collision, and if you further believe from the evidence that plaintiff had no control over said vehicle or its movements, and that said C. was not in the employ of plaintiff or under his control, and if you further believe that plaintiff had no right or authority to control or direct the said C., then you are instructed that plaintiff is not chargeable with the negligence, if any, of the said C., and, if from all the evidence you believe plaintiff acted as a reasonably prudent person under the circumstances and conditions surrounding him at the time the vehicle approached near and went upon said crossing, then you are not warranted in finding for defendant upon its plea of contributory negligence.²²

²⁰ *McAdoo v. State*, 111 A. 476, 136 Md. 452.

²¹ *Philadelphia, W. & B. R. Co. v.*

Hogeland, 66 Md. 149, 7 A. 105, 59 Am. St. Rep. 159.

²² *Byars v. Wabash R. Co.*, 141 S. W. 926, 161 Mo. App. 692.

§ 4433(4). **Utah**

You are further instructed that, where a train is negligently run across a public highway and collides with a vehicle attempting to use the crossing, if a person in the vehicle who is not driving the same and has no management or control over it is killed, and such person is an unmarried daughter, the father is not prevented from recovering damages because the driver of the vehicle was guilty of negligence in entering upon the crossing. Under such circumstances the father has the right to sue either the railroad company or the driver, or both, and if he brought suit against the driver, the driver could not escape responsibility by claiming that the railroad company was also negligent, and if he brought suit against the railroad company, it could not claim freedom from responsibility because the driver was also negligent; and in this case the plaintiff is entitled to recover if the defendant was guilty of negligence in some of the particulars alleged in plaintiff's complaint, and such negligence was the proximate cause of the accident resulting in the death of his daughter, and no negligence of any one else could defeat the plaintiff's right to recover except the negligence of the deceased; and in this case you are instructed that the deceased was not guilty of negligence.²³

§ 4434. **Negligence of traveler not proximately contributing to accident**

You are instructed that even though you may believe from the evidence that at and just prior to the collision complained of the plaintiff was running his automobile at an excessive rate of speed and in excess of the speed as provided by the ordinances of the city of ——— for said place, and that plaintiff was negligent in so doing, if he did so, but if you further believe from the evidence that the speed at which plaintiff was running his automobile did not proximately cause or contribute to cause the collision and consequent injuries, if any, to plaintiff and his automobile, then in such event, if you so find, you are instructed that you cannot find against the plaintiff on the ground of his running his automobile at an excessive rate of speed in excess of the speed limit at such place, if he did so.²⁴

§ 4435. **Effect of contributory negligence**§ 4435(1). **United States**

Turning, now, to the conduct of ———, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negli-

²³ Martindale v. Oregon Short Line R. Co., 160 P. 275, 48 Utah, 464.

²⁴ Texas & P. Ry. Co. v. Hilgartner (Tex. Civ. App.) 149 S. W. 1091.

gently the company ran this train, or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence his administrator is not entitled to a verdict in this suit.²⁵

§ 4435(2). **Arkansas**

The jury are instructed that if plaintiff failed to exercise that care which the law requires of one before going upon or crossing over a railway track where there are moving trains, and this negligence contributed directly and proximately to his injury, he could not recover, unless appellant had knowledge of appellee's perilous position in time to have avoided injuring him by the use of ordinary care, and failed to exercise such care.²⁶

§ 4435(3). **Indiana**

The jury are instructed that "contributory negligence" is such negligence on the part of plaintiff as helped to produce the injuries complained of, and if the jury find, from a preponderance of all the evidence in this case, plaintiff was guilty of any negligence that helped to bring about or produce the injuries complained of, then and in that case, the plaintiff cannot recover in this action.²⁷

§ 4435(4). **Kentucky**

The court instructs the jury that if they believe from the evidence that at the time and place plaintiff claims to have been injured he failed to exercise ordinary care in crossing the railroad track, and but for such failure upon his part the injury would not have occurred, then the law is for the defendant, and you should so find, although you may believe from the evidence that the persons in charge of the train as well as the flagman were, each or both, guilty of negligence.²⁸

§ 4435(5). **New York**

The jury are instructed that, if the negligence of the deceased in any manner contributed to cause the collision which resulted in his death, the plaintiff cannot recover.²⁹

§ 4435(6). **Oklahoma**

The court further instructs you that the plaintiff and the defendant both had a right to use the streets in the town of _____ where the accident is alleged to have happened. It was likewise the duty of both to exercise reasonable care to avoid the collision, but it was not the duty of the defendant to exercise a higher de-

²⁵ *Grand Trunk Ry. Co. of Canada v. Ives*, 12 S. Ct. 679, 144 U. S. 408, 36 L. Ed. 485.

²⁶ *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 42 S. W. 831, 64 Ark. 364.

²⁷ *Baltimore & O. S. W. Ry. Co. v. Young*, 54 N. E. 791, 153 Ind. 163.

²⁸ *Cross v. Illinois Cent. R. Co.*, 110 S. W. 290, 33 Ky. Law Rep. 432.

²⁹ *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.

gree of care than the plaintiff, nor was it the duty of the plaintiff to exercise a higher degree of care than the defendant. It was the duty of each, acting in his own place, under the circumstances surrounding each—that is, plaintiff and the defendant's employés in charge of the switch engine—to exercise that degree of care to avoid any accident which a reasonably prudent person would have exercised under the circumstances. If defendant's negligence is the proximate cause of the injuries, then it is liable for damages. If the plaintiff's negligence and the defendant's negligence are equal, it cannot be said that the defendant's negligence is the proximate cause, and therefore the plaintiff would not be entitled to recover. And in this case, if the plaintiff and the defendant's employés in charge of the engine, with equal negligence, approached each other on the highway and an injury resulted to the plaintiff from the collision, then there can be no recovery for the reason it cannot be said that the negligence of either is the proximate cause of the injuries of the other.³⁰

The court instructs the jury that contributory negligence is negligence on the part of the plaintiff contributing as a proximate cause to his injury or damage. In this connection you are charged that the plaintiff in this action is chargeable with all of the acts or omissions, if any, of which the plaintiff's employés were guilty in handling the automobile in question. The defendant has plead as a defense to this action that the plaintiff was guilty of contributory negligence, in that its employés operating said automobile failed to make any effort to ascertain whether or not a train was about to approach said crossing and drove said automobile upon said tracks without looking for a train. Now, if you believe from the evidence that the agents, servants, and employés of the plaintiff, operating said automobile, drove the same upon the tracks of the defendant without making any effort to ascertain whether or not a train was about to pass over the same, and if you further believe that such failure, if any, was the proximate cause of the damage, if any, done to plaintiff's property, then, and in that event, you will find for the defendant, unless you find that the defendant was guilty of willful, wanton, and gross negligence, as hereinafter defined to you.³¹

§ 4435(7). Utah

You are further instructed that, where the operatives of a train approach and enter upon a public crossing carelessly, and a person

³⁰ Missouri. *O. & G. Ry. Co. v. Parker*, 151 P. 325, 50 Okl. 491. The court overruled an objection to this instruction that it stated the law of

comparative negligence, which does not obtain in Oklahoma.

³¹ *St. Louis & S. F. R. Co. v. Model Laundry*, 141 P. 970, 42 Okl. 501.

driving over the crossing is killed as a consequence, no recovery of damages can be had from the company if he himself was guilty of negligently entering upon the crossing; for in such case he is guilty of contributory negligence.³²

§ 4435(8). Virginia

The court instructs the jury that if they believe from the evidence that the engineer was guilty of negligence in failing to see the deceased, or warn him of the approach of the train, or in failing to endeavor to stop or reduce the speed of the train after the engineer could by the exercise of due care have seen deceased's danger, and if they further believe from the evidence that the deceased by the exercise of due care on his part would or should have discovered the negligent omission of the engineer in time to have saved himself, the jury must find for the defendant.³³

The court instructs the jury that —, the plaintiff's testator, in going upon the tracks in front of the approaching train, was guilty of negligence, and in the absence of evidence that he could not have gotten off the track sooner, his negligence continued as long as he remained on the track, and until the train collided with him. Therefore, notwithstanding the engineer, also, may have been guilty of negligence in not seeing —, or in not sounding the whistle, or in not endeavoring to stop or reduce the speed of the train, the jury must nevertheless find for the defendant.³⁴

The court instructs the jury that if they believe from the evidence that the decedent, —, could have stepped from the track and avoided collision with the train after the train had reached a point at which no effort on the part of the engineer could have prevented the collision, then the jury must find for the defendant, even though they believe from the evidence that the engineer might, by the previous exercise of due care, have discovered, in time to have prevented the collision, the said decedent's intention to cross the track in front of the train.³⁵

The court instructs the jury that if the engineer failed to see and warn —, and failed to endeavor to stop or reduce the speed of the train when by the exercise of due care he could or should have done so, and that — failed to see the approaching train when by the exercise of due care he could have done so, and prevented the collision, then the jury must find for the defendant.³⁶

The court instructs the jury that if decedent's death was due

³² *Martindale v. Oregon Short Line R. Co.*, 160 P. 275, 48 Utah, 464.

³³ *Morton's Ex'r v. Southern Ry. Co.*, 71 S. E. 561, 112 Va. 398.

³⁴ *Morton's Ex'r v. Southern Ry. Co.*, 71 S. E. 561, 112 Va. 398.

³⁵ *Morton's Ex'r v. Southern Ry. Co.*, 71 S. E. 561, 112 Va. 398.

³⁶ *Morton's Ex'r v. Southern Ry. Co.*, 71 S. E. 561, 112 Va. 398.

to the concurring negligence of himself and the defendant's servants in charge of the train, that is, to the negligence of both parties, decedent and the company, operating and in effect at the same time, they must find for the defendant.⁸⁷

§ 4436. Effect of contributory negligence where negligence of railroad company consists in violation of ordinance

You are instructed that the plaintiff claims to have proved that the defendant at the time of the accident was running its shifter in violation of each of said ordinances. It is for you to say whether such proof has been made or not. If it has, then we say to you that such violation would constitute negligence on the part of the defendant, and it would be liable in his action, if such negligence was the cause of the accident and the plaintiff's own negligence did not contribute thereto. But if the deceased could, by the exercise of due care and caution on his part, have avoided the accident, it was his duty to do so, and his failure so to do would prevent him from recovering, no matter if the speed of the shifter was excessive and illegal, and no lookout was kept or maintained by the defendant. The law does not permit any one to recover damages from another for an injury, if his own negligence has contributed thereto, or where by the exercise of reasonable care he could have avoided it, no matter how great the negligence of such other person may have been. If, therefore, in this case the deceased had a clear and unobstructed view of the approaching shifter, and saw or heard it, or by the reasonable use of his senses could have seen or heard it, or if he had a timely and sufficient warning of its approach, and by the exercise of reasonable care and caution on his own part the accident could have been avoided, he cannot recover.⁸⁸

§ 4437. Doctrine of last clear chance

§ 4437(1). Alabama

The court instructs the jury that if you believe from the evidence that Mrs. ——— approached the railroad crossing, wishing to cross, and that she saw or heard the train approaching, and that she for herself measured the distance and time it would take to cross, and, acting upon her own judgment, undertook to cross, then I charge you that she assumed the risk, and her administrator cannot hold the railroad company responsible, unless Mrs. ———'s intention was apparent to the employes of defendant operating the train, and after her perilous intention and conduct be-

⁸⁷ Morton's Ex'r v. Southern Ry. Co., 71 S. E. 561, 112 Va. 398.

⁸⁸ Short v. Philadelphia, B. & W. R. Co. (Del.) 76 A. 363, 7 Pennewill, 108.

came apparent, by the exercise of due care and diligence, the injury could have been avoided.³⁹

§ 4437(2). California

The court instructs the jury that one having knowledge of the dangerous situation of another and having a clear opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding that the latter has placed himself in such situation of danger by his own negligence. If, therefore, you should find from the evidence that the motorman of defendant's car which collided with the wagon saw the decedent on the wagon on the track, and could have stopped the train without injury to the same or to its passengers, and by so stopping the train within the shortest time and space possible under the circumstances, could have avoided the collision, and neglected to do so, in consequence of which neglect to stop the train, the decedent was killed, the plaintiff is entitled to a verdict.⁴⁰

§ 4437(3). Florida

The jury are instructed that, while it was the duty of the plaintiff's husband, in crossing the railroad track of the defendant, to look and listen for approaching trains with such care as an ordinarily prudent man would have used, yet that failure on his part to do so—if the jury find there was a failure on his part to do so—was not such contributory negligence as would bar plaintiff's right of recovery, if they further find that the defendant, after seeing the plaintiff's husband, or after it should, in the exercise of due care, have seen the plaintiff's husband on its track, or so near thereto as not to have space to pass clear, failed to exercise all proper means to avoid the accident.⁴¹

§ 4437(4). Kentucky

The court instructs the jury that it was the duty of the plaintiff, before driving upon defendant's track, to exercise reasonable care to ascertain whether a car was approaching and whether or not it was dangerous for him to drive upon the track, and if the plaintiff failed to exercise such care, and but for such failure, if he so failed, the collision would not have occurred and plaintiff was injured, then the jury should find for the defendant, unless defendant's motorman knew, or by the exercise of ordinary care could have known, that plaintiff was upon or about to cross defendant's track in time to have prevented the collision by the exercise of ordinary care in the use of the means at his command,

³⁹ *Memphis & C. R. Co. v. Martin*, 23 So. 231, 117 Ala. 367.

⁴⁰ *Ijardl v. Central California Traction Co.*, 172 P. 703, 36 Cal. App. 488.

⁴¹ *Florida Cent. & P. R. Co. v. Foxworth*, 25 So. 338, 41 Fla. 1, 79 Am. St. Rep. 149.

and he failed to use such care, in which event you will find for the plaintiff; but, if you believe from the evidence that the vehicle in which plaintiff was riding was negligently driven upon the track of the defendant, at a time when the defendant's car was so near that the motorman in charge thereof could not by the exercise of ordinary care in the use of the means at his command have prevented the collision, you will find for the defendant.⁴²

The jury are instructed that if ——— was himself negligent, and but for this would not have been killed, they should find for the defendant, unless those in charge of the engine, after they discovered, or by ordinary care could have discovered, the peril in which his negligence had placed him, thereafter failed to use ordinary care to avoid injuring him, in which event they should find for the plaintiff.⁴³

§ 4437(5). Maryland

You are instructed that, notwithstanding the jury may find that the plaintiff was guilty of negligence, and that such negligence contributed to the injury of which she complains, yet still, if the agents of the defendant were aware of such negligence in time, by the use of ordinary care and prudence, to have avoided the effect of such negligence on her part, but did not do so, then such negligence on her part is not such contributory negligence as to constitute a defence to this action.⁴⁴

The jury are instructed that, if they find from the evidence that the defendant owned and operated a railroad in ———, as stated in the first prayer, and that on the night of the ———, the plaintiff was stupidly drunk, on his hands and knees, on the defendant's track, at or near the crossing thereof over ——— street, and was injured and wounded by a passing train of cars, then the plaintiff is entitled to recover, provided the jury further find that the agents of the defendant in charge of said cars discovered the plaintiff in such dangerous situation in time to stop said cars and save the plaintiff from injury by the use of ordinary care and caution on the part of such agents in charge of said cars.⁴⁵

§ 4437(6). Missouri

The court instructs the jury that if you find and believe from the evidence that defendants' locomotive engineer in charge of the train saw an object on or near the track in a place of peril, and was then unable to know whether the same was a human being

⁴² *Logan v. Kentucky Traction & Terminal Co.*, 164 S. W. 326, 158 Ky. 73.

⁴³ *Hummer's Ex'x v. Louisville & N. R. Co.*, 108 S. W. 885, 128 Ky. 486.

⁴⁴ *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 A. 105, 59 Am. Rep. 150.

⁴⁵ *Baltimore & Ohio R. Co. v. Kean*, 65 Md. 394, 5 A. 325.

or not, he had no right to continue the speed of the train without abatement until he actually saw that in fact the object was a human being; but, under the law, immediately upon seeing the object, it became his duty to exercise ordinarily prudent care to determine whether in fact the object was a human being, and to use such care as an ordinarily prudent engineer would have exercised under the same circumstances, with the appliances at his command, to reduce the speed if reasonably necessary and control the speed of the train and avoid injury upon the first appearance to him of the danger of striking a human being, and if you find and believe from the evidence that defendants' said engineer did not exercise such care in the control of the train as an ordinarily prudent person would have exercised, after he saw the object on the track, and that such failure on his part directly contributed to cause the death of ———, then defendants were guilty of negligence, provided you find from the evidence that ——— was at the time on or near the track at a place where there was at the time and continuously for several years prior thereto, with the knowledge and consent of said railroad company, there had been a passageway or crossing across the tracks of said railroad, which was used and treated as a thoroughfare by a large number of people, not employés of said railroad company, who were in the habit of walking and driving to and fro thereon.⁴⁶

You are instructed that, although you may believe from the evidence that ——— was guilty of negligence in stepping upon the track, yet if you further find from the evidence that, after said ——— was guilty of negligence, the agents, servants, and employés of defendant in charge of the locomotive and cars discovered, or could have discovered by the use of ordinary care, her condition, and the danger of the same, if it was dangerous, and could have avoided injuring her by the use of ordinary care, and failed to do so, then such negligence of said ——— is no defense to this action.⁴⁷

§ 4437(7). New York

The jury are instructed that the deceased, ———, could not, by his own negligence, cast upon the defendant the necessity of exercising extraordinary care.⁴⁸

§ 4437(8). Oklahoma

The court instructs the jury that the rule is that, even if the defendant be shown to have been guilty of negligence, the plain-

⁴⁶ Owen v. Delano (App.) 194 S. W. 756.

⁴⁸ Wilds v. Hudson River R. Co., 24 N. Y. 430.

⁴⁷ Sullivan v. Missouri Pac. Ry. Co., 23 S. W. 149, 117 Mo. 214.

tiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. Defendant claims that plaintiff in driving on the track was guilty of negligence which was the proximate cause of the injury, and evidence has been introduced showing that the engineer saw the plaintiff driving onto the track before the collision occurred. You are instructed that, even though you should find that plaintiff in driving on the track was guilty of negligence which contributed to his injury, this fact would not bar his recovery, if the engineer discovered his position and that he was in peril in time to avoid the collision, and after such discovery neglected to exercise reasonable care to avoid this collision and as a result of his failure to exercise such care the collision occurred.⁴⁹

§ 4437(9). Texas

You are instructed that, if you believe from the evidence that, when the engine that killed said team was approaching said crossing on ——— avenue on said occasion, the employes of defendant operating said train saw ——— near defendant's track at said crossing, driving toward said crossing, and it reasonably appeared to said employes that the said ——— would not probably stop before he reached said track, or would not pass over the same in time to avoid a collision with said train, and if you further believe from the evidence that said employes then failed to use all the means they had at hand, consistent with the safety of said engine to stop the same, and prevent a collision, and if you further believe from the evidence that by the use of all the means they had at hand for stopping said engine, they could have stopped the same, or so reduced the speed thereof, as to avoid a collision with said team, you will find for the plaintiff, even though you may believe that the said ——— was guilty of contributory negligence in the manner in which he approached and drove upon said crossing.⁵⁰

§ 4437(10). Virginia

The court further instructs that it was the duty of deceased, in approaching the crossing on ———, before going upon the track, or attempting to cross it, to use his eyes and ears for the purpose

⁴⁹ Atchison, T. & S. F. Ry. Co. v. Baker, 130 P. 577, 37 Okl. 48.

⁵⁰ St. Louis & S. F. R. Co. v. Summers, 111 S. W. 211, 51 Tex. Civ. App. 133.

of avoiding danger; and if the jury believe from the evidence that he neglected to do so, and attempted to cross the track in front of a rapidly moving train, in full view and hearing, and was killed in so doing, and that his own act—his own negligence—was the proximate and immediate cause of his death, or contributed to it, they should find for the defendant, provided, the jury further believe from the evidence that after said deceased was seen by the defendant's servants in charge of said train to be in a position of danger, or might by due diligence have been seen, they exercised proper care and due diligence to stop the train and prevent it from striking said deceased.⁵¹

§ 4437(11). Washington

The jury are instructed that, if you find from the evidence in this case that the deceased was guilty of negligence in driving said automobile onto the railroad crossing, and that said automobile in some way became stalled or hung on said crossing, so that said ——— was unable to go across the track, and that while in such dangerous position and unable to extricate himself therefrom the engineer and fireman on defendants' train saw the automobile stopped on the crossing in time to have stopped the train by the use of reasonable diligence and skill on their part before reaching said crossing, and did not do so, or if you find that said engineer and fireman by the use of reasonable diligence and watchfulness on their part should have discovered said stalled automobile on the crossing in time to have stopped the train by the use of reasonable diligence and skill before reaching the crossing, and did not do so, then in either event defendants are guilty of such negligence as to render them liable for the killing of said deceased, if he was killed by defendants' train, regardless of said deceased's negligence in going upon said crossing in the first place; the law being that the party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence, and not that of the one first at fault, is the sole proximate cause of the injury. Stated otherwise, the law is that, where both parties are negligent, the one that has the last opportunity to avoid accident, notwithstanding the negligence of the other, is solely responsible for it, his negligence being deemed the direct and proximate cause of it.⁵²

⁵¹ Baltimore & O. R. Co. v. Few's Ex'r, 26 S. E. 406, 94 Va. 82.

⁵² McKinney v. Port Townsend & P. S. Ry. Co., 158 P. 107, 91 Wash. 387.

§ 4438. Inability to set up contributory negligence as a defense to liability for reckless and wanton conduct

§ 4438(1). Alabama

You are instructed that if the jury believe, from the evidence in this case, that the defendant's agent or servant in charge of the two cars and the caboose ran them at a high rate of speed, without signals of approach, without warning, at the place where the decedent, ———, was killed, and if said place of killing was in an incorporated town, where those in charge of said cars and caboose knew the public at said time were wont to pass and did pass with such frequency and in such numbers as that those in charge of said cars and caboose knew that there was a likelihood that there were persons on the track at the time and place when and where deceased, ———, was killed, and that such persons might be injured by such cars and caboose at that time and place, then that is such reckless indifference to the safety of such persons as would render the defendant liable for the injuries received; and in such event, plaintiff is entitled to a verdict, if ——— was thus killed, notwithstanding there was no fault on the part of servants of defendant, after discovery of the peril of the deceased, and notwithstanding the deceased, ———, was negligent.⁵³

§ 4438(2). Kansas

You are instructed that, before the plaintiff can recover in this case, you must not only find that the defendant's servants and employes were guilty of ordinary negligence, but you must find that such negligence and want of care was reckless and wanton. The undisputed evidence in this case clearly shows that the plaintiff was guilty of negligence at the time he approached the crossing in question by not looking to the east to see whether or not a train was approaching from that direction. And, being so negligent, he cannot recover in this case on account of the mere want of ordinary care and prudence on the part of the defendant company's servants and employes. But, even though the plaintiff was guilty of such negligence, yet if you believe from the evidence that the operation of the train in question by the servants and employes of the defendant company, at the time of the accident, was reckless and wanton, then the defendant company cannot avail itself of the defense of negligence on the part of plaintiff, and plaintiff would be entitled to recover.⁵⁴

You are instructed that the words "reckless and wanton," as herein used, means the conscious failure of one charged with a duty to exercise due care and diligence to prevent an injury, after the

⁵³ Alabama Great Southern R. Co. v. Guest, 39 So. 654, 144 Ala. 373.

⁵⁴ Gilbert v. Missouri Pac. Ry. Co., 139 P. 380, 91 Kan. 711.

discovery of the peril, or under circumstances where he is charged with the knowledge of such peril, and, being conscious of the inevitable or probable result of such failure, still acts without due care and diligence. And it is immaterial whether the failure to discharge the duty in the exercise of care and diligence springs from an act of commission or omission. The duty referred to, the disregard of which amounts to wantonness, is that which arises only when the person charged with dereliction has knowledge of the danger, or of the facts which imputed that knowledge to him. One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence; his conduct must be such as to put him in the class with the willful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so, or indifferent whether he does so or not.⁵⁵

You are instructed that the trainmen in charge of said engine had the right to assume and rely upon the fact that plaintiff was in the possession of all of his faculties, and that he, having an unobstructed view of said approaching train, knew of said approaching train, and that he had a team that was safe, and that he would stop said team and would not attempt to cross over said track in front of said train, or drive so close to said track that the train passing along would collide with said team, and if you find from the evidence that said trainmen exercised reasonable and ordinary care to avert said accident after it became apparent to them, or would have been apparent to a reasonably prudent man, that plaintiff was about to go upon said railroad track in front of said train, then you would not be justified in finding them or either of them guilty of wanton negligence, and this is the law, even though you should find that said train was being operated at a greater rate of speed than provided for in the ordinance of the city of ———, and without causing the bell to be rung.⁵⁶

§ 4439. Comparative negligence

You are instructed that if in this case you are satisfied that the plaintiff was entitled to recover, but are further satisfied that both parties are at fault, and the alleged injury was the fault of both, and you find that the plaintiff could not, by ordinary care, have avoided the alleged injury to himself occasioned by defendant's negligence, then, notwithstanding he may have been to some extent at fault, he would be entitled to recover; but the damages

⁵⁵ Gilbert v. Missouri Pac. Ry. Co.,
139 P. 380, 91 Kan. 711.

⁵⁶ Gilbert v. Missouri Pac. Ry. Co.,
139 P. 380, 91 Kan. 711.

should be diminished by the jury in proportion to the amount of default attributable to him.⁵⁷

4. *Pleading and Evidence*

§ 4440. Duty of plaintiff to prove case as alleged in declaration

The jury are instructed that negligence is not to be presumed, but must be affirmatively proven by the party alleging it, and in the manner alleged in the declaration in the case; and in this case the burden of proof is upon the plaintiff to show that the defendant is entirely responsible for the injury complained of by reason of, and in consequence of, the neglect charged in the declaration, and that the plaintiff did not contribute towards it.⁵⁸

§ 4441. Presumptions and burden of proof

§ 4441(1). Alabama

You are instructed that the burden is upon plaintiff to prove by the evidence in this case, to your reasonable satisfaction, every material allegation of his complaint, or of some one count thereof, and if he has not so reasonably satisfied you by the evidence, then you must find a verdict for defendant.⁵⁹

§ 4441(2). Arkansas

You are instructed that whenever a person, who is on a railroad track with right, is struck or injured by the operating of a railroad train at a public crossing, the presumption is that the striking or injuring of such person was caused by the negligence of the railroad company's servants and employes in charge of the train at the time, and the burden is upon the railroad company to show that its servants and employes were not guilty of any negligence causing the striking and injury.⁶⁰

You are instructed that the burden of proof is upon the defendant to show, by a preponderance of the evidence in the whole case, that the plaintiff was guilty of contributory negligence, provided such negligence is not shown by plaintiff's testimony.⁶¹

§ 4441(3). Delaware

You are instructed that negligence has been defined as a failure to use such care, prudence and vigilance as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself from being injured. There is no presumption of negligence, either on the part of the plaintiff or on the part of

⁵⁷ Atlantic Coast Line R. Co. v. Taylor, 54 S. E. 622, 125 Ga. 454.

⁵⁸ Thomas v. Chicago & G. T. Ry. Co., 49 N. W. 547, 86 Mich. 496.

⁵⁹ Cardwell v. Louisville & N. R. Co., 64 So. 504, 185 Ala. 628.

⁶⁰ Louisiana & A. Ry. Co. v. Woodson, 192 S. W. 174, 127 Ark. 323.

⁶¹ Louisiana & A. Ry. Co. v. Ratcliffe, 115 S. W. 396, 88 Ark. 524.

the defendant, from the mere fact that injury resulted by the train and automobile coming into collision; that is, liability on the part of the defendant does not arise out of the mere fact that the plaintiff was injured.⁶³

§ 4441(4). Georgia

The jury are instructed that, if it has been shown in this case that the plaintiff was injured by the running of the locomotives, cars, or other machinery of this company, then a presumption would be raised against the company. This presumption may be rebutted by the defendant by making it appear, either from its own or from the plaintiff's testimony, that the injury was done by plaintiff's consent, or was caused by his own negligence; and the plaintiff cannot recover if both parties were negligent, but the negligence of the plaintiff was equal to, or greater than, the defendant's, or if the injury was the result of accident, unmixed with negligence on the part of either party.⁶³

§ 4441(5). Illinois

The jury are instructed that the burden is upon the plaintiff to prove, by the greater weight of the evidence, not only the negligence of the defendant as charged in the declaration, but also to prove by the greater weight of the evidence that the deceased was free from negligence which contributed to the collision which caused his death, and if you find from all of the evidence in the case that the plaintiff has not so proved both of said facts, then you should find defendant not guilty.⁶⁴

§ 4441(6). Michigan

You are instructed that no presumption of negligence arises because of the happening of the accident and plaintiff's injury, and the burden of proof rests upon the plaintiff to show that the defendant railway company was negligent.⁶⁵

§ 4441(7). Oklahoma

The court instructs you, gentlemen of the jury, that the mere fact that the plaintiff has been injured on the street crossing in the town of ——— by an approaching switch engine of the defendant company would not of itself entitle plaintiff to recover, nor show negligence on the part of the defendant company; but the plaintiff must go further and show by a fair preponderance of the evidence every material allegation of his petition, and that his injuries, if any were caused by the defendant's negligence in the op-

⁶² Trimble v. Philadelphia, B. & W. R. Co., 89 A. 370, 4 Boyce, 519.

⁶³ Atlantic Coast Line R. Co. v. Locklear, 71 S. E. 683, 9 Ga. App. 344.

⁶⁴ Chicago, B. & Q. R. Co. v. Appell, 103 Ill. App. 185.

⁶⁵ Rathbone v. Detroit United Ry., 169 N. W. 884, 203 Mich. 695.

eration of the switch engine along the public thoroughfare, in failing to give proper signal, and in running at an unusual rate of speed, and as the direct, proximate result of the defendant's negligence in the operation of said engine, plaintiff was hurt, and that said hurt was not the result of the plaintiff's own carelessness and negligence in failing to use due caution and care on its own part to stop, look, and listen for the approaching engine, and the burden is also upon the plaintiff to show by competent evidence where he has been injured and the extent thereof in order that the jury may intelligently assess his damages if they find plaintiff is entitled to prevail.⁶⁶

§ 4441(8). Virginia

The court further instructs the jury that the negligence of the defendant in any particular cannot be presumed; but the burden rests upon the plaintiff to prove the negligence alleged in the declaration to the satisfaction of the jury, by a preponderance of the evidence, unless they should believe that such negligence appears from the evidence of the defendant in this case.⁶⁷

The court instructs the jury that the fact that the plaintiff was struck and injured by defendant's engine ——— does not raise any presumption of negligence against the defendant, but the burden rests upon the plaintiff to show by a preponderance of evidence that the defendant was guilty of negligence in one or more of the particulars charged in the plaintiff's declaration, and that such negligence was the sole proximate cause of the accident complained of; otherwise, the jury must find for the defendant.⁶⁸

§ 4442. Burden of proof as to contributory negligence

See, also, ante, § 4441(2, 5).

§ 4442(1). Arizona

The jury are instructed, in the absence of credible evidence on the question of whether plaintiff's decedent exercised due care in going upon the railroad crossing where he was killed, you must presume that he did exercise such care. The burden is upon the defendant to show the contrary by a preponderance of the evidence. Therefore if, under all the proven facts and circumstances of the case, the evidence of the defense is not of sufficient weight to establish the defendant's allegations in this respect by a preponderance of the evidence, your finding must be in accordance with such presumption of due care.⁶⁹

⁶⁶ Missouri, O. & G. Ry. Co. v. Parker, 151 P. 325, 50 Okl. 491.

⁶⁷ Southern Ry. Co. v. Vaughan's Adm'r, 88 S. E. 305, 118 Va. 692, L.

R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

⁶⁸ Norfolk & W. Ry. Co. v. Sink's Ex'r, 87 S. E. 740, 118 Va. 439.

⁶⁹ Davis v. Boggs, 199 P. 116.

§ 4442(2). Indiana

The jury are instructed that the burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching; and, if this has not been shown to you by a preponderance of the evidence, the plaintiff cannot recover.⁷⁰

The jury are instructed that, when a person crossing a railroad track is injured by collision with a train, the fault is *prima facie* her own, and she must show affirmatively that her fault or negligence did not contribute to the injury, before she is entitled to recover for such injury.⁷¹

§ 4442(3). Maryland

You are instructed that, in order to defeat a recovery in this suit, on the ground of contributory negligence upon the part of the plaintiff, the burden of proof is upon the defendant to show that the plaintiff was guilty of negligence, and that such negligence on her part directly contributed to produce the injury.⁷²

§ 4442(4). Virginia

The court instructs the jury that as a general rule the burden of proof is on the defendant to show contributory negligence on the part of the plaintiff if relied on as a ground of defense, unless contributory negligence of the plaintiff is disclosed by his own evidence or may be fairly inferred from all the facts and circumstances of the case.⁷³

The court instructs the jury that negligence on the part of the decedent in approaching the crossing where he met his death, or in attempting to cross in front of the train which killed him, cannot be presumed, and the burden rests upon the defendant to prove it to the satisfaction of the jury by a preponderance of the evidence, unless they should believe that such contributory negligence appears from the evidence of the plaintiff in this case.⁷⁴

§ 4442(5). Washington

I instruct you that the plaintiff need not affirmatively prove that he stopped, looked, and listened. The presumption is that he did so, and the burden of proof that he did not stop, look, and listen is on the defendant railway company, and must be proved by a preponderance of the testimony on its part.⁷⁵

⁷⁰ *Cincinnati, I., St. L. & C. Ry. Co. v. Howard*, 24 N. E. 892, 124 Ind. 280, 8 L. R. A. 593, 19 Am. St. Rep. 96.

⁷¹ *Cincinnati, I., St. L. & C. Ry. Co. v. Howard*, 24 N. E. 892, 124 Ind. 280, 8 L. R. A. 593, 19 Am. St. Rep. 96.

⁷² *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 A. 105, 59 Am. St. Rep. 159.

⁷³ *Southern Ry. Co. v. Abbe's* Adm'r, 98 S. E. 31, 124 Va. 379.

⁷⁴ *Southern Ry. Co. v. Vaughan's* Adm'r, 88 S. E. 305, 118 Va. 692, L. R. A. 1916E, 1222, Ann. Cas. 1918D, 842.

⁷⁵ *Steele v. Northern Pac. Ry. Co.*, 57 P. 820, 21 Wash. 287.

§ 4443. Matters considered in determining issues

The court instructs the jury that the situation of the premises as to obscuring the view of the party in the buggy or those on the locomotive, when not caused by the default of either, is not the basis for recovery, or basis for relief or liability, but such situation, and also the question of rate of speed and proximity of the locomotive to a foregoing train, are all to be considered by you in helping you to determine just what occurred or what did not occur, and helping you to decide the determinative question, which is this: Were the statutory requirements complied with, and, if not, was the failure to comply due to such sudden and immediate appearance upon the road of the party in the buggy, so that defendant's agents and servants had not time to comply with them, as I have explained the matter to you?⁷⁶

§ 4444. Matters considered in determining question of contributory negligence**§ 4444(1). Indiana**

The jury are instructed that, in determining the question of plaintiff's conduct before and at the time she approached the crossing, you may consider the evidence as to the locality and obstructions, if there were such, which obstructed or interfered with plaintiff's view, or prevented her from seeing an approaching train; also anything, if there was such, which interfered with her hearing the noise made by a train in motion; also the failure of defendants, if that be true, to sound the whistle and ring the bell, as required by statute.⁷⁷

§ 4444(2). Tennessee

In order to help you determine whether and to what extent there was any such contributory negligence, I charge you that it is the duty of a person about to cross over railroad tracks to be mindful of the fact that trains do run and pass upon such tracks; and hence it is their duty, generally, to look and listen for an approaching or passing train, and, if necessary, in order that they may be in the use and employment of ordinary care, to stop. Their duty is both to look and listen to the extent of freeing themselves from negligence, and, the less opportunity there is to do one of them, the greater the necessity to do the other. How far he is to go in exercising his faculties of looking and listening is a question for the jury to determine under all of the evidence relating to the situation and condition of the premises, as to obscuring of the view,

⁷⁶ Tennessee Cent. R. Co. v. Morgan, 175 S. W. 1148, 132 Tenn. 1.

⁷⁷ Louisville & N. R. Co. v. Williams, 51 N. E. 128, 20 Ind. App. 576.

proximity of the locomotive in question to a foregoing train, or preceding train, and the other facts and circumstances in the case; the rule being this: One must take notice that trains move upon the track, and must exercise reasonable care and caution, as a reasonably prudent man would employ or use under similar circumstances, to protect himself from harm or injury.⁷⁸

5. *Action Against Two Defendants*

§ 4445. Form of verdict

You are instructed that it is the duty of the plaintiff himself to assume the burden of proof to show the acts of negligence upon the part of either one or both defendant companies. The form of your verdict in this case, unless the plaintiff has satisfied you by a fair preponderance of evidence that this accident was caused by negligence on the part of either one of the defendants, would be no cause of action. If you find that it was caused by an act of negligence upon the part of either one of these defendants, you will so indicate by finding a verdict in favor of the plaintiff and against either one of the defendants that you find is liable therefor under the rules of law which I have pointed out, or against both of them, if you find that they are both negligent in the operation of those vehicles at the time in question. Now, if you find that this damage was caused by an act of negligence on the part of either one solely, you are so to indicate, and find a verdict in favor of the plaintiff against that defendant that you find to be negligent; and, if you find the other defendant was not negligent, you will find a verdict of no cause of action or not guilty as against that defendant. You can find a verdict for the plaintiff as against either of the defendants or against both of them, but you cannot find separately. If you find against both of them you cannot separate the responsibility. If you find from the evidence in this case that both defendants were guilty of negligence, which proximately caused the accident in question, then you will find for the plaintiff against both of the defendants and award the plaintiff such sum as against both of the defendants as you find from the evidence he has suffered by reason of the accident. But there can be no separation or degree of liability, as to the two joint defendants. If both have been guilty of the negligence which you find from the testimony, your duty will be to return a verdict in such sum as you believe will fully compensate the plaintiff for the injuries received and the damages he has sustained, but it must be one verdict as against both of the defendants. If you find for the plaintiff, you will, of course, assess the amount of his damages.

⁷⁸ Tennessee Cent. R. Co. v. Morgan, 175 S. W. 1148, 132 Tenn. 1.

If you find that one—that the negligence of one of these defendants was the proximate cause, as I stated before, and that the other defendant through its agent did not commit an act of negligence which was the proximate cause of the accident, then you will return against that defendant in such a sum as you find the plaintiff has been damaged by reason of the accident the amount which you find to be his damages and against the other defendant which you find is not guilty no cause of action.⁷⁹

H. INJURIES TO PERSONS NEAR TRACK

§ 4446. Duty to avoid frightening horses being driven near track or overhead

§ 4446(1). Indiana

You are instructed that, if an injury came to the plaintiff by his horse merely becoming frightened at the locomotive while standing on the track, however close to the highway, that had become stationary for a few minutes before, and was making no loud and unusual noises, there could be no recovery for such injuries. Under such circumstances, the locomotive could not, in law, be considered an object likely to frighten reasonably gentle horses. And in order, under such circumstances, to make it such an object of danger to travel, it would have to be shown that in its use and management some act was done which caused its machinery to make noises, emit smoke or steam, in a way and to a degree that would, under the circumstances, amount to carelessness and negligence.⁸⁰

§ 4446(2). Kentucky

The court instructs the jury that if they believe from the evidence that the defendant's engineer in charge of said engine, after discovering the plaintiff's presence on the highway on the occasion in controversy, saw or by the use of ordinary care could have seen that his horse was frightened, and if the jury further believe from the evidence that the circumstance was such as to lead an ordinary prudent person, situated as the engineer was, to believe that the horse would attempt to cross the track in front of the train, or would come in collision with the train, and that the said engineer, after so seeing the plaintiff, failed to use ordinary care to stop the train, or to prevent injury to the plaintiff, and that the plaintiff was injured as the direct and natural result of said failure on the part of said engineer, then and in that event the jury will

⁷⁹ Rathbone v. Detroit United Ry.,
169 N. W. 884, 203 Mich. 695.

⁸⁰ Indianapolis Union Ry. Co. v.
Boettcher, 28 N. E. 551, 131 Ind. 82.

find for the plaintiff; and unless the jury so believe as set out in this instruction, they will find for the defendant.⁸¹

§ 4446(3). North Carolina

The jury are instructed that a railroad company is not liable when an injury results from horses being frightened by the noises or appearance of the train, when due and proper care in the management of the train is used. If the engineer wantonly and maliciously made unnecessary noise for the purpose of scaring the horses, and thereby the injury was brought about, in the loss of the horses, defendant would be liable. Negligence is the failure to observe, for the protection of the interests of another person; that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. An act is wantonly done when it is needless for any rightful purpose, and manifests a reckless indifference to the rights and interests of another. "Maliciously done" means an act done with a desire or purpose to injure. A railroad is not liable, because of blowing whistle and ringing bell, while exercising this right in a lawful and reasonable manner, for injuries occasioned by horses, when driven upon the highway, taking fright at such noises.⁸²

§ 4446(4). Texas

Gentlemen of the jury, in this case you are charged: If you find and believe from the evidence that the plaintiff was injured by reason of the defendant's engine emitting or "popping off" steam as it passed over the crossing in front of the team behind which plaintiff was riding and traveling at the time of the accident, and frightening the said team behind which plaintiff was riding at the time of the accident, but if you further believe that such emission or "popping off" of steam was not occasioned by the engineer, or by any of defendant's employes in charge of its engine at the time, but that such emission or "popping off" of steam was occasioned merely by the escape of steam through a proper, usual, and necessary apparatus for the escape of an excess of steam, and that such noise or emission or "popping off" of steam was usual and incident to the use of its engine while under the proper amount of steam, and used in its ordinary manner, then you will find for the defendant, provided you believe that such emission or "popping off" of steam was the sole cause of the fright of the team and of plaintiff's injuries, if any.⁸³

⁸¹ Louisville & N. R. Co. v. Allen, 154 S. W. 1095, 153 Ky. 252.

⁸² Everett v. Receivers of Rich-

mond & D. R. Co., 27 S. E. 991, 121 N. C. 519.

⁸³ Texas & P. Ry. Co. v. Hemphill, 125 S. W. 340, 58 Tex. Civ. App. 232.

§ 4446(5). *Virginia*

The court instructs the jury that the defendant had the right to presume that, the less noise made by the train in approaching the crossing, the less danger there was of frightening horses near the track; and, while the defendant would be liable for injuries caused by frightening horses by unnecessary noise, it is not liable for injuries caused by frightening horses too far off for collision, when it makes as little noise as possible.⁸⁴

The court further instructs the jury that, operating railroads by steam being lawful, the defendant had the right to run its engines and trains where they can be seen by man and beast,—the right to make the noises incident to the movement and working of its engines; and the defendant is not liable for injuries occasioned by a horse, when being driven on the highway, taking fright at the sight of an engine, nor at the noises usually made by a running engine.⁸⁵

The court further instructs the jury that the defendant's employes in charge of the engine had a right to presume that horses near the track would not be frightened by an approaching engine, and it was not their duty to stop the engine or to give any signals when the horse was seen approaching the crossing too far off for a collision, and giving no indications of fright when seen by some of the employes on the engine.⁸⁶

§ 4446(6). *Washington*

You are instructed that if the defendants or either of them were operating a train upon and over the railroad and roadbed of the defendants or either of them at ——— avenue and ——— street at or about the hour of ——— o'clock a. m. on ———, that said train was being operated at an excessive and negligent rate of speed, and they or either of them failed to give any warning or signal of the approach of said train, and no bell was rung or whistle sounded, and no warning whatever given of the approach of said train, and the minor plaintiff could not hear the said train and could not see the same by reason of the contour of the ground or the place where the said railroad and train were, although he looked and listened for a train before driving upon said bridge immediately over said railroad and before going upon said overhead crossing at the place where the train passes under said bridge, and that steam or smoke was escaping from said engine, and went up and through the cracks of said bridge, and immediately under the horses which the minor plaintiff was driving, and fright-

⁸⁴ *Southern Ry. Co. v. Cooper*, 36 S. E. 388, 98 Va. 299.

⁸⁵ *Southern Ry. Co. v. Cooper*, 30 S. E. 388, 98 Va. 299.

⁸⁶ *Southern Ry. Co. v. Cooper*, 36 S. E. 388, 98 Va. 299.

ened them, and they ran away and threw the minor plaintiff from the wagon in which he was when driving or controlling said team, and that the defendants knew, or by the exercise of ordinary care should have known, that the said bridge was negligently constructed or that the escape of steam or smoke in the operation of a train downgrade and at a high rate of speed, without giving any warning of its approach, was dangerous to a person or persons upon said bridge driving a team thereon or thereover, and that the team of plaintiff was a gentle and well-behaved team, then and in that event your finding must be for the minor plaintiff and against the defendant or defendants guilty of such negligence as defined in these instructions.⁸⁷

§ 4447. Liability for placing objects near highway calculated to frighten horses—Hand car

You are instructed that plaintiff is required to prove that the employés and servants of the defendant placed a hand car near said highway, and near the beaten track of the same; that said hand car was an object, placed in the position stated, naturally or manifestly calculated, from its appearance and situation, to frighten horses of ordinary gentleness, and broken to travel over the highway, and traveling along the same; that the horse the plaintiff was riding was frightened by said hand car, and became unmanageable, and threw the plaintiff to the ground, and injured her, in the manner charged and alleged in her petition.⁸⁸

You are instructed that proof that the plaintiff sustained injuries as alleged will not alone authorize a verdict in her favor. The plaintiff must prove that said injuries were caused by a wrongful act of the defendant, its employés or servants. A person who does an act that is not unlawful cannot be held responsible for any resulting injury, unless he does it at a time, or in a manner, or under certain circumstances which render him chargeable with a want of due care and regard for the rights of others, and the want of such care constituted the negligence complained of. The placing of said hand car near said highway was not of itself wrongful or unlawful on the part of the defendant, its employés or servants. The wrong, if any, in so placing the hand car, must be necessarily sought for in the time, manner, and circumstances under which the act was performed, and from them you must determine whether the act of placing the hand car in such a position was negligence on the part of the defendant, its employés or servants.⁸⁹

⁸⁷ Jones v. Spokane, P. & S. Ry. Co., 124 P. 142, 69 Wash. 12.

⁸⁸ Atchison, T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199.

⁸⁹ Atchison, T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199.

You will notice that the only negligence imputed to the defendant is the "needless, unnecessary, unlawful, negligent, and careless placing of the hand car in the public highway, and so near the traveled and beaten track as to naturally frighten horses of ordinary gentleness traveling along said highway." Negligence is defined to be the want of care. In this case it is ordinary negligence that is imputed to the defendant. Ordinary negligence is the want of ordinary care and prudence; that is, such care as men of ordinary care and prudence exercise in matters of like kind, under like circumstances and surroundings to avoid injury to others.⁹⁰

You are instructed that it is not every obstruction on a highway irrespective of its character that is illegal, even though it is not sanctioned by any expressed legislative authority. Adjoining landowners may use a portion of the public highway temporarily, in making repairs, for the deposit of materials or tools necessary for use in making such repairs, and thus temporarily obstruct a portion of the highway; and if they do not unnecessarily obstruct or interfere with the lawful use of the highway by others, negligence or wrong is not to be imputed to them for so doing. If you find from the evidence that the placing of the hand car in such position was naturally or manifestly calculated, by its appearance and position, to frighten horses of ordinary gentleness, and well broken to travel along the highway, and traveling along the same, and that the defendant or its employes at the time were aware of such fact, you will be justified in finding such act to be negligence on the part of the defendant, its agents and servants. If you find that the defendant was guilty of negligence in placing such hand car on its right of way near to the highway or upon the highway and near the traveled track of the same, and that the plaintiff was riding along said highway on a horse ordinarily kind and gentle and broken to travel on the public highway, and the plaintiff's horse without fault of the plaintiff was frightened by the appearance of said hand car, and became unmanageable, and threw the plaintiff to the ground, and she sustained the injuries, or some of the injuries, alleged by her, your verdict must be for the plaintiff.⁹¹

You are instructed that, if you find that the hand car, situated and placed on the right of way of the defendant and outside of the limits of the highway, was placed in such a position by the employes of the defendant that it would naturally or manifestly frighten horses of ordinary gentleness and broken to travel on the highway traveling along, and such employes were aware of the fact that a hand car so placed was an object naturally calcu-

⁹⁰ Atchison, T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199.

⁹¹ Atchison, T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199.

lated, from its appearance, to frighten horses ordinarily gentle and well broken to travel on public roads, and traveling along the same; and you further find that the plaintiff was riding such a horse along the said public highway, and her horse, without fault on her part, became frightened at the appearance of such hand car, and became unmanageable, and threw her to the ground, and she thereby sustained the injuries complained of,—you should find for the plaintiff, if you find such act of the employés of the defendant to have been negligence.⁹²

§ 4448. Liability for personal injuries from falling cinders

The jury are instructed that, if the defendant used the best devices known to avoid throwing sparks, ashes, or cinders, and used them carefully and with prudence, then it was not responsible for the injury to plaintiff mentioned in the evidence. The defendant was not bound to use any supposed improved device, or one which theoretically might be supposed to be better than the one in use, but only such devices whose utility had been tried and approved in practical operation.⁹³

§ 4449. Contributory negligence—Duty of traveler to avoid exposing his horses to fright

§ 4449(1). Arkansas

You are instructed that if you find from a preponderance of the evidence that the plaintiff's driver knew at the time he drove plaintiff's team to the place and stopped the team where the alleged injury occurred that the team of mules were afraid of running trains and the noise incident thereto when handled with prudence and care, and knew that the train was likely to pass while he was there and might frighten and cause his team to run, or try to run away; and while there in close proximity to defendant's railway line observed the train approaching in time to have moved his team out to a place of more safety, but remained at the place, intending to watch and hold the team while the train passed by, and did hold them until the train was passing by, and as the train was passing by the team became so frightened that they backed, threw, or ran the wagon into the passing train, then plaintiff would be guilty of contributory negligence, and cannot recover in this action.⁹⁴

§ 4449(2). Kansas

You are instructed that the defendant, in its second cause of defense, alleges that the plaintiff's injuries, if she has sustained any,

⁹² Atchison, T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199.

⁹³ Burke v. Manhattan R. Co., 13 Daly (N. Y.) 75.

⁹⁴ Geren v. St. Louis, I. M. & S. Ry. Co., 137 S. W. 1100, 99 Ark. 226.

were caused by her own negligence in riding on a horse which was easily frightened, and unsafe to be ridden by her. This is an affirmative defense, and the burden of proving the same (except it is shown by the evidence offered by the plaintiff) rests upon the defendant. The jury are instructed that it is the duty of a traveler on the public highway, who is about to cross a railroad track, to make vigilant use of his senses in order to ascertain whether there is present danger in crossing, and a traveler who fails to take this precaution is not using ordinary care, and although you may find from the evidence in this case that the defendant was guilty of negligence in placing the hand car in the place in which it was, and that it would naturally tend to frighten horses, still, if you find from the evidence that the plaintiff knew this fact, and on approaching said crossing did not exercise ordinary care and caution for the purpose of ascertaining whether or not it was dangerous for her to cross said crossing, she would not be using ordinary care; and if the injuries resulted from said failure she would be guilty of contributory negligence, and could not recover, and in such case your verdict should be in favor of the defendant. You are further instructed that, although you may find from the evidence in this case that it was negligence on the part of the company to leave the car in such close proximity to the traveled portion of the highway, and that it would naturally tend to frighten horses, still that fact did not relieve the plaintiff from the necessity of taking ordinary precautions for her safety.⁹⁵

§ 4449(3). Texas

The jury are instructed that if plaintiff knew that his team was afraid of the engine, and after crossing the track in safety he had time to have moved on to a safe distance, and stopped voluntarily and unnecessarily, and, "while so standing," the employes, for the purpose of backing the train, gave the usual signals, and frightened the team, the plaintiff could not recover.⁹⁶

§ 4450. Contributory negligence as precluding recovery for intentionally frightening horse

The jury are instructed that, if you find that the agents and servants of the defendant, at the time of the alleged injury, seeing the plaintiff as he was about to approach the crossing, could have avoided any injury by the exercise of even ordinary care, but, disregarding their duty in that respect, recklessly and purposely caused the whistle to sound or the steam to be blown off, on and from the locomotive engine, intending to injure the plaintiff or to frighten

⁹⁵ Atchison, T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199.

⁹⁶ Hargis v. St. Louis, A. & T. Ry. Co., 12 S. W. 953, 75 Tex. 19.

his horse, or under such circumstances as imply a willingness to inflict injury or to disregard human life, you may find that such injuries (if any were committed) were willfully and wantonly done, and in such case the plaintiff could recover, even though he were himself negligent in his own conduct at the time; provided, that such agents and servants were in the regular course of their employment by the defendant at such time, and in the line of their business.⁹⁷

§ 4451. Presumptions and burden of proof

You are instructed that negligence is not presumed; it is a fact to be proven by the plaintiff, and it is a question of fact to be determined by you from all the evidence in this case whether the defendant, its employes or servants, were guilty of any negligence in placing the hand car upon its right of way, and near or upon the highway.⁹⁸

I. INJURIES TO ANIMALS

§ 4452. Liability in general

Injuries to stock from defects in private crossing, see ante, § 4292.

§ 4452(1). Alabama

You are instructed that, if you should believe from this evidence that this cow went on the defendant's track, and that as soon as the engineer saw the cow, or perceived the danger the cow was in, he used all means necessary to stop the train to prevent injury to the cow, then the railroad company would not be liable. On the other hand, if the railroad company has failed to satisfy you that the engineer operating its train was not guilty of negligence, then the railroad company would be liable for killing the cow.⁹⁹

You are instructed that if the jury believe from the evidence that the animals came suddenly from the left-hand side of the track, and so close to the train that the engineer could not stop in time to prevent the accident, then you must find for the defendant.¹

§ 4452(2). Arkansas

You are instructed that, if you find from a preponderance of the testimony in this case that the mare belonged to plaintiff, and was negligently struck by defendant's train and killed, or if you find that the mare was negligently run upon the bridge of defendant by its train, and thereby received injuries from which she died, you will find for the plaintiff, and assess his damages in any sum

⁹⁷ Indianapolis Union Ry. Co. v. Boettcher, 28 N. E. 551, 131 Ind. 82.

⁹⁸ Atchison T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199.

⁹⁹ Southern Ry. Co. v. Freeman, 81 So. 135, 16 Ala. App. 687.

¹ Louisville & N. R. Co. v. Brinckerhoff, 24 So. 892, 119 Ala. 606.

that you may find from the evidence in this case, not to exceed \$——.²

§ 4452(3). Kentucky

You are instructed that it was the duty of the defendant railroad company to use ordinary care in keeping its right of way free from such unnecessary obstructions as would prevent those operating its locomotives from seeing such objects as cattle upon its railroad track which could otherwise have been seen; it was also the duty of those in charge of defendant's locomotive upon the occasion in question to keep a vigilant lookout all along the railroad track and right of way to discover the presence of cattle which might be, or have strayed, upon the said track, and to use ordinary care to avoid killing or injuring such cattle; it was also the duty of defendant's servants in charge of its said locomotive in approaching a public highway crossing to sound the steam whistle and bell upon the said engine either continually or alternately from a point at least —— yards from said crossing until the said engine reached the crossing; it was also the duty of those in charge of defendant's locomotive, after they saw, or by the exercise of reasonable care could have seen and known of the presence of plaintiff's cattle upon the railroad track upon the occasion in suit (if they did see or by the exercise of ordinary care could have seen same), to have used all the means at their command consistent with the safety of the said train, its operatives and passengers, to have avoided injuring said cattle. Now if the defendant negligently failed in any of the particulars set forth in this instruction, and as a direct and proximate result thereof the plaintiff's cattle were killed, or injured so that they had to be killed, then the law is for the plaintiffs, and the jury must so find.³

§ 4453. Duty to use ordinary care to avoid injury

§ 4453(1). Arkansas

You are instructed that, if you find that by keeping a constant lookout they [employés in charge of the train] could have seen the cow in time to avoid injuring her, and they either did not keep a lookout in time to discover her, or, after discovering her in danger, they did not exercise ordinary care to avoid injuring her, then the defendant would be liable. If, on the other hand, you believe from the evidence that the employés in charge of the train, or some one of them, was keeping a constant lookout and saw the cow as soon as she could be discovered, and used all reasonable and ordinary care to avoid injuring her after they did discover her, the de-

² St. Louis, I. M. & S. Ry. Co. v. Goss, 123 S. W. 390, 92 Ark. 372.

³ Chesapeake & O. Ry. Co. v. Mason, 185 S. W. 71, 169 Ky. 699, L. R. A. 1916F, 127.

fendant would not be liable. If they were in the exercise of ordinary care, and she was so concealed or off of the track, and they had no reason to suppose she would come on the track, until they were so near that when she did come on the track they were unable to avoid killing her, defendant would not be liable.⁴

§ 4453(2). *North Dakota*

The court instructs the jury that, if you believe from the evidence in this case that the railway company had its train properly equipped with airbrakes and modern appliances, and that after the stock was discovered to be in a place of danger said employes exercised ordinary care not to injure them, you must find for the defendant. If, on the other hand, you find from the evidence in the case that the defendant's employes did not use ordinary care not to injure the stock after they were discovered to be in a place of known danger, it would be your duty to find for the plaintiffs in such sum as you would find they had been injured.⁵

§ 4454. *Duty to keep lookout*

§ 4454(1). *Alabama*

The jury are instructed that, if the engineer is negligent in keeping a lookout, and after a while, after such negligence, does discover an animal upon the track, and it is then so close upon the track that it is impossible to prevent killing or hurting it, that engineer is guilty of negligence; whereas, in the other case I have supposed to you, he would not be. Now the contention here is that the engineer was guilty of negligence in not keeping a lookout of this sort; that if he had kept a lookout for animals in dangerous proximity, he would have seen the animals in time to have prevented injury to them. The contention of the defendant, on the contrary, is that he did keep such a lookout as a reasonably prudent and competent man ought to have kept, and, keeping it, did not see the animals until they were so close that he could not help hurting them. If this is true, of course plaintiff cannot recover; if the first contention is true, of course the plaintiff must recover.⁶

The court charges the jury that if they believe from the evidence that the engineer in charge of the train that killed the horse sued for could, by keeping a proper lookout, have seen the horse before he got on the track, in time to check or stop the train, and thereby save the life of the horse, and that he failed to keep such proper lookout, then the defendant is liable for the value of the horse.⁷

⁴ *Kansas City Southern Ry. Co. v. Garrett*, 196 S. W. 454, 129 Ark. 583.

⁵ *Carr v. Minneapolis, St. P. & S. M. Ry. Co.*, 112 N. W. 972, 16 N. D. 217.

⁶ *Western Ry. of Alabama v. Stone*, 39 So. 723, 145 Ala. 663.

⁷ *Central of Georgia Ry. Co. v. Edmondson*, 33 So. 480, 135 Ala. 336.

You are instructed that, although the jury may believe from the evidence that the engineer did not see the animals till they were falling from the pilot, still, if they believe that, under the circumstances, the engineer should have seen them in time to avoid the injury, then the jury should find for the plaintiff.⁸

The court instructs the jury that, if you find from the evidence in this case that the defendant's servants could have seen the mule killed in this action by discharging their duty in keeping a lookout and in the exercise of ordinary care prevented the killing, you will find for the plaintiff.⁹

§ 4454(2). *Arkansas*

The court instructs the jury that, if you believe from the evidence in this case that if defendant's servants had been keeping a lookout they could have avoided the killing of plaintiff's cow by stopping its train, it was the duty of defendant's servants to stop its train to avoid the injury.¹⁰

The court instructs the jury that it is the duty of all persons running trains in this state upon any railroad, to keep a constant lookout for persons and property upon the track of any and all railroads, and, if any person or property shall be killed or injured by the neglect of any employé of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employé or employés in charge of such train of such company could have discovered the peril of the person or animal injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed.¹¹

You are instructed that the law makes it the duty of persons running trains in this state upon any railroad to keep a constant lookout for stock upon said railroad; and, if any stock shall be injured by the negligence of such persons to keep such a lookout, the company owning and operating such railroad shall be liable to the owner of such stock so injured for all damages resulting from such neglect, and the burden of proof shall devolve upon the railroad company to establish the fact that this duty has been performed.¹²

* ⁸ *Louisville & N. R. Co. v. Brinkerhoff*, 24 So. 892, 119 Ala. 606.

⁹ *Kansas City Southern Ry. Co. v. McCrossen*, 215 S. W. 161, 140 Ark. 68.

¹⁰ *Kansas City Southern Ry. Co. v. Whitley*, 213 S. W. 369, 139 Ark. 255.

¹¹ *Kansas City Southern Ry. Co. v. Whitley*, 213 S. W. 369, 139 Ark. 255.

¹² *Fenton v. De Queen & E. R. Co.*, 144 S. W. 192, 102 Ark. 386.

§ 4455. Duty to keep lookout as affected by discharge of duty to fence

You are instructed that, having inclosed its right of way at the place where these horses were, it was not bound to anticipate that horses or cattle would be there on the track, but had a right to presume that the track was clear; and that defendant owed no duty to the plaintiff in relation to his trespassing horses until their presence was discovered, and then only owed the use of ordinary care to avoid injury to the horses.¹³

§ 4456. Sufficiency of headlight

The court instructs the jury for the plaintiff that if they believe from the evidence that, on the occasion of the admitted killing of the cow on the ——— day of ———, the defendant company failed to have its engine equipped with an electric headlight which would consume not less than 300 watts at the arc, and that, as a proximate result of such failure, said cow was killed by the defendant, then the jury must find for the plaintiff as to this item of his suit in such sum as the said cow was reasonably worth on the market in the neighborhood of the killing, not to exceed the sum claimed, to wit, \$———. ¹⁴

§ 4457. Duty to whistle or ring bell

§ 4457(1). Georgia

You are instructed that, if you shall find that the agents and servants of defendant failed to blow the whistle and ring the bell of the locomotive, and shall further find that in such failure ordinary and reasonable care and diligence was not used, and that such failure proximately caused the death of the [stock], then, in either of these events, you should find for the plaintiff.¹⁵

§ 4457(2). Iowa

The court instructs the jury that the statutory requirement that the "whistle shall be twice sharply sounded at least ——— rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed," is for the safety of animals as well as persons, and that a failure to give the signals required by this statute would be negligence on the part of the defendant; but, before such negligence will justify a recovery against the defendant, it must appear that if such signals had been given they would have prevented the cattle going on the track or frightened them away from the crossing.¹⁶

¹³ *Mears v. Chicago, & N. W. Ry. Co.*, 72 N. W. 509, 103 Iowa. 203.

¹⁴ *Yazoo & M. V. R. Co. v. Fulgham*, 74 So. 294, 113 Miss. 413.

¹⁵ *Atlantic Coast Line R. Co. v. Waycross Electric Light & Power Co.*, 51 S. E. 621, 128 Ga. 613.

¹⁶ *Graybill v. Chicago, M. & St. P. Ry. Co.*, 84 N. W. 946, 112 Iowa, 738.

§ 4457(3). South Carolina

The jury are instructed that if you find as a matter of fact that the engineer or fireman saw, or could have seen, the plaintiff's mule on the track at any time before the killing, and that they did not try to stop the train or to frighten the mule off the track by blowing the whistle or ringing the bell, then the railroad company is guilty of negligence, and you must find for the plaintiff.¹⁷

§ 4458. Speed as negligence

The court charges the jury that if they believe from the evidence that defendant's locomotive was running at such rapid rate of speed that it would have been impossible by the use of ordinary means and appliances to stop the locomotive and prevent the injury to the stock within the distance in which stock upon the track could be seen by aid of the headlight, then the defendant was guilty of negligence; and if the jury further believe from the evidence that that negligence proximately contributed to the injury to plaintiff's stock, then the plaintiff ought to recover.¹⁸

The court charges the jury that the duty is on a railroad company to run its locomotive at night at such a rate of speed that it can be stopped, if necessary, by the use of ordinary means and appliances within the distance in which stock would be seen upon the track by the aid of the headlight of the locomotive; and if the defendant railroad company in this case failed in this duty, and such failure was the proximate cause of the injury to plaintiff's stock, then they ought to find a verdict for the plaintiff.¹⁹

§ 4459. Same—Violation of ordinance

The court charges the jury that if they believe from the evidence that defendant's locomotive was being run at the time of the injury complained of at a greater rate of speed than is prescribed by the city ordinance, which is in evidence, then such running of said locomotive at such rate of speed would be negligence.²⁰

§ 4460. Duty to slow down or stop locomotive or train**§ 4460(1). Illinois**

The court instructs the jury that, if they believe from the evidence that the train, which it is alleged killed the stock, could have been stopped by the exercise of ordinary care and prudence before running over the horse, which it is alleged was killed, and that by reason of such neglect to stop said train the horse was run

¹⁷ Davis v. Southern Ry. Co., 47 S. E. 723, 68 S. C. 446.

¹⁸ Louisville & N. R. Co. v. Christian Moerlein Brewing Co., 43 So. 723, 150 Ala. 390.

¹⁹ Louisville & N. R. Co. v. Christian Moerlein Brewing Co., 43 So. 723, 150 Ala. 390.

²⁰ Louisville & N. R. Co. v. Christian Moerlein Brewing Co., 43 So. 723, 150 Ala. 390.

over and killed by defendants' train of cars, then the jury are directed to find for plaintiff, the value of his horse or colt.²¹

§ 4460(2). *West Virginia*

The jury are instructed that if the jury believe from the evidence that the defendant's engine and caboose killed the plaintiff's horses, and the said caboose had upon it two brakemen and a conductor, and the engine had the engineer and fireman aboard, and that while the alarm whistle was blowing no brake was applied upon said caboose, but that said engine and caboose chased said horses, and knocked them off, without any apparent slowing of the train, then the said defendant is guilty of negligence, and the jury will find for the plaintiff.²²

The jury are instructed that if the jury believe from the evidence that defendant's engine chased plaintiff's horses ——— or ——— feet, and that where said horses were struck said engine had not slacked its speed, then there was negligence on the part of the employes of the defendant to check or stop said train, and in that case they are instructed to find for the plaintiff.²³

The jury are instructed that if the jury believe from the evidence that defendant's train killed plaintiff's horses, and that said train was a light train; that it had upon it two brakemen, a fireman, and engineer, and if they further believe from the evidence that the alarm whistle sounded ——— feet away from the horses, and that said brakemen and conductor took no steps to prevent the destruction of plaintiff's horses, then, and in that case, there is not only a want of care, but negligence, on the part of the defendant, and the jury will find for the plaintiff.²⁴

§ 4461. *Duty in backing engine*

I instruct you that if you should find that the colt killed in this case came upon the track of the railway immediately in front of the backing tender of the engine, and so near thereto that there was not time to observe the statutory precautions, that is, to sound the alarm, put on the brakes, or take other means to stop the train and avoid the accident, and if you should further find that the engineer was upon the lookout in position to see, and that because of the sudden appearance of the colt, and its nearness to the tender, he could not have seen and did not see the colt upon the track, and if you should find that the fireman was necessarily engaged in firing the engine, and for that reason was not upon the lookout,

²¹ *Illinois Cent. R. Co. v. Baker*, 47 Ill. 295.

²² *Bullington v. Newport News & M. V. Co.*, 9 N. E. 876, 32 W. Va. 436.

²³ *Bullington v. Newport News & M. V. Co.*, 9 N. E. 876, 32 W. Va. 436.

²⁴ *Bullington v. Newport News & M. V. Co.*, 9 N. E. 876, 32 W. Va. 436.

then the defendant would not be liable merely for the reason that the engine was being backed.²⁵

§ 4462. Duty to anticipate that cattle will come on track

You are instructed that, if they were keeping a constant lookout and did not see the cow, of course they would not be required to slacken the speed until they discovered her, and after they did discover her, if, in the exercise of ordinary care, they had no reason to believe she was going to come upon the track, they would not be liable for any failure to slacken speed or stop the train until they had reason to believe she would come on the track. In other words, they are required to do what a reasonably prudent man would have done under the circumstances, and if there was nothing in the conduct of the cow to indicate that she was coming upon the track, or an ordinarily prudent person would not have anticipated the cow would have come on the track, then they are not required to do anything until they had some reason to believe she was coming on the track, and if, after that, they tried to avoid striking her, and did all they reasonably could with safety to the passengers and persons on the train after it was discovered that she was coming on the track, that would relieve them of liability.²⁶

§ 4463. Right of engineer to presume that animals will leave track or will not suddenly rush upon track

The court instructs the jury that the engineer operating the locomotive pulling the train has the right to operate the train upon the assumption that any animal on the track will get off before being struck by the train. In this case, if the animal was upon the right of way, or if it was near enough to the track to be struck by the engine, nevertheless the engineer had the right to assume that the animal would move out of the way before the train arrived at the point where the animal was. If the animal started across the track in front of the engine suddenly, and if the animal remained still until the engine was only a short distance away, and then started suddenly to cross the track in front of the engine, and if, after the engineer realized that the animal would cross in front of the engine, he was unable to slow the engine down or stop it, so as to avoid the killing, in that event you will find for the defendant.²⁷

The court instructs the jury that if the animal was in view, and was in a place of safety when first observed by the engineer, the said engineer in that event had a right to assume that the animal would not suddenly rush upon the track, and had the right to oper-

²⁵ Southern Ry. Co. v. Owen, 215 S. W. 270, 142 Tenn. 1.

²⁶ Kansas City Southern Ry. Co. v. Garrett, 106 S. W. 454, 129 Ark. 583.

²⁷ Kansas City Southern Ry. Co. v. Whitley, 213 S. W. 369, 139 Ark. 255.

ate his train accordingly. If said animal did remain in a place of safety until the engine was so near that it could not be stopped, and then rushed suddenly in front of the engine and was injured, the jury will find for the defendant.²⁸

§ 4464. Duty of railroad company to fence track or maintain cattle guard

§ 4464(1). Illinois

The jury are instructed that, in determining the limits of the village of ———, the location of the plat will not determine, but it must be determined from the facts and circumstances surrounding it; and if they believe, from the evidence, that the town lots come down to the north side of the right of way of the defendant, and that switches were used on both sides of the main track to receive and deliver freight, and that the public used the open space south of the main track in getting to and from cars standing on the switches, and that dwellings and stores and warehouses were near and around the location where the cow was struck, or killed, these facts ought to be considered in determining the limits of the town of ———, and whether the cow was struck, or killed, within the limits of said town.²⁹

§ 4464(2). Iowa

You are instructed that, if you find that the steers in question were struck inside of the defendant's right of way and west of the crossing in question, then you will proceed to consider and determine as to whether said steers were upon said right of way by reason of the fence or cattle guard in question, or both, being defective and out of repair at the time of the killing of the cattle in question. There is no question made but that the defendant was obliged to fence and keep its fence in repair and to erect and maintain in proper repair its cattle guard on the west side of the highway in question. A fence and cattle guard were erected and maintained at said place. No question is made as to the kind of fence and cattle guard so maintained, and therefore the only question here to determine is as to whether said fence and cattle guard were out of repair and defective by reason of so being out of repair.³⁰

You are instructed that the fence by law required should be constructed either with five barbed wires securely fastened to posts not more than twenty feet apart, or with five boards securely fastened to posts not more than eight feet apart, the fence in either case to

²⁸ *Kansas City Southern Ry. Co. v. Whitley*, 213 S. W. 369, 139 Ark. 255.

²⁹ *Toledo, W. & W. Ry. Co. v. Chapin*, 66 Ill. 504.

³⁰ *Harper v. Chicago, R. I. & P. Ry. Co.*, 143 N. W. 529, 161 Iowa, 592.

be at least fifty-four inches high. There is a failure to fence unless the company builds substantially such a fence as the law prescribes. Such fence includes proper gates, and corresponding in sufficiency, so far as a gate may do so, with said required fence, with proper and sufficient fastenings, at private crossings which are not constructed for open crossings, and such a crossing as is questioned in this action.³¹

§ 4464(3). Michigan

The jury are instructed that the defendant railroad company claims in this case that it has complied with the statutory requirements in regard to the fences and cattle guards. That is their defense—that they have complied with the statutes substantially, and that they had there that day erected and in good order fences and cattle guards that met fully the requirements of the statute. They claim that they had built fences both on the easterly and westerly sides of this railroad, and built a cattle guard at the north side of this highway, and one at the south side of the highway, and proper connecting fences. That is their claim. Now, there is no claim here that the fences as built, or the cattle guards as built, were not sufficient. The claim of the plaintiff is that they were not properly located and extended. The claim of the plaintiff is that the railroad fences did not cover the entire right of way outside of the highway. So you see the complaint is not on account of the kind of fence that had been erected there, or the kind of cattle guard, but the complaint is of the location of the fences and the cattle guard. Now, this statute requires the fences to be erected at highway crossings up to the line of the highway, to that point where the line of the highway and the line of the railroad right of way meet. It contemplates that railroad tracks shall not be exposed except within the limits of the highway, that outside of the highway they shall be fenced, and that part of the railroad track which is unfenced shall consist only of that part of it which lies within the boundaries of the lines of the highway. As I told you before, highways must be left open their full width by everybody, railroads included. So this defendant, the railroad company, need not have fenced into the highway, nor upon any part of the highway, but only up to the line of the highway. So you see it is important for you to determine from the evidence where the line of the highway was, and where the line of the railroad right of way was, and the defendant was required to fence up to that point where those two lines met, but not beyond that.³²

You are further instructed, gentlemen, that if you find from the

³¹ *Titus v. Chicago, M. & St. P. Ry. Co.*, 103 N. W. 343, 128 Iowa, 194.

³² *Goretski v. Au Sable & N. W. Ry. Co.*, 138 N. W. 658, 172 Mich. 623.

evidence in this case that the guards in question were not such guards as were approved by the railroad commissioner, or that they were not placed down as required by the railroad commissioner, under his plans and specifications submitted here, then you would find the defendant liable, under further instructions that I will give you. Or if you find that they were such guards, and were so placed, as required by the plans and specifications approved by the commissioner of railroads, but that the company had negligently failed to keep such guards in repair, then you will find them liable. When I say "keep them in repair," I mean in good and sufficient repair, so they would serve the purpose for which they were placed there. I do not mean that, if you find they were in that condition, they would be liable, but you must further find that this injury was occasioned because of such defect, if you find it. In other words, gentlemen, if you find that the guards in question are such as are approved, and further find that the company negligently failed to keep the same in repair (that is, negligently permitted them to fill up between the slats with cinders, ballast, or dirt), and that these cattle went upon the railroad track, over these guards so out of repair, and that the injury was occasioned by such want of repair, then the defendant would be liable. If, on the other hand, you do not find these things to be true, then they would not be liable; that is, if you find that the guards were in repair, the company would not be liable, or, if you find that the injury was not occasioned because of the want of repair, then the company would not be liable.³³

§ 4464(4). Missouri

The court instructs the jury that it is not the duty of the defendant to construct cattle guards that will at all times turn stock; but it is its duty to so construct cattle guards that they will ordinarily turn stock. Therefore, if you believe and find from the evidence herein that the cattle guards in question would ordinarily turn stock on or about ———, your verdict herein will be for defendant.³⁴

The court instructs the jury that if you find from the evidence that the defendant, by its agents or servants, in the month of ———, ran its electric car over and against plaintiff's horse at or about the place mentioned in evidence, in ——— county, ———, at a point on said road that was not in the crossing of a public highway, and at a point or territory where there were no streets crossed by the defendant's road, then plaintiff is entitled to recover of defendant the value of said horse as shown in the testimony, not

³³ Hathaway v. Detroit, T. & M. Ry. Co., 83 N. W. 598, 124 Mich. 610.

³⁴ Lee v. Butler County R. Co., 227 S. W. 1061.

exceeding \$——, without any proof of negligence, unskillfulness, or misconduct on the part of the officers, servants, or agents of defendant, provided you believe from the evidence that the horse was so injured, by being run over or against by defendant's electric car, if such happened, as to be of no value.³⁵

The court instructs you, in reference to the first and second counts of the petition, that if you believe from the evidence that the plaintiff's mules were struck at a point on defendant's railroad within the switch limits of the station of ——, and that the length of the track set apart and used by the defendant as its switch at said station was necessary for the transaction of the defendant's business at said station, or for the convenience of the public in transacting business thereat, or for the safety of the men engaged in operating trains, then the defendant was not required to fence its tracks at said place, and the plaintiff cannot recover on the said counts.³⁶

§ 4464(5). Texas

The jury are instructed that it was the duty of the defendant, under our statutes, to have placed a good and sufficient cattle guard at the points of entering plaintiff's field or inclosure with its railroad, and to keep them in good repair. In all cases the statute requires that such cattle guards or stops shall be so constructed and kept in repair as to protect such fields and inclosures from the depredation of stock of every description.³⁷

You are instructed that if you believe from the evidence that, on or about the ——, defendant killed —— head of plaintiff's cattle and injured —— head, by striking them with its locomotive or cars, and you find that, at the time said cattle were struck, defendant's right of way was not fenced in such a manner as under ordinary circumstances to effectually turn live stock of an ordinary disposition and docility, then you will return a verdict for the plaintiff.³⁸

§ 4465. Same—Duty to repair breaches in fence

§ 4465(1). Illinois

The jury are instructed that, if you believe from the evidence that defendant had a good and sufficient fence on ——, and that it was broken down by trespassers, or blown down or burned down without fault of defendant, and plaintiff's horses got through this fence

³⁵ *Collins v. Metropolitan St. Ry. Co.*, 138 S. W. 697, 157 Mo. App. 619. Under the pleadings and evidence, the injury occurred at a point where the road might lawfully have been inclosed with a fence and where there was no lawful fence.

³⁶ *Redmond v. Missouri, K. & T. Ry. Co.*, 77 S. W. 768, 104 Mo. App. 651.

³⁷ *Stephenville, N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471.

³⁸ *Ft. Worth & D. C. Ry. Co. v. Scheer* (Civ. App.) 169 S. W. 1069.

at the place of such break before the defendant had reasonable time to repair the fence, then you will find for defendant.³⁹

§ 4465(2). Indiana

You are instructed that railroad companies are not required to keep such a guard on their road as to see a breach in their fence and to repair it the instant it occurs; still they are required under the law to keep such a force as will discover breaches and openings in their fences and to close them within a reasonable time. If they neglect to so do within a reasonable time, it is a neglect of duty which will render them liable for injury to stock if it comes onto the road through such openings or broken fences, providing the owner or persons having the stock in charge is guilty of no negligence which contributes to the injury.⁴⁰

§ 4466. Same—Duty as to gates

You are instructed that a gate in a right of way fence at a private crossing is a part of the "fence," and railroads are required to keep such gates in such repair as to prevent stock of ordinary disposition from escaping through and onto defendant's right of way through any such gates, and you are further instructed that the defendant is required to keep its road fences and gates in such repair as to effectually prevent stock from entering upon its road-bed and track.⁴¹

§ 4467. Same—Waiver of rights by adjoining owner

You are instructed that the duty to fence its railroad by a railroad company is for the benefit of the adjoining landowner, and that an adjoining landowner, through or along whose land a railroad passes, may waive the right to have such fences and gates as are prescribed by the statute, or agree to dispense with same; and if you believe, from the evidence, that the adjoining landowner, K., did so waive his right in this instance, and that plaintiff's colt was trespassing in said K.'s field, by going over or through a legal fence, and was in such field without any consent from said K., then your verdict will be for the defendant.⁴²

§ 4468. Liability for injuries to cattle lawfully permitted to run at large

You are instructed that, while the law is that cattle upon the open range which stray upon and depasture the uninclosed lands of a person other than their owner are not trespassers to the ex-

³⁹ Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

⁴⁰ Michigan Cent. R. Co. v. Farrell, 99 N. E. 1026, 52 Ind. App. 603.

⁴¹ Trinity & B. V. Ry. Co. v. Wil-

lamson (Tex. Civ. App.) 180 S. W. 283.

⁴² Rinehart v. Kansas City Southern Ry. Co., 80 S. W. 910, 128 Mo. App. 446.

tent that an action would lie in favor of the owners of the land, and that injury to the right of way of a railroad company by cattle under like conditions would not be actionable trespass, it does not follow that, because no action is given under such circumstances, the cattle are so lawfully upon the right of way as to make the railroad company an insurer of their safety. The plaintiff is presumed to have known that the railroad company is not required to fence its right of way at the point where the cattle entered upon the tracks and were killed, and that, charged with such knowledge, he took all risk, in permitting his cattle to run at large, of injury to, or destruction of, them by mere accident, and he cannot recover in this action unless he has proven by a preponderance of evidence that the injury or destruction of his cattle was by defendant's negligence.⁴³

§ 4469. Duty towards cattle unlawfully running at large upon the highway

§ 4469(1). Oklahoma

You are further instructed, gentlemen of the jury, that the statutes of ——— provide that all cattle, together with certain other domestic animals, shall be by the owners thereof restrained from running at large in ———, unless permitted to do so by the suspension of said herd law. You are further instructed that there is no evidence in this case that the said herd law has been suspended as provided by law, and that it is presumed as a matter of law, and you are instructed that said herd law is, and was on ———, in force in that part of ——— county, ———, where plaintiff's cattle are alleged to have been killed; and if said cattle of plaintiff were injured upon a public highway while grazing or roaming at large, the said cattle were trespassing and unlawfully upon said premises at said time and place, and the defendant was only under the duty to use ordinary care to avoid injuring them after they were discovered on or in dangerous proximity to its track.⁴⁴

You are further instructed, gentlemen of the jury, that even though the cattle in question were upon the public highway, in violation of the herd law of ———, and even though they were trespassers upon the property, it was the duty of the defendant to exercise ordinary care and diligence to protect the said cattle of plaintiff. And if you find from the evidence that the defendant failed to exercise ordinary care and diligence in slowing up its train and bringing same to a stop, after discovering said cattle,

⁴³ Chicago, B. & Q. R. Co. v. Cash, 157 P. 701, 24 Wyo. 316.

⁴⁴ Chicago, R. I. & P. Ry. Co. v. Carden, 149 P. 127, 46 Okl. 557.

and you find that said train crew had ample time so to do, and failed to do so, then and in that event you will find for the plaintiff, even though the cattle were trespassing.⁴⁵

§ 4469(2). South Carolina

The jury are instructed that it is the law, and therefore appears, and it may be taken notice of by the court and by you, that the general stock law is of force in ——— county; a provision of which requires the owner of stock to keep his stock fenced, not to allow them to run at large. Now, in a county where the stock law is of force everybody has the right to presume—the railroad company has the same right anybody else would have—the right to presume that people are obeying the law, are keeping their stock fenced; and therefore the railroad is not bound to exercise as great care or vigilance in looking out and watching for stock on its track in a county where the stock law is of force as they would be where the law allows stock to run at large. That does not excuse a railroad for killing or injuring stock where the stock law is of force, if it knows as a matter of fact, or if it ought to know, if it has the opportunity to know, and if a person of ordinary intelligence and ordinary observation would know, that stock were out at large. It is true that the law is to the effect that a trespasser has no rights as against the owner of the property on which he is trespassing, except he has the right not to be willfully or wantonly injured by the owner of the property, and to some extent that might apply to trespassing stock; but it cannot apply to animals in the same sense that it applies to people, for the very reason I mentioned a moment ago—animals have not the intelligence of people—and therefore they cannot be held to the same rule of accountability or liability and the same rule of duty that intelligent beings are held to. So that a railroad has no right to wantonly or willfully injure trespassing stock; neither has it the right to injure trespassing stock through negligence. The rule is only modified by the stock law to the extent that the railroad is not bound to keep the same degree of watchful care, watchfulness for stock on its track, where the stock law is in force, as where the stock law is not in force. Where stock is on the track in a county where the stock law is not in force, and the railroad sees them, or has the opportunity and ought to see them by the exercise of ordinary watchfulness, then, if it fails to see, or if, seeing them, injures them through willful, wanton negligence, the railroad is liable for damages. So, in this case, if you find they were at large in violation of the provisions of the general stock law, and should find that the railroad company, by the exercise of ordinary vigi-

⁴⁵ Chicago, B. I. & P. Ry. Co. v. Carden, 149 P. 127, 46 Okl. 557.

lance—which means a less degree of vigilance in a stock law county than in a nonstock law county—if the railroad, by the exercise of vigilance, which a prudent railroad in a stock law county ought to exercise, knew or could have known that stock was on the track, then the railroad was bound to exercise due care, the care of a prudent railroad to prevent injury to the stock; and if you find that it failed to exercise that degree of care, and that the stock was injured by reason of such failure, then the railroad is liable. If the evidence fails to make out those facts, the railroad then is not liable.⁴⁶

§ 4470. Unavoidable accident

I charge you, gentlemen of the jury, that if you believe from the evidence that the view of the engineer was obstructed by the culvert or trestle testified about until the cow emerged from it and turned towards the track, and that from the time it so emerged until struck the engineer did all he could to avoid the striking of the cow, you will find for the defendant.⁴⁷

§ 4471. Proximate cause of injuries—Failure to fence track

§ 4471(1). Kansas

You are instructed that if a legal and sufficient fence, as just defined, inclosing the defendant's railway in and through the township in which plaintiff's hogs were killed, as shown by the testimony in this action, would not have prevented said hogs, or any of them, from going to, on, or over the track of said railway at the place where they were killed, then no recovery in favor of plaintiff can be based, wholly or partly, on any failure to fence said railway.⁴⁸

§ 4471(2). Michigan

So, gentlemen of the jury, if this defendant, the railroad company, fenced up to the line between its own right of way and the highway line, then it has done its full duty, and there can be no recovery in this case. In other words, if the place where this horse was killed was a part of the highway and within the highway lines, there can be no recovery in this case. If the fences and the cattle guards were on the highway line, then the defendant is not liable, and your verdict would be in favor of the defendant, no cause of action. On the other hand, if the defendant, the railroad company, exposed and left unfenced any material or substantial part of its right of way outside of the highway, then it in-

⁴⁶ *Davis v. Southern Ry. Co.*, 47 S. E. 723, 68 S. C. 446.

⁴⁷ *Western Ry. of Alabama v. McPherson*, 40 So. 934, 146 Ala. 427.

⁴⁸ *Leavenworth, T. & S. W. Ry. Co. v. Forbes*, 15 P. 595, 37 Kan. 445.

creased the exposure which the public would be liable to, and if it left unfenced any part of its right of way outside of the highway, and if by reason of that the horse was killed, then the defendant would be liable. And it is the duty of the plaintiff to trace the killing of the horse to the neglect to fence. In other words, the killing of the horse must be, in a degree, and to a certain extent, the consequence of the neglect to fence, if there was any such neglect. The mere fact that the horse was killed there does not of itself give any right of action. The question is, Did the defendant neglect its duty to fence, and by reason of that was the horse killed? The neglect of duty must be shown upon the part of the defendant. Was the killing of this horse due to the defendant's failure to fence this right of way at the point where it was its duty to fence it, viz.: at the point outside of the highway? If not, there can be no recovery, but if so there may be a recovery.⁴⁹

You are instructed that the defendant denies that the fence was out of repair, and denies that the animals got upon their track in consequence of any defect in the fence, or through the fence. If you find that the defendant had been operating the railroad mentioned in the declaration in this case for ——— months or more before the killing of the plaintiff's animals, as alleged by plaintiff, then it was the duty of the company to erect and maintain on the side of its road fences ——— feet high, and in good repair, consisting of rails, timber, boards, stone walls, or any combination thereof, or other things equivalent thereto, and of such reasonable strength as to confine or turn the animals usually restrained by fences in this country. But if these animals did not get on this track in consequence of any defect in the railroad fence, or because of breachings or otherwise, it would make no difference in this case whether the fence was in repair or out of repair. If the jury find that on or about ———, a cow belonging to plaintiff was killed by an engine of the defendant, running upon the railroad operated by the defendant, and that such cow escaped from the plaintiff's field onto the railroad track, by reason of a defect in the fence, which it was the duty of the defendant to erect and maintain, and that such defect was an open, visible one, and had existed for some time before the killing of the cow, then the plaintiff would be entitled to recover the value of the cow, and interest on such value from the time of killing. And if the jury find that on or near the said ——— day of ———, a shoat belonging to the plaintiff was killed by an engine of defendant running upon the railroad operated by defendant, and that such hog escaped from plaintiff's field onto the railroad track because

⁴⁹ *Goretski v. Au Sable & N. W. Ry. Co.*, 138 N. W. 658, 172 Mich. 623.

of a defect in the fence, which it was the duty of the defendant to erect and maintain, and that such defect was an open and visible one, and had existed some time before the killing of the shoat, then the plaintiff is entitled to recover the value of the hog, and interest from the date of killing. So that you see in both cases the liability of the company depends upon the question as to whether or not the cow and the shoat got upon the track in consequence of the defect in the fence. If you find from the evidence that the cow escaped from the pasture onto the track through the fence, which it was the company's duty to maintain, and that such fence was insufficient under the rule I have already given you, then the defendant would be liable to the plaintiff for killing the cow, whether the cow was upon the public highway or not at the time she was struck by the engine; but that, of course, depends upon whether she got upon the track because of a defect in the fence. If she had escaped from the lot onto the highway, and so onto the track, and was killed, then I charge you that in this case the plaintiff would not be entitled to recover for the cow, even though you should find that she was killed by the defendant's cars, because in that case the killing would not be occasioned by the omission to repair which the plaintiff asserts as her cause of action in this case. If you find from the testimony that the plaintiff left her cow in question running at large in the highway, and defendant's cattle guard and side way fences, running from either side of the cattle guard to the defendant's right of way fences, were properly constructed and in good repair, and that the cow got on the defendant's right of way from this point, and was struck and killed by the defendant's engine, the plaintiff cannot recover. It is not enough for the plaintiff to allege and show that the defendant's fence was defective along its right of way, so that the cow could have gotten onto defendant's track, but it is the duty of the plaintiff, in order to entitle her to recover, to show by a preponderance of the testimony that the cow (and this is true of the shoat, too) got onto the track because of and through the defective place in defendant's fence, if you find there was any; and, unless she has established that fact by a preponderance of the evidence, she could not recover. Now, gentlemen, I think I have said all that I need to say, in order to enable you to properly dispose of the issues in this case. The question with reference to both of these animals is—First, was this fence out of repair as claimed by the plaintiff? Second, if it was, did the cow and hog get on the track because of that defect in the fence? If they did, why, then, one result would follow. If they did not, the other would follow. Now, you take this evidence, and dispose of it fairly and impartially, and having done so return into

court with a verdict which will be in accordance with the law and evidence.⁵⁰

§ 4472. Same—Defective cattle guard as cause of accident

You are instructed that the defendant has offered evidence to show that some of the cattle at least passed over that portion of the guard which it is not alleged was defective, and for at least so many of such cattle as passed over the guard where it was not defective no recovery whatever can be had; and unless you find that some of the cattle passed over said guard by reason of its defective condition no recovery can be had.⁵¹

§ 4473. Contributory negligence

§ 4473(1). Missouri

The court instructs you that, if you find from the evidence that the plaintiff took his animals on the right of way of the defendant's railroad, and brought them on and along the same while he was using a push car on the defendant's railroad track, and that on the approach of a train the plaintiff, knowing they would become or likely become frightened thereby, to protect them, took them off of the right of way, then it became his duty to exercise care to hold them there in safety until the train passed, and if he failed to do so, and they broke loose and ran back on the right of way, and on the track, and were struck by the train, then he cannot recover in this action on the second count of the petition.⁵²

§ 4473(2). Pennsylvania

The jury are instructed that on the question of contributory negligence of plaintiff you will consider whether he looked immediately before he opened the gates or admitted the cows to the right of way of the defendant company. If he did not look at that time, if he looked just before opening the gate on the other side of the track, and then walked from there over to the side of the track where the cows were, and opened the gate without looking between the time of opening the first gate and letting the cows out on the track, he would be guilty of contributory negligence, and such contributory negligence would defeat his right to recover.*

§ 4474. Same—Duty of owner of stock with respect to preventing it from running at large

You are instructed that, in a township where hogs are by law prohibited from running at large, it is the duty of those who keep

⁵⁰ *Jebb v. Chicago & G. T. Ry. Co.*, 84 N. W. 538, 67 Mich. 160. There was nothing in this instruction of which defendant could complain.

⁵¹ *Johnson v. Detroit & M. Ry. Co.*, 97 N. W. 760, 135 Mich. 353.

⁵² *Gee v. St. Louis & G. Ry. Co.*, 99 S. W. 506, 122 Mo. App. 358.

* *Kelemenan v. Pittsburg, etc., R. Co.*, 52 Pa. Super. Ct. 52. The place where the cows were killed was a farm crossing.

hogs in a field or pen to inclose them with such a fence or barrier as will prevent their escape. If in such township they have escaped by breaking through or getting over the fence with which they were inclosed, such escape will be presumed to have been by reason of the fault or negligence of the person assuming to keep them, unless it is proven that such fence was so constructed and kept in repair that such breaking through or getting over could not have been reasonably anticipated from the condition of the fence and the size, activity, natural inclinations, and known character of the hogs so escaping.⁵³

You are instructed that the rules of law as to diligence and negligence apply to stock owners as well as to railway companies. Hence if hogs were prohibited by law from running at large in the township where plaintiff's hogs were kept by him, and were killed by the defendant's railway train, the law required from the plaintiff the same degree of diligence to keep his hogs from escaping that it required from the railway company to avoid killing them when they got in front of its train; and if the plaintiff failed to use that degree of diligence to keep his hogs from escaping, he cannot recover in this action.⁵⁴

§ 4475. Gate in private crossing—Duty of plaintiff to keep closed

You are instructed that if you believe and find the defendant company had erected a proper and sufficient gate in its right of way at the plaintiff's farm crossing, and that said gate was by said company kept in repair, then I charge you that it was the plaintiff's duty to keep the gate closed, and if you find that the mule in question entered at said gate while the same was open, and went upon the defendant's railroad and was killed, then I charge you to find a verdict in favor of the defendant.⁵⁵

§ 4476. Doctrine of last clear chance

The court instructs the jury that the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is clearly responsible for the accident. The mere fact that the plaintiff was injured while trespassing on the defendant's premises, and would not have been injured if he had not been so trespassing, is not of itself enough to convict him of contributory negligence.⁵⁶

The court instructs the jury that it is well settled that the plaintiffs may recover damages for injury caused by the defendant's

⁵³ *Leavenworth, T. & S. W. Ry. Co. v. Forbes*, 15 P. 595, 37 Kan. 445.

⁵⁴ *Leavenworth, T. & S. W. Ry. Co. v. Forbes*, 15 P. 595, 37 Kan. 445.

⁵⁵ *Texas Cent. R. Co. v. Jenkins* (Tex. Civ. App.) 120 S. W. 948.

⁵⁶ *Carr v. Minneapolis, St. P. & S. M. Ry. Co.*, 112 N. W. 972, 16 N. D. 217.

negligence, notwithstanding the plaintiffs' own negligence in exposing their stock to injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the danger of the plaintiffs' property, to use ordinary care for the purpose of avoiding injury.⁵⁷

§ 4477. Presumptions and burden of proof

§ 4477(1). Alabama

I charge the jury that, to cast the burden upon the defendant of disproving the negligence charged in the complaint, the plaintiff must have shown, not only that the defendant inflicted the injury, but that it occurred at or near a public road crossing, the crossing of two railroads, the regular station or stopping place, or in a village, town, or city.⁵⁸

The jury are instructed that the question for you to decide in this case is not alone whether or not the plaintiff's cow was killed by the defendant's company, but before you can find for the plaintiff you must be reasonably satisfied from the evidence that the killing was caused by the negligence of the defendant or its employes, and the burden of proving such negligence rests in this case upon the plaintiff, and the negligence is not presumed against the defendant from the mere proof of striking the cow.⁵⁹

§ 4477(2). Arkansas

You are instructed that, if the jury believe from the evidence that the horse was injured by reason of the running of the train, either by actual collision with the engine or on account of fright caused by the running of the train, then the burden is on the defendant railway company to prove that such damage did not occur on account of the negligence of the employes operating the train.⁶⁰

I charge you that if plaintiff's mare was run into the bridge by a train of defendant's and injured, and died from the injuries received, the law presumes negligence on the part of the defendant, and you will find for the plaintiff, unless you further find from a preponderance of the testimony that defendant and its employes were free from negligence.⁶¹

§ 4477(3). Georgia

I charge you, gentlemen, that when stock has been shown to have been killed by the locomotive, cars, or other machinery, that

⁵⁷ Carr v. Minneapolis, St. P. & S. M. Ry. Co., 112 N. W. 972, 16 N. D. 217.

⁵⁸ Western Ry. of Alabama v. McPherson, 40 So. 934, 146 Ala. 427.

⁵⁹ Kansas City, M. & B. R. Co. v. Henson, 31 So. 590, 132 Ala. 528.

⁶⁰ Arkansas, L. & G. R. Co. v. Morse, 187 S. W. 169, 124 Ark. 376.

⁶¹ St. Louis, I. M. & S. Ry. Co. v. Goss, 123 S. W. 390, 92 Ark. 372.

the law presumes negligence on the part of the railroad; that that makes out a prima facie case for the plaintiff; that is, nothing else appearing, the plaintiff would be entitled to recover. I charge you that the defendant may come in and overcome that presumption. That, like all presumptions, is a matter that can be overcome by proof. I charge you that presumption may be overcome by showing that the defendant used all ordinary diligence and care to prevent the accident; to prevent the killing.⁶²

§ 4477(4). *Illinois*

The jury are instructed that the plaintiff must prove that the horse did not get on at the crossing of a public road or highway, and if he failed to show this by positive proof, the jury must find for the defendant, unless defendant was guilty of gross or willful negligence in the killing of the horse.⁶³

§ 4477(5). *Iowa*

You are instructed that, if you find by the evidence that the fence and cattle guard in question, or either of them, became defective and out of repair, and that by reason of such conditions said cattle went upon the defendant's railroad to a point west of the crossing and were there struck by defendant's train and killed, then the defendant would be liable therefor, as this would make a prima facie case in plaintiff's favor, and the burden is then upon defendant to show its freedom from negligence on account of the defective condition of such cattle guard and fence, or either of them, as the case may be, and upon this question the defendant has offered no evidence to meet the prima facie case made by plaintiff, if he has made such case.⁶⁴

§ 4477(6). *South Carolina*

The jury are instructed that, if you find, as a matter of fact, that the railroad company killed the plaintiff's mule, then you are to presume that the railroad company was negligent; and this presumption of negligence will stand until the railroad company convinces you by the greater weight of the evidence that it was a case of accident—that is, that after the fact of the killing has been established, the burden of proof is upon the railroad company to prove that it was done by accident, and not through their negligence. This is a rule of law that has not been changed by the stock law.⁶⁵

The jury are instructed that, where it appears that a railroad has, by its train, killed stock, a domestic animal, as a cow or a mule,

⁶² *Central of Georgia Ry. Co. v. Bagley*, 49 S. E. 780, 121 Ga. 781.

⁶³ *Illinois Cent. R. Co. v. Baker*, 47 Ill. 295.

⁶⁴ *Harper v. Chicago, R. I. & P. Ry. Co.*, 143 N. W. 529, 161 Iowa, 592.

⁶⁵ *Davis v. Southern Ry. Co.*, 47 S. E. 723, 68 S. C. 446.

and no other fact appears in reference to it, the law raises the presumption that the railroad was negligent. An animal has not the intelligence to apprehend danger, and to take itself out of the way of apprehended danger. As a matter of course, animals do run from what they are afraid of, but they have not the intelligence that a human being has to know what always to be afraid of and what to get out of the way of; and so the law charges these railroad companies running their trains, by the exercise of the franchise which the statute confers upon them, with the duty of looking out for the safety of domestic animals; and therefore, where it appears that the railroad, by its train, has killed a domestic animal, and nothing else appears but the fact of the killing, then the law raises the presumption that it was the result of negligence on the part of the railroad company. As a matter of course, when the facts do appear, and they negative the idea of negligence, and they show the railroad was exercising ordinary care in running its train, so that it was not the fault or its lack of care that caused the death of the animal or injury to the animal, then the implication of the presumption of negligence is withdrawn. This must appear by the facts of the case. Unless the evidence makes out, by the preponderance of the evidence, the fact of negligence in the railroad company, the plaintiff is not entitled to recover. So the facts are for your determination as to whether or not this railroad was running its train as alleged in the complaint, and whether or not the train killed the mule, as alleged, and, if so, then whether the railroad was negligent or not.⁶⁶

§ 4478. Sufficiency of evidence as to cause of injury

You are instructed that, if you believe from the evidence that at the time when the yearling was first seen dead it showed no marks of violence sufficient to have caused its death, your verdict, in so far as the yearling is concerned, should be for the defendant.⁶⁷

§ 4479. Damages

§ 4479(1). Arkansas

You are instructed that, if you find for plaintiff, the measure of damages will be the value of the mare at the time and place of its death, with ——— per cent. per annum from that time.⁶⁸

§ 4479(2). Iowa

You are instructed that, if you find that plaintiff was the owner of the two steers in question, that they were struck and killed by defendant's train at a point upon defendant's right of way west of

⁶⁶ *Davis v. Southern Ry. Co.*, 47 S. E. 723, 68 S. C. 446.

⁶⁷ *Central of Georgia Ry. Co. v. Williams*, 80 So. 880, 202 Ala. 496.

⁶⁸ *St. Louis, I. M. & S. Ry. Co. v. Goss*, 123 S. W. 390, 92 Ark. 372.

the crossing in question, that said steers were upon said right of way by reason of the defective and out of repair condition of the cattle guard and fence in question, or either of them, upon the west side of the crossing in question, then you will proceed to consider and determine the value of the cattle at the time of being struck and killed, and this you will determine from all the evidence in the case.⁶⁹

§ 4479(3). South Carolina

The jury are instructed that, if you find that the plaintiff is entitled to recover from the railroad company for the killing of his mule, then the measure of damage is the value of the mule at the time of the killing.⁷⁰

§ 4479(4). West Virginia

The court instructs the jury that, while the measure of damages is the value of the stock when killed, such value is the market value of such stock, and not some peculiar or particular value attached to it by the plaintiff.⁷¹

J. LIABILITY FOR DAMAGES FROM FIRES

§ 4480. Liability in general

§ 4480(1). Alabama

The court instructs the jury that the defendant in this case is not liable for accidental injuries caused by the escape of fire from its engines, if the evidence shows that the engines were properly handled and properly equipped.⁷²

The court instructs the jury that, if you believe from the evidence that the engine was properly equipped with a spark arrester of approved utility, and that the engine was properly managed, then you must find a verdict for the defendant, even if you should be reasonably satisfied from all the evidence that the fire was caused by sparks from such engine.⁷³

You are instructed that, if you believe from the evidence that plaintiff's property described in the complaint was destroyed by fire on or about ———, emitted from a negligently operated locomotive of defendant, then the jury must find for the plaintiff.⁷⁴

⁶⁹ Harper v. Chicago, R. I. & P. Ry. Co., 143 N. W. 529, 161 Iowa, 592.

⁷⁰ Davis v. Southern Ry. Co., 47 S. E. 723, 68 S. C. 446.

⁷¹ Bullington v. Newport News & M. V. Co., 9 N. E. 876, 32 W. Va. 436.

⁷² McCary v. Alabama Great Southern R. Co., 62 So. 18, 182 Ala. 597.

⁷³ McCary v. Alabama Great Southern R. Co., 62 So. 18, 182 Ala. 597.

⁷⁴ Louisville & N. R. Co. v. Sher-

rell, 44 So. 631, 152 Ala. 213. An objection to this instruction, that it assumed that the verdict should go for plaintiff if the locomotive was negligently operated, whether such negligent operation had any part in communicating the fire to the building or not, was held to be hypercriticism, when the charge was construed as a whole and in connection with the evidence.

You are instructed that in a case of this kind, if the plaintiff has reasonably satisfied you from the evidence that the fire was caused by defendant's locomotive, he has nothing to do until the defendant has reasonably satisfied you of each and all of the three following things: First, that so far as regards the throwing of sparks the engine was properly built; second, that in that respect it was not in a bad or defective condition; third, that the throwing of sparks was not caused by unskillful or careless management of the locomotive. And, even should the defendant in its turn reasonably satisfy you of all of the three things above named, yet the plaintiff may by its evidence overcome the evidence of the defendant, and show you that the fire was set out from the engine, either because it was badly built, in bad condition, or badly handled, and if from all the evidence in the case you believe that the fire was caused by negligence of the railroad your verdict must be for the plaintiff.⁷⁵

§ 4480(2). Florida

The court instructs the jury that a railroad company, free from negligence, is not liable for damages from fire kindled by sparks or clinkers from locomotives.⁷⁶

§ 4480(3). Illinois

The court further instructs the jury, for the defendant, that the defendant had a right to use a locomotive engine propelled by steam, and is not an insurer against fire communicated from such locomotive; that all the law requires of the defendant was to have its locomotive provided with the best known appliances to prevent the escape of fire, and to keep the same in repair, and then have it managed with reasonable prudence, care, and skill. If, then, the jury believe, from the evidence, that the locomotive in controversy was, at the time in controversy, provided with the best known appliances to prevent the escape of fire, which were in good repair, and was managed with reasonable prudence, care, and skill, then they should find for the defendant, even though the jury should believe, from the evidence, that the fire that consumed the depot was communicated from the locomotive, and that the burning of the hotel was such a direct and natural consequence of the burning of the depot as might have been foreseen by any reasonable man at the time.⁷⁷

⁷⁵ Alabama Great Southern R. Co. v. Sanders, 40 So. 402, 145 Ala. 449.

⁷⁶ Gracy v. Atlantic Coast Line R. Co., 42 So. 903, 53 Fla. 350. This is proper, with other instructions requiring railroad company to prove

care, proportionate to the circumstances, to guard against injuries to adjacent property.

⁷⁷ Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

§ 4480(4). *Kentucky*

The jury are instructed that they should find for the plaintiff in this action, if they believe from the evidence either that said engine was not equipped with the best or most approved screen or spark arrester in practical use and in perfect order, or that the engine in question was operated by defendant's agents, servants, and employes, then in charge of it, in a careless and negligent manner, and thereby a spark or sparks from said engine was thrown upon the house which was burned, and set fire to said house, thereby destroying same.⁷⁸

§ 4480(5). *Maryland*

You are instructed that, if the jury find from the evidence that the tracks and roadbed of the defendant between ——— and ——— were kept with reasonable care and diligence during the month of ———, in the year ———, and that the first train moving north-erly on the morning of ——— in said year was operated with reasonable care and diligence, and that the engine of said train was in good order and entirely fit for service, and was provided with as good an ash pan and spark arrester as is known to railway people, and the same had been inspected regularly with reasonable care and diligence, and that an inspection thereof was made on the evening of same date and said engine was found to be in good condition and fit to be operated, and that the coal used by said engine was as good as could be gotten on the market, then the defendant is not liable for the damages resulting from the fire which started on said date along the railway tracks near ———, even though the jury believe the same was started by defendant's engine, and their verdict must be in favor of the defendant.⁷⁹

§ 4480(6). *Missouri*

You are instructed that, if the jury find from the evidence that plaintiff was the owner of the barn in controversy, and of its contents, and that they were destroyed by fire coming from an engine operated by defendant upon its railroad on the night of ———, then the defendant is liable to plaintiff for the damage done, and although the engine may have been free from defects, and although there may have been no negligence in the management of the engine and train at the time of the fire.⁸⁰

§ 4480(7). *North Carolina*

You are instructed that, if you should find that the fire that burned the land was the fire that came from the west side of the

⁷⁸ *Illinois Cent. R. Co. v. Schelble*, 172 S. W. 910, 162 Ky. 469.

⁷⁹ *Carter v. Maryland & P. R. Co.*, 77 A. 301, 112 Md. 599.

⁸⁰ *Matthews v. Missouri Pac. Ry. Co.*, 44 S. W. 802, 142 Mo. 645. This instruction was given under a statute declaring an absolute liability.

railroad, then you would answer the issue, "No," or if you find that the engine was properly equipped with spark arrester, and that the engine and train was under proper control and being properly handled, and that the fire did escape from the engine, but did not ignite or burn on the right of way or set fire to the woods by the right of way, then the defendant would not be liable, because they are not required to keep the woods free from combustible matter.⁸¹

§ 4480(8). Texas

You are instructed that, if you believe from the evidence that fire was communicated from a locomotive or locomotives of the defendant to the premises of plaintiffs and interveners at a point or points without defendant's right of way, as alleged in their petition and plea, and that said fire or fires burned over the premises of plaintiffs and interveners, or part or parts thereof, and destroyed any grass, cane, or wood thereon, or destroyed or injured any grass turf, or destroyed or injured any timber thereon, as alleged in plaintiffs' petition and interveners' plea, and if you further believe from the evidence that the defendant had used ordinary care to have its locomotives equipped with the best appliances in general use by railway companies for preventing the escape of fire and sparks, and that defendant had used ordinary care to keep such appliances in repair and serviceable condition, and that defendant's employes in charge of its locomotives used ordinary care to operate the said locomotives, so as to prevent the escape of fire and sparks, then upon all claims made by plaintiffs and interveners in their pleadings for damages, if any, resulting from fires so communicated at points without defendant's right of way, you will find for defendant.⁸²

You are instructed that if you find from the evidence that the plaintiff's lands were burned over by fire at or about the time, and as alleged in his petition, and that said fires were set out by sparks emitted from the engines of the defendant company, and you further find that the engines of the defendant company were properly equipped with the most approved spark arresters and appliances determined by practical railroad men to be among the best in use on railroads for the prevention of the escape of sparks, fire, and cinders from locomotives, and that such apparatus and appliances were in good order and repair, and that the engines were carefully and properly handled by competent employes of the defendant company at the time of the alleged setting out of the fires complained of by said plaintiff, then you are instructed that although

⁸¹ Wilkins v. Atlantic Coast Line R. Co., 98 S. E. 777, 174 N. C. 278.

⁸² St. Louis Southwestern Ry. Co. of Texas v. Connally (Civ.App.) 93 S. W. 206.

you may believe that the fires were set out by the defendant's engines the burden of proof is upon the plaintiff to show that the damages complained of was the result of the negligent act or omission of the defendant or its employes; and if you find from the evidence that the said fires (if any) were so caused by the negligence of said defendant or its employes, then you will find for the plaintiff such an amount as damages as you find from the evidence he has sustained; but if you find from the evidence that said fires (if any) were caused or originated from some other source than from the defendant or its employes or its engines, and was not set out by defendant's engines or by it or its employes, or if you find that said fires (if any) were set out by the defendant or its employes or engines, but that neither said defendant nor employes were guilty of negligence in so setting out said fires (if any), then the plaintiff should not recover, and you will find for the defendant.⁸³

You are instructed that, if you believe from the evidence that the fire was communicated from defendant's locomotive or locomotives to the premises of plaintiffs and interveners, or either of them, at a point or points without defendant's right of way, and that such fire burned over the premises of plaintiffs and interveners, or a part or parts thereof, and destroyed any cane and grass growing thereon, and destroyed any cord wood, corded thereon, or damaged and injured plaintiffs' or interveners' land by destroying or injuring the grass turf thereon or destroying and injuring any forest trees thereon, as alleged in their petition and plea, then you will find for plaintiffs and interveners all such damages, if any, as were caused by fire so communicated, unless you find for the defendant under other instructions hereinafter given.⁸⁴

§ 4480(9). Virginia

The court instructs the jury that if they believe from the evidence that the defendant's engine, which is alleged to have started the fire that destroyed the plaintiff's lumber, was equipped with as good a spark arrester and ash pan as is known in practical use, that such spark arrester and ash pan were in good repair, and that said engine was operated by a skillful engineer, with ordinary care, and that the right of way was reasonably clear of combustible matter liable to ignition, they must find for the defendant, although they may also believe from the evidence that the defendant's engine set out the fire in question.⁸⁵

⁸³ St. Louis Southwestern Ry. Co. of Texas v. Connally (Civ. App.) 93 S. W. 206.

⁸⁴ St. Louis Southwestern Ry. Co.

of Texas v. Connally (Civ. App.) 93 S. W. 206.

⁸⁵ Abernathy v. Emporia Mfg. Co., 95 S. E. 418, 122 Va. 406.

The court instructs the jury, if they believe from the evidence that the plaintiff in this case sustained damage from a fire occasioned by sparks, cinders, or coals emitted or thrown from an engine of defendant, as alleged in the declaration, and that the defendant was a railroad company at the time of the said fire, that then the plaintiff is entitled to recover of the defendant the damage so sustained at the date of the fire; and that plaintiff would be entitled to recover such damage without any reference to any insurance collected by the plaintiff.⁸⁶

§ 4481. Duty to exercise ordinary care to avoid fires

§ 4481(1). Minnesota

The court instructs the jury that "ordinary care" is a relative term; that what would be regarded as ordinary care, under certain circumstances, may not be ordinary care under other circumstances and conditions; and for this reason, in passing upon defendant's negligence, the jury should take into account the character of the country through which the road ran, the risk to adjoining property to be guarded against, the conditions then prevailing, such as the degree of dryness, or the reverse, of the grass stubble or other material near the track, and the speed and direction of the wind; but, on the other hand, you must give due consideration to the necessities of the railway service, and the duty of the company to its patrons and the public.⁸⁷

§ 4481(2). Texas

You are instructed that, if you do not believe from the evidence that sparks, cinders, or coals escaped from defendant's engine No. — and set fire to inflammable grass or weeds or other material on land included within the right of way, and through the agency of such inflammable grass or weeds or other material set fire to the plaintiff's property, you will return a verdict in favor of the defendant; or if you do not believe from the evidence that the defendant failed to exercise ordinary care to equip said engine with the most approved appliances in general use to prevent the escape of sparks, cinders, or coals, and do not believe that he failed to exercise ordinary care to keep such appliances in repair and properly fitted and adjusted, and do not believe that he failed to exercise ordinary care to keep the land included within the right of way sufficiently free of inflammable grass and other matter to prevent the same from catching fire from sparks, cinders, or coals escaping from said engine and communicating said fire to plaintiff's property, and do not believe that he failed to exercise ordinary care with

⁸⁶ *Norfolk & W. Ry. Co. v. Spates*,
94 S. E. 195, 122 Va. 69.

⁸⁷ *Riley v. Chicago, M. & St. P. Ry. Co.*, 74 N. W. 171, 71 Minn. 425.

respect to the wetting of the fuel used in said engine, or that in the exercise of ordinary care such fuel need not be wetted, and do not believe that he failed to exercise or use ordinary care in respect to the emptying of the ash pan of such engine, or that in the exercise of ordinary care such ash pan need not be emptied, you will return a verdict for the defendant, though you may believe that sparks, cinders, or coals escaped from said engine and set fire to material on the right of way, and through its agency set fire to the plaintiff's property.⁸⁸

You are instructed that ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances. If therefore you believe from the evidence that on ———, sparks, cinders, or coals escaped from the defendant's engine No. ——— and set fire to inflammable grass or weeds or other material on land included within the right of way, and through the agency of such inflammable grass, weeds, or other material set fire to the plaintiff's premises and improvements; and if you further believe from the evidence that the defendant failed to exercise ordinary care to equip said engine with the most approved appliances in general use to prevent the escape of sparks, cinders, and coals, or failed to exercise ordinary care to keep such appliances in repair and properly fitted and adjusted, or failed to use ordinary care to keep the land included within the right of way sufficiently free of inflammable grass, weeds, and other matter as to prevent the same catching fire from sparks, cinders, or coals escaping from such engine and communicating such fire to adjacent property, or failed to exercise ordinary care in respect of the wetting of the fuel used, in such engine, if in the exercise of ordinary care such fuel should be wetted, or failed to exercise ordinary care in respect of the emptying of the ash pan of such engine, if in the exercise of ordinary care such ash pan should be emptied; and if you further believe from the evidence that the setting of the plaintiff's property on fire was directly and proximately caused by the defendant's negligent failure, if any, to exercise such ordinary care—then you will return a verdict in favor of the interveners, or of the interveners and the plaintiff, as hereinafter charged, for the amount of the damage, if any, sustained by the plaintiff by reason of such fire, unless you believe from the evidence that the plaintiff was guilty of contributory negligence, as hereinafter defined.⁸⁹

You are instructed that the defendant receiver, in running trains over the road of which he is receiver, is required to exercise ordinary care to equip the engine or locomotive drawing such train

⁸⁸ Freeman v. Nathan (Civ. App.)
149 S. W. 248.

⁸⁹ Freeman v. Nathan (Civ. App.)
149 S. W. 248.

with the most approved appliances in general use to prevent the escape of sparks, cinders, and coals therefrom, and to exercise ordinary care to keep such appliances in repair and properly fitted and adjusted, and to exercise ordinary care to keep the land included within the right of way sufficiently free of inflammable grass, weeds, and other matter as to prevent the same catching fire from sparks, cinders, or coals escaping from passing engines, and communicating such fire to adjacent property, and to exercise ordinary care in respect to the wetting of the fuel used in such engines if in the exercise of ordinary care such fuel should be wetted, and to exercise ordinary care in respect of the emptying of the ash pan of such engine, if in the exercise of ordinary care such ash pan should be emptied, to prevent the escape of sparks, cinders, or coals from such engine. And the defendant receiver is liable for damages from fires directly and proximately caused by his negligent failure to exercise such ordinary care in any of the respects above named, unless, however, the person or persons sustaining such damage have been guilty of contributory negligence, as hereinafter defined. But when the defendant receiver has exercised such ordinary care in each of the respects above named, he has complied with the requirements of the law, and is not liable for any damage from any fires set out by said engines; nor is he liable for any such damage, when the person or persons sustaining such damage have been guilty of contributory negligence as hereinafter defined.⁹⁰

You are instructed that a railway company in running its trains over its road is required to exercise ordinary care to equip its engine or locomotive drawing such train with the most approved appliances in general use to prevent the escape of sparks and fire therefrom, and to exercise ordinary care to keep such appliances in good repair to prevent such escape of sparks and fire, and to exercise ordinary care to keep the land included within its right of way sufficiently free of combustible and inflammable material as to prevent same catching fire from sparks or fire emitted from passing engines, and communicating such fire to adjacent property, and a railway company is liable for damages from fires directly and proximately caused by its negligent failure to exercise such ordinary care in the keeping of its said right of way, or to exercise such ordinary care in the equipment and maintenance of its said engines, as above instructed. But a railway company has complied with the requirements of the law when it has exercised such ordinary care in the equipment and maintenance of its engine alleged to have set out said fire, and has exercised such ordinary care in the so keeping of its said land inclosed in its said right of way, and,

⁹⁰ *Freeman v. Nathan* (Civ. App.) 149 S. W. 248.

when a railway company has exercised such care in the above-named respects and particulars, it is not liable for any damages from fire set out by its said engines.⁹¹

§ 4482. Duty with respect to construction and condition of engines

§ 4482(1). Alabama

The court charges the jury that if they believe from the evidence that one of the defendant's engines threw sparks upon plaintiff's shed, or directly against it, and that the sparks so thrown themselves set fire to the shed, and that the burning shed communicated the fire to plaintiff's other property; and, further, that such engine was furnished with a spark arrester and other appliances of approved character to prevent, so far as possible, throwing sparks, and was properly handled by the engineer, and that such spark arrester and other appliances were in good condition, then they ought to find a verdict for the defendant.⁹²

§ 4482(2). Maryland

The jury are instructed that if they shall find from the evidence that the plaintiff's icehouses with their contents were destroyed by fire communicated from the defendants' engines, and shall further find that the defendants did not exercise reasonable care and diligence to avoid as far as practicable injury to the property along the line of the road upon which their engines were operated by having their said engines properly constructed and in good condition, then their verdict must be for the plaintiff.⁹³

§ 4483. Duty to have spark arresters

§ 4483(1). United States

The jury are instructed that, when a railroad company equips its engines with appliances for the prevention of the emission of sparks and cinders, it must have the apparatus complete as far as the appliances used for the prevention of the escape of sparks and cinders from its smokestack are concerned. It cannot comply with the law by merely having the form of the appliance in common use, but it must have the details complete. Everything must be properly constructed, and the appliances must be perfect in form. It must exercise reasonable care and skill in using these expedients for the prevention of fire, and use such expedients as are in common use for the prevention of fire being emitted from its smokestack.⁹⁴

⁹¹ *Missouri, K. & T. Ry. Co. of Texas v. Nelser*, 118 S. W. 166, 54 Tex. Civ. App. 400.

⁹² *Louisville & N. R. Co. v. Sullivan Timber Co.*, 35 So. 327, 138 Ala. 379.

⁹³ *Sims v. American Ice Co.*, 71 A. 522, 109 Md. 68.

⁹⁴ *Rosen v. Chicago, G. W. Ry. Co. (C. C. A. Minn.)* 83 F. 300, 27 C. C. A. 534.

§ 4483(2). Alabama

You are instructed that, if you believe from the evidence that defendant's engine No. ——— was deficient in spark-arresting appliances when it passed by plaintiff's property on the night in question, and that plaintiff's property was destroyed by fire emitted from said locomotive of the defendant because of such deficiency, then you must find for the plaintiff.⁹⁵

§ 4483(3). Kentucky

The jury is instructed that by law it is the duty of the defendant to furnish the locomotive engines with the best and most improved screens and spark arresters in practical use, and keep the same in proper order; and if you believe from the evidence that the defendant failed to so furnish or keep such screens or spark arresters on its said locomotives, and because of such failures the house of ———, described in the petition, situated in ———, was ignited by or through a spark or sparks escaping from one of the defendant's locomotives, and said house was thereby destroyed, you should find for the plaintiff.⁹⁶

§ 4483(4). Oregon

The court instructs the jury that, if you find from the evidence that the defendant has actually used on the engines drawing this train the most approved appliances for the purpose of preventing sparks or fire from escaping, or has exercised reasonable care and diligence to obtain and use them, then I instruct you defendant was not negligent in said respect.⁹⁷

§ 4484. Care required with respect to management or operation of engines**§ 4484(1). Alabama**

You are instructed that uncertainty in your minds as to whether the fire was caused by reason of the engine being improperly made, or being in bad condition, or being badly handled in respect to the throwing of sparks, is no reason for failing to find a verdict for the plaintiffs; and it will be your duty to find your verdict for the plaintiffs if you believe from the evidence that the fire was caused by either one of those three causes.⁹⁸

You are instructed that, if you believe from the evidence that plaintiff's property was destroyed by fire, and that said fire was the primary result of the negligence of defendant, either in not having proper appliances on its engines or, if it did have them,

⁹⁵ Louisville & N. R. Co. v. Sherrell, 44 So. 631, 152 Ala. 213.

⁹⁶ Hartford Fire Ins. Co. v. Cincinnati, N. O. & T. P. Ry. Co., 206 S. W. 628, 182 Ky. 295.

⁹⁷ Chenoweth v. Southern Pac. Co., 99 P. 86, 53 Or. 111.

⁹⁸ Southern Ry. Co. v. Darwin, 47 So. 314, 156 Ala. 311, 130 Am. St. Rep. 94.

in not having them so adjusted as to prevent the escape of sparks of fire in unusually large quantities calculated to ignite combustible material, then the defendant is liable to the plaintiff, and you should so find.⁹⁹

The court instructs the jury that, if the jury believe from the evidence that the plaintiff's building was set on fire by sparks or coals from the defendant's engine, and that said sparks or coals were emitted or dropped from said engine, either because of the defective condition or improper construction of said engine, or because of the negligent handling or management of said engine, they will return a verdict for the plaintiff.¹

§ 4484(2). Kentucky

The court instructs the jury that if you believe from the evidence that the defendant's engines were properly equipped with such screens or spark arresters, yet if you believe from the evidence that defendant's agents, servants, or employes were otherwise negligent in the management or operation of its engines and trains, and because thereof said house was ignited and destroyed, you should find for plaintiff.²

§ 4484(3). Oregon

The court instructs the jury that, if you find from the evidence that the servants of defendant engaged in operating the train in question acted under all the attending and surrounding circumstances as reasonably prudent and careful persons, having due regard to the rights of others, would have acted under the same circumstances, then I instruct you that the defendant was not careless or negligent in operating said train or engines.³

§ 4485. Same—Speed as negligence

§ 4485(1). Alabama

The court instructs the jury that the defendant had a right to run its trains and engines, operated by steam generated by fire, over its tracks at such rate of speed as was reasonably necessary to do its work, and to throw such sparks from such engines as may be necessary in such operation, provided the said engines are properly equipped and properly managed by competent servants.⁴

§ 4485(2). Michigan

The jury are instructed that the engineer and fireman, in managing the train, are at liberty, and it is their duty, to run their

⁹⁹ Louisville & N. R. Co. v. Sherrell, 44 So. 631, 152 Ala. 213.

¹ Alabama Great Southern R. Co. v. Sanders, 40 So. 402, 145 Ala. 449.

² Hartford Fire Ins. Co. v. Cincin-

nati, N. O. & T. P. Ry. Co., 206 S. W. 628, 182 Ky. 295.

³ Chenoweth v. Southern Pac. Co., 99 P. 86, 53 Or. 111.

⁴ McCary v. Alabama Great Southern R. Co., 62 So. 18, 182 Ala. 597.

trains as near on time as possible; and in case of a way freight whose length of stops at stations is necessarily irregular, they are not to be considered negligent by their use of natural and reasonable means to make time.⁵

You are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movements of trains. The risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays; that it would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather. Those who establish themselves in the neighborhood of railroads must know that trains are expected to run regularly, and, if there are special risks arising from no want of care in the proper equipments and management of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation.⁶

§ 4486. Duty to keep right of way free from combustible material

§ 4486(1). Maryland

The jury are instructed that it was the duty of the defendant to keep its railroad tracks and right of way clear of combustible materials; and if the jury find that the defendant negligently permitted sedge grass and weeds and bushes likely to be ignited from sparks issuing from its engine to be and remain upon its right of way between the ——— and the old ——— buildings, and that on the ———, said grass and weeds were set on fire by one of the defendant's engines, and further find that said fire was carried by the wind through said grass and weeds to and set on fire said buildings, and from said buildings the fire was carried across ——— creek to the plaintiff's woodland, as testified to by his witnesses, and burned it, then the plaintiff is entitled to recover in this action, even though the jury believe that the defendant was not negligent in its management and use of the said engine.⁷

§ 4486(2). Nebraska

You are instructed that if you find from the evidence that the defendant negligently and carelessly permitted dry grass, weeds, and other combustible materials to accumulate on its right of way adjoining the plaintiff's premises, so as to unnecessarily increase the hazard from fire, and that, by reason of such accumulation of combustible materials, fire escaping from defendant's engine was

⁵ Hagen v. Chicago, D. & C. G. T. J. R. Co., 49 N. W. 509, 86 Mich. 615.
⁶ Hagen v. Chicago, D. & C. G. T. J. R. Co., 49 N. W. 509, 86 Mich. 615.

⁷ Carter v. Maryland & P. R. Co., 77 A. 301, 112 Md. 599.

kindled therein, and thence communicated to plaintiff's property, which was thereby destroyed, without the negligence of the plaintiff in any manner contributing thereto, you should find for the plaintiff, even though the escape of the fire from such engine was without any fault on defendant's part.⁸

You are instructed that if, at the time the property in question was destroyed, the defendant's right of way at the place where the fire started, if it started on the right of way, was free and clear from dry grass, weeds, and other combustible materials, or if the defendant, its agents and servants, exercised due and reasonable diligence, care, and precaution to keep and have its said right of way free and clear from such dry grass, weeds, and other combustible materials, then in that case the defendant would not be liable in this action on the second ground above mentioned.⁹

§ 4486(3). Texas

The court instructs the jury that, if the defendant was guilty of negligence, in that it failed to exercise ordinary care to keep its roadbed and right of way reasonably free from combustible material that might be ignited in the ordinary operation of its trains, and which probably would result in fire being communicated to and destroying the property, and if the fire mentioned in the evidence was so communicated, and destroyed the plaintiff's property, the plaintiffs would be entitled to recover, unless they were precluded from recovery by contributory negligence.¹⁰

You are instructed that, if you believe from the evidence that the defendant negligently permitted grass and weeds to accumulate and become dry on its right of way, and that fire was communicated from locomotives of defendant to such grass and weeds and spread therefrom to the premises of plaintiffs and interveners, or any of them, and burned over part or parts of said premises, and destroyed grass and cane thereon, and destroyed any cord wood thereon and damaged and injured or destroyed grass, turf or trees thereon, as alleged in their petition and plea, then you will find for the plaintiffs and interveners for all such damages, if any, so caused.¹¹

§ 4486(4). Virginia

The court instructs the jury that, although the jury may believe from the evidence that the defendant's train was supplied with the most approved apparatus for the prevention of the emission of sparks, and that said engines were operated by the most skill-

⁸ Union Pac. Ry. Co. v. Ray, 65 N. W. 773, 46 Neb. 750.

⁹ Union Pac. Ry. Co. v. Ray, 65 N. W. 773, 46 Neb. 750.

¹⁰ Marshall & E. T. Ry. Co. v. Killingsworth (Civ. App.) 162 S. W. 1161.

¹¹ St. Louis Southwestern Ry. Co. of Texas v. Connally (Civ. App.) 93 S. W. 206.

ful engineers, and that the defendant company did all that skill and science could suggest in the management of its locomotives, yet, if they further believe from the evidence that the company negligently allowed the accumulation of dangerously combustible matter on their right of way, easily to be ignited by fire from its furnaces, and if they further believe from the evidence that said fire, by igniting said combustible matter on the said company's right of way, was thence communicated to the adjacent property of the plaintiffs, then the said defendant company is liable for all the damages resulting to their property by reason of said negligence.¹²

§ 4486(5). Washington

You are instructed that it is the duty of the railway company to exercise reasonable care to keep its right of way at all points adjoining the private property of others free from combustible materials which are liable to become ignited from passing trains. And, should you believe from the evidence that the railway company failed to exercise such reasonable care and that the grain in question was burned because of a fire which originated in combustible material on the right of way of the company through sparks escaping from a passing engine, which thereafter spread to the grain field in question, then it is immaterial whether the engine of the railway company was improperly equipped or not. And it is likewise immaterial, should you find that the fire which caused the injury escaped from the right of way of the railway company under the circumstances just stated, whether the employes in charge of the engine were skillful or careful, or negligent and careless, in the operation of said railway engine, and your verdict should be for the plaintiff in either case, should you find that the fire escaped from the right of way of the railway company, after having been set through sparks escaping from a passing engine.¹³

§ 4487. Duty to keep adjacent lands free from combustible material

You are instructed that it is not the duty of a railroad company to go off its right of way and premises to clear up rubbish from all lands adjoining and adjacent to its right of way, and it is not liable or chargeable with negligence for the spread of fire from its own right of way over premises containing such combustible material to other premises so remote that the railroad company could not reasonably anticipate and expect such spread of fire in

¹² New York, P. & N. R. Co. v. Thomas, 24 S. E. 204, 92 Va. 606.

¹³ Fireman's Fund Ins. Co. v. Northern Pac. Ry. Co., 91 P. 13, 46 Wash. 635.

case sparks from its locomotive should accidentally set fire to adjoining lands.¹⁴

§ 4488. Assumption of risks by adjacent property owners

§ 4488(1). Florida

The court instructs the jury that all persons erecting buildings or manufacturing establishments in the immediate vicinity of a railroad track take and assume the risks of fire communicated from passing engines, provided such engines are equipped with the best-known appliances to prevent the escape of fire, and are kept in repair, and are managed with reasonable care and skill.¹⁵

§ 4488(2). Georgia

The jury are instructed that the ——— Railroad Company is a chartered company, having the right to use all the rights and privileges, conferred on it by its charter, as fully and to the same extent as an individual has to enjoy his legal rights; that amongst these is the right to use their cars and engines, to have their wood and water stations at convenient places, and all the appliances necessary to a complete enjoyment of all their chartered privileges; that they have the right to provide and keep at their several stations such supplies of wood as may be necessary, not only for present, but for future use, as circumstances may require—and they are the judges of what amount is necessary, and they are not responsible for accidents happening from the exercise of these rights, unless these accidents result from the gross negligence or carelessness of the employees or agents of the road, and the plaintiff must prove that the injury complained of did result from such culpable neglect or carelessness. The amount of diligence required is just so much as an ordinarily prudent man could use in his own affairs. If a man chooses to build or buy a house in close proximity to a railroad station, where wood is ordinarily kept for the use of engines, he does so at his own risk. He voluntarily undertakes to incur the ordinary risks incident to such a location, and if his house is burned, without the culpable negligence of the agents or employees of the company, he has no redress against them.¹⁶

§ 4488(3). Illinois

The court instructs the jury, for the defendant, that all persons erecting buildings in the immediate vicinity of a railroad track take the risks of fire communicated from passing engines, provided such engines are equipped with the best known appliances to pre-

¹⁴ Phillips v. Durham & C. R. Co., 50 S. E. 462, 138 N. C. 12, 3 Ann. Cas. 384.

¹⁵ Gracy v. Atlantic Coast Line R. Co., 42 So. 908, 53 Fla. 350.

¹⁶ Macon & W. R. Co. v. McConnell, 31 Ga. 133, 76 Am. Dec. 685.

vent the escape of fire, and kept in repair, and are managed with reasonable care and skill, even though the danger may be greatly increased by high winds or proximity to other buildings.¹⁷

§ 4489. Proximate cause as essential element of cause of action

§ 4489(1). Idaho

You are instructed that a person who negligently sets a fire is responsible for the damage done by it, although such fire is joined by a fire set by another person, and the two concurrently do the damage, if it appears that the first fire would have done the damage without the assistance of the second fire. And so in this case, if you find that the defendant negligently set a fire about one-half mile north of ———, and that such fire spread from there to the plaintiff's premises, and damaged his property, then you should find a verdict for the plaintiff, even though you find that another fire mingled with said fire so set by the defendant, unless you should find that the fire so set by the defendant would not have done the damage to the plaintiff's property without the assistance of the other fire.¹⁸

The court instructs you that, if you find from the evidence that the damage to plaintiff's property was caused by two or more fires uniting, and that only one of these fires was traceable to the fire alleged to have started on or near the ——— property, the other fires, or any one of them, not being traceable to any responsible origin, but being of such sufficient or superior force that it would have produced the damage to plaintiff's property regardless of the fire which started on or near the ——— property, then I instruct you that the plaintiff cannot recover, and your verdict must be for the defendant.¹⁹

§ 4489(2). Maryland

You are instructed that, even if the jury find that the fire mentioned in the declaration was started by the negligence of the defendant, yet if the jury further find that on the day of the fire there was a high wind, and that between the railroad's right of way and ——— creek on the lands of ——— there was a great quantity of sedge grass, briars, and other filth, and also several abandoned buildings in a state of decay, all of which was very dry and combustible to which the fire spread, and that by reason of said wind burning matter from said building was carried across the creek to the plaintiff's lands; then these are facts which the jury are at

¹⁷ Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

¹⁸ Miller v. Northern Pac. Ry. Co., 135 P. 845, 24 Idaho, 567, 48 L. R. A. (N. S.) 700, Ann. Cas. 1915C, 1214.

¹⁹ Miller v. Northern Pac. Ry. Co., 135 P. 845, 24 Idaho, 567, 48 L. R. A. (N. S.) 700, Ann. Cas. 1915C, 1214.

liberty to consider in connection with all the facts in the case in determining whether the spreading of said fire to the plaintiff's lands was the natural and direct consequence of the starting of said fire by the defendant, and, if the jury find that the burning of the plaintiff's timber was not the natural and direct result of said fire having started in the sedge grass on ——'s land, then the defendant is not liable in this action, and their verdict must be for the defendant.²⁰

§ 4489(3). North Carolina

You are instructed that if the two fires, one from the west and the one originating on the east, if these two fires met, and the fire on the east side would not have burned over the woods but for the fire on the west, then the defendant would not have been liable, because the fire must have originated from the negligence of the defendant to make the defendant liable.²¹

You are instructed that, to render the defendant liable in this action, the injury suffered by the plaintiff must have been the natural and probable consequence of the defendant's negligence; such a consequence as, under the surrounding circumstances of the case, might or ought to have been foreseen by the wrongdoer as likely to result from his action.²²

You are instructed that, in considering whether or not the burning of the plaintiff's property was a natural and probable consequence of defendant's act in starting the fire, if you shall find that the defendant did start the fire, the jury should consider the distance to the plaintiff's property from the point at which the fire started, the condition of the intervening land with reference to combustible material thereon, the state of the wind, if they should find from the evidence that the same was unusual and extraordinary, and not to be expected for the locality and season, and the probability or otherwise of the fire being gotten under control by property owners or others before it reached plaintiff's premises.²³

You are instructed that if the jury shall find from the evidence that the fire was caused by the ignition of combustible matter on the defendant's right of way by a spark from defendant's engine, and burned across the property of intervening landowners to plaintiff's property, which it burned, but that there intervened after the act of the defendant an unusual and extraordinary wind, a wind not to be expected in that locality and at that season, without which

²⁰ Carter v. Maryland & P. R. Co., 77 A. 301, 112 Md. 599.

²¹ Wilkins v. Atlantic Coast Line R. Co., 93 S. E. 777, 174 N. C. 278.

²² Phillips v. Durham & C. R. Co.,

50 S. E. 462, 138 N. C. 12, 3 Ann. Cas. 384.

²³ Phillips v. Durham & C. R. Co., 50 S. E. 462, 138 N. C. 12, 3 Ann. Cas. 384.

the plaintiff's property would not have burned, the defendant is not liable, and the jury should answer "No" to second issue.²⁴

You are instructed that, even though the jury should find from the evidence that the defendant's right of way was not free from combustible material, still the defendant is not liable unless they shall also find from the evidence that the presence of such combustible material was by the fault and negligence of the defendant, and, further, that it was the proximate cause of the injury and destruction of the plaintiff's property; and unless they so find they should answer the second issue "No."²⁵

You are instructed that, if the jury shall find from the evidence that defendant exercised due and reasonable care and precaution to keep its right of way reasonably and properly clear of rubbish and other combustible material at the point where the fire is alleged to have originated, and without the knowledge or default of the defendant two trees were cut on adjoining lands, and the limbs or laps were thrown upon the right of way and left there by other parties, and this conduct of third persons was the proximate cause of the injury to the plaintiff's property, the defendant is not liable, and the jury should answer the second issue "No."²⁶

You are instructed that if the jury shall find from the evidence, the burden being on the plaintiff, that the defendant company permitted dead grass and straw and pine tops and an accumulation of inflammable and combustible matter to exist on its right of way so near the track as to collect fire from the engine, and it did collect fire from the engine, and it became ignited by sparks from the engine, and the fire spread rapidly across the right of way and thence across the lands of several other persons to the feme plaintiff's property and destroyed her property, then this would be negligence on the part of the defendant; and if you find these to be the facts it devolves on the defendant to show that the engine was properly equipped with the usual and proper appliances to avoid doing injury from the escape of burning sparks; and if you find it was not thus furnished, and the fire was conveyed from the smokestack to the right of way, and thence across the land of several other persons to feme plaintiff's land and destroyed her property, and you find that this was the natural and proximate cause of the property of feme plaintiff being destroyed by fire, and that said injury suffered was the natural and probable consequence of said negligence, and such as, under the surrounding cir-

²⁴ Phillips v. Durham & C. R. Co., 50 S. E. 462, 138 N. C. 12, 3 Ann. Cas. 384.

²⁵ Phillips v. Durham & C. R. Co.,

50 S. E. 462, 138 N. C. 12, 3 Ann. Cas. 384.

²⁶ Phillips v. Durham & C. R. Co., 50 S. E. 462, 138 N. C. 12, 3 Ann. Cas. 384.

cumstances of the case, might or ought to have been reasonably anticipated by the defendant as likely to result from its actions, then you will answer the second issue "Yes."²⁷

§ 4490. Same—Liability for personal injuries

The court instructs the jury, for the plaintiff, that if you believe from all the facts and circumstances offered in evidence in this case that the fire in question was set out by sparks negligently allowed to escape from defendant's train and locomotive, and that the fire so set out spread to and threatened the destruction of plaintiff's property, and that plaintiff, exercising due care and caution, undertook to extinguish the said fire in order to prevent it from destroying his own property, and that while fighting the fire, and exercising such care as a reasonably prudent man would have exercised under the circumstances, the flames were blown in his face, and he was burned and injured thereby, then the defendant is liable for all the injuries resulting to him on account of the said burning, and in estimating his damages you should take into consideration, not only his loss of time, but the pain and suffering endured by him, if any, and also what damage was done to his eyesight, if you believe from the evidence there was any such damage.²⁸

§ 4491. For whose acts defendant liable

You are instructed that, if the fire originated through the careless act or through the act of those operating that engine in allowing sparks to escape from it, in not taking proper steps to prevent the sparks from getting out and causing the fire to originate on the right of way, or if the parties operating that train in any other way caused the fire to originate on that right of way and escape and burn the property of the plaintiff, then defendant is liable, because those parties so acting under its orders, direction, and authority are its authorized agents and employes, notwithstanding they may have been known and called the agents and employes of somebody else.²⁹

§ 4492. Liability for fire set by railroad contractor

You are instructed that there is a statute of this state which provides that, if any person shall for any lawful purpose kindle fire upon his own land, he shall do it at such time and in such manner as to prevent it from spreading, and, if he fails to do so, he shall be liable for all damage done by it, and that, if ———

²⁷ Phillips v. Durham & C. R. Co., 50 S. E. 462, 138 N. C. 12, 3 Ann. Cas. 384.

²⁸ Illinois Cent. R. Co. v. Thomas, 68 So. 773, 109 Miss. 536.

²⁹ Bellamy v. Conway, C. & W. R. Co., 67 S. E. 545, 85 S. C. 450.

violated this statute, such violation is prima facie evidence of negligence, and, if the fire which caused such loss was occasioned through the violation by ——— of the statute law of the state, the appellants are liable for the damage resulting from such violation.³⁰

§ 4493. Contributory negligence of owner of property injured

§ 4493(1). Alabama

The court instructs the jury that, if you are reasonably satisfied from all the evidence in this case that the watchman of plaintiff saw the engine pass by the factory of plaintiff on defendant's track, throwing sparks of unusual size or in unusual quantities, or of dangerous size, on or near the property of the plaintiff, and knew that such sparks would likely or probably set fire to such property, and could have extinguished such sparks, but negligently failed to do so, then you must find a verdict for defendant, if you are reasonably satisfied from the evidence that such sparks proximately caused the fire.³¹

§ 4493(2). Arkansas

The court instructs the jury that, if you believe from the testimony that the plaintiff had an agent to look after the mill, and that the agent knew of the fire burning near the mill, and knew, or by the use of ordinary care could have known, that the same exposed the mill to destruction by fire, and that he failed to use ordinary care to prevent the same, then your verdict should be for the defendants, notwithstanding you should find that the fire caught from a fire negligently or carelessly left by defendants' employees on the right of way, if you believe there was any such fire negligently left on the right of way.³²

§ 4493(3). Florida

The court charges that before you can find for the plaintiff you must believe from the evidence that there was negligence on the part of the defendant either in the equipment or operation of such of its engines as might have caused the fire in question, and that such negligence was the proximate cause of the plaintiff's loss, and if you believe from the evidence that the plaintiff's loss was caused by his own negligence then you will find for the defendant.³³

§ 4493(4). Illinois

The jury are instructed that, if the son and servant of the plaintiff saw the fire in time to put it out while it was on the right of

³⁰ North Bend Lumber Co. v. Chicago, M. & P. S. Ry. Co., 135 P. 1017, 76 Wash. 232.

³¹ McCary v. Alabama Great Southern R. Co., 62 So. 18, 182 Ala. 597.

³² Clark v. St. Louis, I. M. & S. Ry., 201 S. W. 111, 132 Ark. 257.

³³ Florida East Coast Ry. Co. v. Smith, 55 So. 871, 61 Fla. 218.

way before it reached the plaintiff's meadow, it was his duty to do so, and if, through his negligence in not doing so the fire consumed the property of plaintiff, the defendant would not be liable.³⁴

§ 4493(5). Kansas

You are instructed that if you further believe that plaintiff allowed hay or other rubbish to accumulate on or about his property, or left any cracks or openings in his building through which fire from a passing locomotive could readily communicate to the hay or other inflammable matter inside such building, and that the fire was first communicated to the scattered hay or other inflammable rubbish so left exposed, or to the hay or other inflammable matter exposed through the cracks or openings of the building, and you further believe that the doing or permitting these things on the part of plaintiff was what an ordinarily prudent man would not have done under the same or like circumstances, then plaintiff cannot recover because of his negligence.³⁵

§ 4493(6). Missouri

You are instructed that, even if the jury shall find and believe from the evidence that the windows or any of them in the upper story of the plaintiff's mill were left open by the plaintiff, if the jury also find that the fire which burned plaintiff's said mill caught from sparks that fell inside the same through said windows, so left open, from a locomotive being run and operated on the defendant's railroad, then the fact that said windows were left open by the plaintiff will not defeat his right to recover, but you should find a verdict for him for the full, reasonable value of the said mill and its contents, if said mill and contents were completely destroyed.³⁶

The court instructs the jury that, even if the jury should believe from the evidence that the windows or doors of plaintiff's barn were open, and that the fire caught from sparks that fell in the hay inside of said barn, that were thrown out by one of defendant's locomotives, yet the jury are instructed that the leaving open of said windows or doors was not such contributory negligence on plaintiff's part as will defeat a recovery by plaintiff, if you believe from the evidence and the other instructions given you that plaintiff is entitled to recover.³⁷

§ 4493(7). Texas

You are instructed that if you believe from the evidence that the plaintiff or any of his employés observed the fire in time to have

³⁴ *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355.

³⁵ *Atchison, T. & S. F. R. Co. v. Ayers*, 42 P. 722, 56 Kan. 176.

³⁶ *Price v. St. Louis, I. M. & S. Ry. Co.*, 170 S. W. 925, 185 Mo. App. 432.

³⁷ *Matthews v. Missouri Pac. Ry. Co.*, 44 S. W. 802, 142 Mo. 645.

arrested it and prevented the damage to the plaintiff's property, and that the plaintiff or any of such employes failed to exercise ordinary care to arrest such fire and prevent such damage; or if you believe from the evidence that an ordinarily prudent person under the same or similar circumstances as the plaintiff would not have made use of his lot as a place whereon to feed stock or to store feed stuff in a barn or shed; or if you believe that the plaintiff permitted shucks or hay to be scattered over said lot in such wise as an ordinarily prudent person under the same or similar circumstances would not have permitted; or if you believe that the plaintiff permitted hay or shucks to be scattered on the defendant's right of way, and that an ordinarily prudent person under the same or similar circumstances would not have permitted the same; and you further believe that such acts or omissions, if any, proximately contributed to cause the damage to the plaintiff's property—you are instructed that such acts or omissions, if any, would be contributory negligence, as hereinbefore referred to, and that the plaintiff or interveners would have no right to recover. By acts or omissions proximately contributing to cause damage to the plaintiff, as used in this charge, are meant acts or omissions without which the damage would not have occurred, and from which it followed as a natural and probable consequence, which could have been reasonably anticipated.³⁸

You are further instructed that if you believe from the evidence that the plaintiff, or its agent or employes, placed cotton where it was burned, and where the fire started, and that same was not protected, except by the roof of the building or shed, and if you find that the placing of such cotton at the place where it was burned, and where the fire first ignited, and so leaving it there, covered by nothing but the roof, was such an act of omission as a person of ordinary prudence would not have done, in view of the probable danger of the fire from passing engines, if such danger was probable, and if you further find from the evidence that such placing of the cotton there and leaving it uncovered was the proximate cause which, concurring with the negligence of the defendant, if you find the defendant negligent, produced the fire which destroyed the property described in plaintiff's petition and damaged the other property therein described, then the plaintiff was guilty of contributory negligence, and you would find for the defendant, without reference to and notwithstanding any negligence of which the defendant may have been guilty.³⁹

You are instructed that if you believe from the evidence that

³⁸ Freeman v. Nathan (Civ. App.)
149 S. W. 248.

³⁹ Nacogdoches Compress Co. v.
Texas & N. O. R. Co. (Civ. App.) 143
S. W. 302.

plaintiff, knowing that the straw in question was easily set on fire, placed same, in an unprotected condition, nearer defendant's railroad tracks, where he knew it was daily operating trains, than a man of ordinary prudence and caution would do, then plaintiff would be guilty of contributory negligence, and would not be entitled to recover in this case.⁴⁰

§ 4494. Application of doctrine of discovered peril

The court instructs the jury that if the plaintiffs' cotton was in imminent danger of catching fire, and defendant's employes in charge of the engine discovered said danger, it was the duty of such employes to avoid burning the cotton, if it could be done in the exercise of ordinary care, and a failure to use such care after a discovery of the danger would be negligence, and if such negligence, if any, was the proximate cause of the burning of the cotton, the defendant would be liable, although the plaintiffs were negligent in exposing the cotton to the danger.⁴¹

§ 4495. Presumptions and burden of proof

§ 4495(1). United States

The jury are instructed that, where it appears that fire has originated in the manner mentioned by the statute, and injury has happened therefrom, the duty devolves upon the defendant of showing that, notwithstanding it has happened, the railroad company—or receiver, in this case—has not been guilty of any negligence which has caused the fire, and has taken proper precautions in the construction and management of his machinery, and in other particulars pointed out by the statute. Under the statute, upon proof of a fire having started from one of the engines of a railroad company, there is a presumption that it has been caused by some fault, some negligence, on the part of the company, either in the structure or management of the engines, or in the manner in which it has taken care of its right of way; and upon proof of the fact that the fire has been caused by an engine of a railroad company, which has passed over onto the land of private owners, and there caused damage, a prima facie case is made out, and the railroad company cannot escape liability, except by assuming and maintaining the burden of showing that it has exercised due care in the premises.⁴²

The jury are instructed that, if you should determine that the evidence satisfies you that the plaintiff has proved the communi-

⁴⁰ Ft. Worth & R. G. Ry. Co. v. Dal., 85 S. W. 22, 38 Tex. Civ. App. 260.

⁴¹ Furst-Edwards & Co. v. St. Louis

S. W. Ry. Co. (Tex. Civ. App.) 146 S. W. 1024.

⁴² Ann Arbor R. Co. v. Fox (C. C. A. Mich.) 92 F. 494, 34 C. C. A. 497.

cation of the fire to the building from sparks or cinders from this motor engine, then the burden of proof is shifted upon the defendant, and he must overcome the *prima facie* case—that presumption. He must show that there was no defect in the engine; that there was no negligence in the manner of its operation by defendant's employés; and that they were skillful men. In other words, he must prove that there was no negligence, within the definition of the term as I have described it to you. And I told you that negligence was the failure to do something which an ordinarily prudent man under the circumstances would do, or doing something which an ordinarily prudent man under the circumstances would not do. This is the definition of negligence; and it is necessary for the defendant company to show that it used all reasonable and proper care, caution, diligence, and skill in the construction of the motor engine, and that at the time of the fire it was skillfully operated. That is all the railroad company would be required to do—to use all due and reasonable care and caution in providing appliances for the prevention of the emission of sparks and cinders from the locomotive, and skill in the management of it by its operators at the time.⁴³

§ 4495(2). *Alabama*

I charge you that, if the plaintiffs have reasonably satisfied you from the evidence that the fire was caused by defendant's locomotive, then the plaintiffs have nothing to do until the defendant has reasonably satisfied you of each and all of the three following things: (1) That so far as regards the throwing of sparks the engine was properly built; (2) that in that respect said engine was not in a bad or defective condition; (3) that the throwing of sparks is not caused by unskillful or careless management of the locomotives. And even should the defendant in its turn reasonably satisfy you of all the three things above named, yet the plaintiffs may by their evidence overcome the evidence of defendant, and show you that the fire was set out from the engine, either because it was badly built, or in bad condition, or badly handled; and if, from all the evidence in the case, you believe that the fire was caused by the negligence of the railway, your verdict must be for the plaintiffs.⁴⁴

You are instructed that if the jury find from the evidence that the fire was discovered on top of an old, rotten, and easily combustible shingled-roof building, soon after defendant's engine passed by near said building, and further find that said engine, when

⁴³ *Rosen v. Chicago G. W. Ry. Co.* (C. C. A. Minn.) 83 F. 300, 27 C. C. A. 534.

⁴⁴ *Southern Ry. Co. v. Darwin*, 47 So. 314, 156 Ala. 311, 130 Am. St. Rep. 94.

passing, was emitting sparks in unusually large and dangerous quantities, then the burden was on defendant to clear itself of all negligence, provided you find from the evidence plaintiff's said property was destroyed by fire emitted from said engine.⁴⁵

You are instructed that, if you are reasonably satisfied from the evidence in this case that the building was set on fire by the engine of the railroad company, then you will return your verdict in favor of the plaintiff, unless the defendant has reasonably satisfied you from the evidence in the case that the engine was not improperly constructed, nor in defective condition as regards the throwing of sparks or fire, and that the same was skillfully handled as regards the throwing of sparks.⁴⁶

§ 4495(3). *Illinois*

The jury are instructed that if you believe, from the evidence, that fire was communicated from a locomotive engine used by the defendant upon its railway, to the depot at ———, on the night in controversy, and if you further believe, from the evidence, that by reason of such fire, so communicated, the said depot burned up, and that the depot fire directly caused a hotel, then owned by the plaintiff, to take fire, and thereby to burn up, then the fact that such fire was so communicated should be taken by the jury as full prima facie evidence to charge the corporation using the road and the engine with negligence, unless it further appears, from the evidence, that said engine was in good order, and was carefully managed, at the time of the alleged communication of fire, and provided the plaintiff was not guilty of negligence in relation to said fire, and used reasonable efforts to put it out and save his property.⁴⁷

§ 4495(4). *Maryland*

The court instructs the jury that, in passing on the issues in this case, to entitle the plaintiff to recover, it is incumbent on him to show by a preponderance of proof that the fire of ———, which is alleged to have caused the injury to the plaintiff, was started by the defendant operating its train near said premises, and there is no presumption either in law or in fact that the fire was originated or caused by the defendant.⁴⁸

You are instructed that, if the jury find that the property along the defendant's railroad, between the ——— and old buildings on the ——— property, was on ———, set on fire by one of the defendant's engines, then such fire is prima facie evidence of neg-

⁴⁵ *Louisville & N. R. Co. v. Sherrill*, 44 So. 631, 152 Ala. 213.

⁴⁶ *Alabama Great Southern R. Co. v. Sanders*, 40 So. 402, 145 Ala. 440.

⁴⁷ *Chicago & A. R. Co. v. Pennell*, 110 Ill. 435.

⁴⁸ *Carter v. Maryland & P. R. Co.*, 77 A. 301, 112 Md. 599.

ligence; and if the jury find that said fire was by reason of the wind and grass and bushes on said property communicated to and set on fire said buildings and from said buildings communicated to the plaintiff's woodland, and the same burned as the proximate result thereof, as testified by the plaintiff's witnesses, then the plaintiff is entitled to recover in this action, unless the jury is satisfied by preponderating proof that the injury complained of was occasioned without any negligence on the part of the defendant or its agents.⁴⁹

§ 4495(5). North Carolina

The jury are instructed that, as to the first issue, the burden is upon the plaintiffs to satisfy you by the evidence, and by its greater weight, and I mean by greater weight that that side upon whom the burden is placed by law and who must establish their contention by the greater weight of the evidence must put in sufficient evidence as to their contentions on their side of the scale to outweigh their adversaries' side; it must be borne down some—ever so slight will be sufficient—but they must satisfy you by the greater weight of evidence: First. That they are the owners of the property alleged to have been burned over, and the court charges you that it is admitted, so you need not consider that. Plaintiffs owned the land. Second. That the fire was set out by defendant company, its agents or employes, from its locomotive engine which passed over or near plaintiffs' land, and if the plaintiffs have failed to satisfy you by the greater weight of the evidence, as I have defined it to you, that the defendant company set out the fire, then you will answer the first issue "No," and if you answer the first issue "No," you need not consider the other issue, because the defendant in no event would be liable if it didn't set out the fire; but if the plaintiffs have satisfied you by the evidence, and by its greater weight, that defendant set out fire as alleged, the burden then shifts to the defendant to satisfy you by the evidence and by its greater weight, as I have defined it to you, that it did not negligently set out the fire, that its engines were not defective, but were properly equipped with good spark arresters and other appliances in good condition, and which appliances were in common and general use, and that the same were operated in a skillful manner, and by a competent engineer, and notwithstanding that you may find that the defendant set out the fire, if you find these facts from the evidence, the burden being upon the defendant company to establish these facts, then the defendant company would not

⁴⁹ Carter v. Maryland & P. R. Co., 77 A. 301, 112 Md. 599.

be liable; the defendant may not be liable for every fire it sets out, and you should answer the first issue "No."⁵⁰

§ 4495(6). Oregon

Gentlemen of the jury, you are hereby instructed that the burden of proof is upon plaintiffs to establish, by a preponderance of the evidence, that the dryer in question was set afire by the negligence of the defendant railroad company. It is not every fire that occurs along the track of a railroad company that such railroad company is liable for, even though property is destroyed by fire set by sparks coming from engines of the company. It is only when there is negligence or carelessness on the part of the company in managing its engines and fires, that there is a liability on the part of the company; and the burden of proof is upon the plaintiff to show by a preponderance of the testimony, not only that the fire was set from sparks coming from the defendant's engine, but also that there was negligence on the part of the defendant in allowing its engine to get out of repair so as to allow the sparks to escape, if you find they did escape, or negligence on the part of the company in employing unskillful or negligent employes, and, if the plaintiff does not establish such negligence by a preponderance of the testimony, your verdict must be for the defendant.⁵¹

§ 4495(7). Texas

You are instructed that, if you believe from a preponderance of the evidence that, at the time alleged, sparks and fire did escape from one of defendant's locomotives and burned said house and corn, either directly setting fire to said house and corn, or by being communicated by combustible material on the track of defendant, then you are instructed that such facts constitute a prima facie case of negligence on the part of the defendant company; it then devolves upon the defendant to overcome said prima facie case of negligence by proof that defendant's said locomotive which set out the fire, if it did, was equipped with proper spark arresters, and that the same were in good repair and working order, and that the defendant had exercised reasonable care to keep same in good repair.⁵²

You are instructed that if you believe from the evidence in this case that sparks and cinders of fire escaped from the defendant's locomotive engine and set fire to plaintiffs' grass, and that said fire communicated with plaintiffs' mesquite timber, turf, and sod on plaintiffs' land, and destroyed said grass, and injured said mesquite

⁵⁰ Bradley v. Camp Mfg. Co., 98 S. E. 318, 177 N. C. 153.

⁵¹ La Salle v. Central R. R. of Oregon, 144 P. 414, 73 Or. 203.

⁵² Texas & N. O. R. Co. v. Cook (Civ. App.) 167 S. W. 158.

timber, turf, and sod, then such facts constitute a prima facie case of negligence on the part of defendant, and, in the absence of rebutting evidence sufficient to overcome said prima facie case, will render the defendant liable for the injury, if any, occasioned thereby.⁵³

§ 4495(8). Virginia

The court instructs the jury that if they believe from the evidence that the fire which consumed the lumber of the plaintiff originated from sparks or cinders emitted by one of the engines of the defendant, then the said defendant is presumptively guilty of negligence.⁵⁴

The jury are instructed that if they believe from the evidence that the woods on the land of the plaintiffs adjoining the railway were ignited by particles of fire that issued from the defendant's engine, and by means thereof the shatters, woods manure, and down timber on said land were consumed, and the growing trees thereon injured, and stumps and butts of trees upon said woodland burnt down into the ground, leaving large and dangerous holes in many places in said woodland, this does not of itself justify the inference of negligence, but the fact of negligence must be established by additional evidence, and the burden of proof is on the plaintiffs to show it. But the above circumstances are to be considered along with the other circumstances attending said fire in determining whether there was negligence or not.⁵⁵

§ 4496. Matters considered in determining question of negligence

The jury are instructed that if the jury believe from the evidence that the right of way of the defendant was as clear of inflammable matter as it reasonably could be, running through a large body of woodland, and that the fire was communicated by the defendant's engine to the plaintiffs' woodland, and injuring the same, by first igniting on the defendant's right of way, then such fact, along with any other facts, if any, is to be considered in determining whether or not the defendant company was guilty of negligence.⁵⁶

The court further instructs the jury that if they believe from the evidence that numerous fires have been occasioned along the defendant's road, either prior to or subsequent to the ——— day of ———, by sparks issuing from the defendants' locomotives, such facts may be considered by the jury for the purpose of determining whether or not there was negligence on the part of the

⁵³ *Texas & P. Ry. Co. v. Prude*, 86 S. W. 1048, 39 Tex. Civ. App. 144.

⁵⁴ *Abernathy v. Emporia Mfg. Co.*, 95 S. E. 418, 122 Va. 406.

⁵⁵ *New York, P. & N. R. Co. v. Thomas*, 24 S. E. 264, 92 Va. 606.

⁵⁶ *New York, P. & N. R. Co. v. Thomas*, 24 S. E. 264, 92 Va. 606.

defendant's employés, or defects in the defendant's engine, and also for the purpose of showing a negligent habit of the officers and agents of the defendant company.⁵⁷

§ 4497. Evidence that engine, setting fire alleged, caused other fires

The jury are instructed that if, from the evidence, they find that defendant's engine set out the fire alleged, and also that the same engine set out several successive fires on the same trip and on the same day, then the fact of the repeated setting out of such fires will be evidence tending to show that defendant's engine was not properly constructed as to its appliances for prevention of escape of fire, or that the same was not properly used at the time, or that it was not in repair, and as such must be considered in making up the verdict, and in determining as to whether or not this fire occurred through the fault or negligence of defendants or its employés.⁵⁸

§ 4498. Sufficiency of evidence as to cause of fire

§ 4498(1). Alabama

You are instructed that uncertainty in your minds as to whether the fire was caused by reason of the engine being improperly made, or being in bad condition, or being badly handled in respect to the throwing of sparks, is no reason for failing to find a verdict for the plaintiff; and it will be your duty to find your verdict for the plaintiff if you believe from the evidence that the fire was caused by either one of those three causes.⁵⁹

§ 4498(2). Arkansas

The court instructs you that if the evidence in this case fails to show how the fire started, or if from the evidence you believe that it is equally as probable that the fire started from some other cause as that it started from sparks or cinders from defendants' locomotive, or from a fire on the right of way which was negligently permitted to spread by defendants' employés, then your verdict should be for the defendants.⁶⁰

§ 4498(3). Idaho

The court instructs you that, if the evidence, fairly considered, leaves the question in doubt as to whether the fire was started by sparks from the defendant's engine, or some other fire started by third persons, so that you are left to guess or speculate as to which

⁵⁷ New York, P. & N. R. Co. v. Thomas, 24 S. E. 264, 92 Va. 606.

⁵⁸ Slossen v. Burlington, C. R. & N. Ry. Co., 14 N. W. 244, 60 Iowa, 215.

⁵⁹ Alabama Great Southern R. Co. v. Sanders, 40 So. 402, 145 Ala. 449.

⁶⁰ Clark v. St. Louis, I. M. & S. Ry. 201 S. W. 111, 132 Ark. 257.

fire caused the damage complained of, there can be no recovery by the plaintiff, and your verdict must be for the defendant.⁶¹

§ 4498(4). *Michigan*

You are instructed that, in determining those two questions, you may take into consideration, and should take into consideration, all the evidence in the case, the rate of speed and the direction in which the engine was running at the time, the direction of the wind, the distance that the engine passed from where the fire was first discovered, the condition of the engine and its machinery, and its manner of operation in the vicinity of the land upon which the fire started, also the weather conditions, also the time when said engine went by and along said land, also the length of time that intervened between the passage of the engine and the discovery of the fire, and all other evidence in the case which throws any light upon any one of these questions; and after such consideration, if you should find that said fire was not started by a spark thrown upon plaintiff's decedent's land by an engine operated by said defendant, then your verdict should be no cause of action. Or, if you should find that a spark from said engine set said fire upon the land of plaintiff's decedent, and that plaintiff's property was thereby destroyed, and you should further find that such spark was thrown from an engine whose machinery, smokestack, or fire boxes were in good order and properly managed, then your verdict should be for the defendant. But if you should find that such loss or damage was caused by fire originating from a spark emitted from said engine at said time and place, and that the defendant has not shown to your satisfaction that said fire originated from a spark thrown by an engine, whose machinery, smokestack, or fire boxes were in good order, and properly managed, then your verdict should be for the plaintiff. And when I speak of an engine here, I mean the engine testified to as a light engine that passed the mill, as shown by the testimony, a short time prior to the discovery of the fire.⁶²

§ 4498(5). *Missouri*

The court instructs the jury that in order to entitle the plaintiff to recover it is not necessary to prove by direct evidence that the fire which destroyed his property was communicated thereto by an engine being operated on defendant's railroad track through ———, but, if the jury is reasonably satisfied from all the facts and circumstances detailed in evidence that the fire was communicated

⁶¹ *Miller v. Northern Pac. Ry. Co.*, 135 P. 845, 24 Idaho, 567. 48 L. R. A. (N. S.) 700, Ann. Cas. 1915C, 1214.

⁶² *Sayre v. Detroit, G. H. & M. Ry. Co.*, 171 N. W. 502, 205 Mich. 294.

to plaintiff's said property by such engine, then you ought to find a verdict for the plaintiff.⁶³

§ 4498(6). North Carolina

You are instructed that the plaintiffs claim that the fire which burned over their land was put out by a freight train going toward —, No. —; hence you will not consider any contention that it was put out by the freight train going toward —, No. —, for same has no connection with the alleged origin of the fire in controversy. The plaintiffs are not contending that the fire that caused damage to the plaintiffs' woods was put out from the freight train passing — from — to —, No. —. If you do not find from the evidence and by its greater weight as to how the fire did burn over the plaintiffs' land, then you will answer the first issue "No"; that is if you are not satisfied from the evidence and by its greater weight that the fire was caused by the negligence of the defendant, you will answer the first issue "No," but if you are so satisfied, you will answer it "Yes."⁶⁴

§ 4498(7). Pennsylvania

The jury are instructed that, if you find from the evidence that there are other causes, for which the defendant was not responsible, which might just as well have produced the result complained of, and that there is an absence of direct proof as to the cause of the injury to plaintiff, then there can be no recovery for the plaintiff, and your verdict must be for the defendant.*

§ 4498(8). Virginia

The jury are instructed that not only is the burden of showing negligence by a preponderance of the evidence upon the plaintiff, but if the fire may have been started from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it was just as probable that the fire was caused by the one as by the other; that is to say, if the jury believe from the evidence that the said fire might have been set out by the boys who were smoking cigarettes, who had passed along where the fire originated (if they believe from the evidence that the boys said to have passed did so pass, and if they further believe from the evidence that the boys were smoking), as well as by sparks from the engine of the defendant, or if it was just as probable that the fire was caused by the one as by the other, they should find for the defendant.⁶⁵

The court instructs the jury that, before the plaintiff can re-

⁶³ Price v. St. Louis, I. M. & S. Ry. Co., 170 S. W. 925, 185 Mo. App. 432.

⁶⁴ Wilkins v. Atlantic Coast Line R. Co., 93 S. E. 777, 174 N. C. 278.

* Decker v. New York Cent. & H. R. Co., 57 Pa. Super. Ct. 432.

⁶⁵ Abernathy v. Emporia Mfg. Co., 95 S. E. 418, 122 Va. 406.

cover in this case, the evidence must be such as to show more than a mere probability that the property was destroyed by sparks of fire or cinders set out by an engine of defendant company, but it is not necessary to prove it beyond a reasonable doubt. If it is shown affirmatively by a clear preponderance of the evidence that the fire was caused by sparks or coals or cinders emitted from an engine of defendant, the proof is sufficient.⁶⁶

§ 4499. Rebuttal of presumption raised by proof that fire caused by sparks from defendant's engine

§ 4499(1). Alabama

The court instructs the jury that the rule of law is this: If the defendant shows that the engine alleged to have caused the fire was of proper construction, and equipped with proper devices and appliances to prevent the escape of fire and sparks, was in good repair, and prudently managed and controlled, the presumption of negligence arising from the mere communication of fire will be rebutted, and the plaintiff will not be entitled to recover.⁶⁷

§ 4499(2). North Carolina

The jury are instructed that, if the plaintiffs have satisfied you by the evidence, and by its greater weight, that the fire which burned over their lands on the date alleged was set out by defendant company, and the defendant company has failed to satisfy you by the evidence, and by its greater weight, that it was not negligent in that its engine was properly equipped and in good condition and operated by a competent and skillful engineer, then you should answer the first issue "Yes."⁶⁸

§ 4499(3). Oregon

The court instructs the jury that, even though you find that defendant's engines caused the fire complained of, if you further find from the evidence that defendant's engines were properly constructed, and had the most approved appliances for arresting sparks and cinders, and were carefully operated by skillful and competent employes, then I instruct you that this presumption is overcome, and plaintiff cannot recover without making proof of other negligence or want of ordinary care, as alleged in the complaint, and if you find that plaintiff has failed to introduce such proof, then your verdict must be for the defendant.⁶⁹

§ 4499(4). Texas

You are instructed that if you believe from the evidence that sparks, cinders, or coals escaped from the defendant's engine No.

⁶⁶ Norfolk & W. Ry. Co. v. Spates, 94 S. E. 195, 122 Va. 69.

⁶⁷ McCary v. Alabama Great Southern R. Co., 62 So. 18, 182 Ala. 597.

⁶⁸ Bradley v. Camp Mfg. Co., 98 S. E. 318, 177 N. C. 153.

⁶⁹ Chenoweth v. Southern Pac. Co., 99 P. 86, 53 Or. 111.

—— and set fire to inflammable grass or weeds or other material on land included within the right of way, and through the agency of such grass, weeds, or other material set fire to plaintiff's property, such fact constitutes a prima facie case of negligence on part of the defendant, and in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, and in the absence of contributory negligence on the part of the plaintiff, as hereinafter defined, will render the defendant liable for the injury occasioned thereby. If, however, you believe from the evidence that the defendant exercised ordinary care to equip such engine with the most approved appliances in general use to prevent the escape of sparks, cinders, and coals, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating the same, in respect to the wetting of the fuel used, if in the exercise of ordinary care such fuel should be wetted, and in respect to the emptying of the ash pan, if in the exercise of ordinary care such ash pan should be emptied, to prevent the escape of sparks, cinders, or coals and fire resulting therefrom, such presumption is rebutted, and, if you so believe, you will find for the defendant, unless you believe that the defendant had permitted inflammable grass or weeds or other material to be and remain on the land included within the right of way, and that sparks, cinders, or coals escaping from said engine set fire to such material and was communicated to the plaintiff's property, and that the defendant failed to exercise ordinary care to keep the land included within such right of way free of such inflammable material. In this event, as hereinbefore charged, you will find for the interveners, or for the interveners and the plaintiff, unless you believe that the plaintiff was guilty of contributory negligence as next hereinafter defined.⁷⁰

The court charges the jury that, if the jury believes from the evidence that sparks of fire escaped from defendant's engine on ———, as it was passing along the defendant's road, near the plaintiff's pasture, and set fire to the grass growing therein, and that said fire was communicated to the plaintiff's barn, and which destroyed said barn, and all of its contents, as alleged by plaintiff, and all of the other property described, then such facts constitute a prima facie case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, will render the defendant liable for the injuries occasioned thereby, and you should find a verdict for the plaintiff. If from the evidence the jury should believe that sparks of fire escaped from the defendant's engine, and set the fire

⁷⁰ Freeman v. Nathan (Civ. App.) 149 S. W. 248.

which caused the plaintiff damage, but if, from the evidence you believe that the engine from which the sparks escaped was equipped with the most improved spark arrester in use, and that the agents and employes of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then the jury are charged that the prima facie case made out by proof of the escape of sparks and fire resulting therefrom is rebutted, and, if the jury so believes, they will find for the defendant. But, if from all the evidence they believe that the defendant failed to equip its engine, from which the sparks escaped that caused the fire, with the most approved spark arrester in use, or that the agents and employes of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, then the jury is charged that the prima facie case made out by proof of sparks escaping and causing the fire has not been rebutted, and they should find for the plaintiff as charged above.⁷¹

You are instructed that if you believe from the evidence that sparks of fire escaped from defendant's locomotive engine, and set the fire that caused plaintiffs' grass and timber to be destroyed, and their turf and sod injured, but you also believe from the evidence that the defendant did use ordinary care in providing its locomotive engine, from which the sparks may have escaped, with the best improved spark arresters in general use, and that the agents and employes of defendant in charge of said locomotive engine used ordinary care in operating and handling said engine to prevent sparks of fire from escaping therefrom, then you are instructed that the prima facie case made out by proof of sparks and fire resulting therefrom, if made out, is rebutted, and, if you so believe, you will find for the defendant.⁷²

You are instructed that, if you believe from the evidence that the defendant failed to use ordinary care to provide its locomotive engine from which the sparks may have escaped that caused the fire, if it was so caused, with the best approved spark arresters in general use, or that the agents and employes of defendant engaged in operating and handling said locomotive engine failed to use ordinary care to prevent the escape of sparks, then you are instructed that the prima facie case made out, if made out, by proof of sparks escaping and causing the fire, has not been rebutted; and, if you so find, you will find for the plaintiffs.⁷³

⁷¹ *Houston & T. C. R. Co. v. Ellis* (Civ. App.) 134 S. W. 246. In this case the evidence did not present the issue of ordinary care to provide the best kind of spark arrester; the evidence simply being that the engine was equipped with a certain kind of

spark arrester and that this was the best kind.

⁷² *Texas & P. Ry. Co. v. Prude*, 86 S. W. 1046, 39 Tex. Civ. App. 144.

⁷³ *Texas & P. Ry. Co. v. Prude*, 86 S. W. 1046, 39 Tex. Civ. App. 144.

The court instructs the jury that if you find from the evidence that the fire mentioned in plaintiff's petition escaped from defendant's engine at the time and place charged by plaintiff, and that the fire spread to plaintiff's pasture, and injured his property, then such facts constitute a prima facie case of negligence on the part of defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, will render the defendant liable for the injury, if any, caused thereby. But if you believe from the evidence that sparks of fire escaped from the engine of the defendant mentioned in plaintiff's petition, whereby fire was communicated to defendant's pasture, and burned his grass and posts thereon, and destroyed the turf thereon, whereby the land was injured, yet if you believe from the evidence that defendant's engine from which the sparks escaped was equipped with the most improved spark arresters in use, and that the agent and employés of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then you are instructed to find for the defendant on this issue.⁷⁴

The court instructs the jury that if, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set fire to the bed and clothing of the plaintiff, and that said fire was communicated to said plaintiff, and injured her, then such facts constitute a prima facie case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, will render the defendant liable for the injury occasioned thereby. If, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set the fire which caused the plaintiff's injuries, but if, from the evidence, they believe that the engine from which the sparks escaped was equipped with the most improved spark arresters in use, and that the agents and employés of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then they are instructed that the prima facie case made out by proof of escape of sparks and fire resulting therefrom is rebutted, and if they so believe they will find for the defendant; but if, from the evidence, they believe that the defendant failed to equip its engine from which the sparks escaped that caused the fire with the most approved spark arresters in use, or that the agents and employés of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, then they are instructed that the prima facie case made out by proof of sparks escaping and causing the fire has not been rebutted.⁷⁵

⁷⁴ San Antonio & A. P. Ry. Co. v. Ilse (Civ. App.) 59 S. W. 564.

⁷⁵ Gulf, C. & S. F. Ry. Co. v. Johnson (Civ. App.) 51 S. W. 531.

§ 4500. Damages**§ 4500(1). Alabama**

The court instructs the jury that, if the jury find for the plaintiff, they will assess his damages at the value of the building and such portion of its contents as were wholly destroyed, and at such further amount as will, in the judgment of the jurors, under the evidence in the case, compensate the plaintiff for such damages as he may have suffered by reason of injury by fire to that portion of the building or contents which was not wholly destroyed by fire.⁷⁶

§ 4500(2). Illinois

The jury are instructed that if you find the defendant guilty, and find, from the evidence, that the plaintiff was free from negligence in the matter of burning the hotel, or his efforts to put out the fire, or in caring for and removing furniture from the burning building, then you should assess the plaintiff's damages at the value of the hotel and furniture necessarily destroyed by fire, if such value is shown by the evidence.⁷⁷

§ 4500(3). Indiana

The jury are instructed that the rule for the measure of damages, if there is a right of recovery, is the difference, if any, between the fair market value of the land burned over, belonging to the plaintiff, immediately before the fire, and its fair market value immediately afterwards.⁷⁸

§ 4500(4). Maryland

You are instructed that, if the jury find their verdict for the plaintiff, then they are instructed to allow him such sum of money as they believe from the evidence will fully compensate him for all damages he has sustained as the direct result of the injury to his woodland and fences.⁷⁹

You are instructed that, if the jury find their verdict for the plaintiff, then he is entitled to recover, in addition to any injury they may find he has sustained from the burning of the timber and fences, the value of any posts and rails they find were in his possession and destroyed by the fire referred to in this case, as testified to by his witnesses.⁸⁰

You are instructed that if the jury find their verdict for the plaintiff, and further find that the plaintiff was at the time of the

⁷⁶ Alabama Great Southern R. Co. v. Sanders, 40 So. 402, 145 Ala. 449.

⁷⁷ Chicago & A. R. Co. v. Pennell, 110 Ill. 435.

⁷⁸ Chicago, I. & L. Ry. Co. v. Brown, 60 N. E. 346, 157 Ind. 544. This is correct as far as it goes. The

defendant did not suggest to the court that any other cause than fire was a factor in depreciating value.

⁷⁹ Carter v. Maryland & P. R. Co., 77 A. 301, 112 Md. 599.

⁸⁰ Carter v. Maryland & P. R. Co., 77 A. 301, 112 Md. 599.

fire referred to in this case in possession of the woodland lying east of ——— creek, south of the ——— road, and west of the lines testified to by ——— and ——— as the division lines between the ——— and ——— or ——— properties, in ——— county, containing on the plat of ——— (given in evidence) ——— acres, claiming title thereto under the deed to him dated ——— (given in evidence), as part of the property thereby conveyed, and using it as his own property, then the plaintiff is entitled to recover all the damages he has sustained (if any) to said woodland and to any fences thereon caused by said fire.⁸¹

§ 4500(5). Michigan

You are instructed that, if the plaintiff is entitled to recover at all, he is entitled to recover the true cash value of the sawmill and storehouses and the other personal property, being machinery, as testified to here, as they were on the premises at the time they were destroyed; and, in determining the value of the sawmill and storehouses and such personal property, you are to take into consideration all the facts connected with such property, such as its cost, its age, its condition, the uses to which it had been put, its location, and any other fact which, in your opinion, fixes or determines what its true cash value was at the time of the fire, excepting therefrom such property as you may find was saved from destruction by the fire. As to the lumber and products of the mill, if the plaintiff is entitled to recover, he is entitled to recover the fair market value of such lumber and products at the time and place of such fire. And when you have determined the amount of said damages, if you should find the plaintiff is entitled to any damages in this case, you should add thereto interest thereon, at the rate of ——— per cent. per annum from the date of the commencement of this suit, being ———, and adding such interest to the amount of the damages found by you, the result would be your verdict herein, if you find in favor of the plaintiff.⁸²

§ 4500(6). North Carolina

You are instructed that, in estimating the amount of damages which plaintiffs are entitled to recover, if you find that they are entitled to recover damages, you can consider the evidence describing the property injured or destroyed, or any part of it—i. e., whether old or new, decayed or sound—and from all the evidence form your estimate of the damages which plaintiffs are entitled to recover, if you find that they are entitled to recover damages; and where there is no evidence of the description of any of the property destroyed, and where there is evidence of the value of the

⁸¹ Carter v. Maryland & P. R. Co., 77 A. 301, 112 Md. 599.

⁸² Sayre v. Detroit, G. H. & M. Ry. Co., 171 N. W. 502, 205 Mich. 294.

property destroyed, you may consider evidence of the value of said property in finding the value of same in estimating plaintiffs' damages, if you shall find that they are entitled to recover damages; but you are not required to accept the estimated value of the property destroyed or the amount of damages estimated by any witness.⁸³

§ 4500(7). Texas

You are instructed that in determining the amount of the plaintiff's damage, if any, the difference between the market value of the real estate just before and just after the fire, together with the interest thereon from the date of the fire at the rate of — per cent. per annum, would be the measure of damages to such real estate. If the real estate had no market value, then the difference between the reasonable value of the real estate just before and just after the fire, together with interest thereon from the date of the fire at the rate of — per cent. per annum would be the measure of damage. By real estate as used herein is meant the ground and the structures thereon. As to property other than real estate, the measure of damages in the event such property was destroyed would be the market value of such property at the time and place of the fire, together with interest thereon from the date of the fire at the rate of — per cent. per annum. If such property had no market value, the measure of damages would be the reasonable cash value of such property at the time and place of the fire, together with interest thereon from such date at the rate of — per cent. per annum. If such property was not destroyed, but was only damaged, the measure of damages would be the difference between the market value thereof just before and just after the fire, at the place of the fire, together with interest thereon from the date of the fire at the rate of — per cent. per annum. If, however, such property had no market value, then the measure of damages would be the difference between the reasonable cash value just before and just after the fire, at the place of the fire, together with interest thereon from the date of the fire at the rate of — per cent. per annum. By market value of any item of property, as the term is used herein, is meant the price at which such an item of property is currently bought and sold in the market.⁸⁴

You are instructed that if you find from the evidence under the above instructions that plaintiff's said grass or any part thereof was burned, and if you further find from the evidence that the

⁸³ *Phillips v. Durham & C. R. Co.*,
50 S. E. 462, 138 N. C. 12, 3 Ann. Cas.
384.

⁸⁴ *Freeman v. Nathan (Civ. App.)*
149 S. W. 248.

turf and land upon which said grass was growing was injured thereby, as alleged by plaintiff, and if you further find under the above instructions that plaintiff's said timber on his said land, or any part thereof, was burned, killed, and injured by said fire, as alleged by him, and if you further find that the land upon which said killed or injured timber, if any, was growing was injured thereby, then you will find for plaintiff as to these items of injury, if any, and assess his damages, if any, that may have directly and proximately accrued to said land by reason of the injuries, if any, to said turf and said timber, at the difference, if any, in the reasonable value of said land immediately before and immediately after said fire, not taking into consideration, however, in arriving at this item of damage, if any, any value of the grass, if any, that you may find was burned on said land.⁸⁵

§ 4501. Same—Damages to personal property

The court instructs the jury that the measure of damages in cases of this kind is the value of the property at the time and place where it was destroyed, and the jury have the right to arrive at this value from the testimony of the witnesses and other facts and circumstances as disclosed by the evidence, and of the weight and credibility of the witnesses, the jury are the sole judges. In other words, the plaintiff is entitled to recover just compensation in money for the property destroyed, such an amount as will fully restore him to the same property status that he occupied before the destruction. To arrive at the amount of such compensation inquiry is necessarily confined strictly to the ascertainment of the value of the property destroyed at the time and place of the destruction thereof, and in this connection I instruct you that whenever there is a well-known or fixed market price for any property, the value of which is in controversy, it is proper, in establishing the value, to take into consideration such market value, but in order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; i. e., a demand therefor, and ability from such demand to sell the same when the sale thereof is desired. Where, therefore, there is no demand for a thing, no demand to sell the same, then it cannot be said to have a market value at the time when and at a place where there is no market for the same.⁸⁶

You are instructed that, if you find from the evidence that there was at the time of the destruction of the property in question a well-known or fixed market price for the same, then the measure

⁸⁵ Missouri, K. & T. Ry. Co. of Tex. as v. Neiser, 118 S. W. 166, 54 Tex. Civ. App. 460.

⁸⁶ McGilvra v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N. W. 854, 35 N. D. 275.

of damages, or, in other words, the amount which the plaintiff is entitled to recover for the destruction of the property, provided you find defendant liable, is its reasonable market value at the time and place it was burned. But I instruct you that the rule as to such measure of damages only requires a strict limitation to the market value in cases where such value would be the fairest and the best measure of damages and is ascertainable. What the law requires is certainty as far as possible and an absence of speculation. It does not, however, require the impossible or the unreasonable.⁸⁷

You are instructed that, on the other hand, if you find from the evidence that there was no market value of the property in question at the time and place of the destruction thereof, then it is your duty, in arriving at the true value of the said property at the time and place of the destruction, to take into consideration all the facts and circumstances disclosed by the evidence bearing upon that question, and in such case you have a right to consider what it would cost the plaintiff to replace the property, and in this connection I instruct you, gentlemen, that the owner of personal property may himself testify as to its value, and you have a right to consider such testimony in connection with all of the other testimony introduced here and in connection with all of the facts and circumstances disclosed by the evidence.⁸⁸

You are instructed that the ultimate question in determining the value of the property in question is, What was it worth at the time and place of the fire, and all I have said upon this question of damages has been said to you with a view to assisting you in determining the answer to this question? and I instruct you that all that I have said in regard to the measure of damages for the personal property destroyed must be confined to your consideration of the value of the personal property destroyed, and must not be considered by you when you consider the damage done to the real property, if any such damage is disclosed by the evidence in this case, and I instruct you that you are the sole judges in determining what the personal property in question was worth at the time and place of its destruction.⁸⁹

§ 4502. Same—Deduction of insurance

§ 4502(1). Illinois

The jury are instructed that, if they find the defendant guilty, they should not consider anything said by counsel as to the amount

⁸⁷ *McGilvra v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 159 N. W. 854, 35 N. D. 275.

⁸⁸ *McGilvra v. Minneapolis, St. P. &*

S. S. M. Ry. Co., 159 N. W. 854, 35 N. D. 275.

⁸⁹ *McGilvra v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 159 N. W. 854, 35 N. D. 275.

of any alleged insurance on the property destroyed, nor should the jury deduct anything from the reasonable value of the property, if that be proved by the evidence, on account of such insurance.⁹⁰

§ 4502(2). *Missouri*

The court further instructs the jury that, although the jury may believe from the evidence that plaintiff had insurance upon the property in question, and that he thereafter received certain moneys on account of the said insurance, such amount so received by the plaintiff, if any, cannot go to diminish the amount of the plaintiff's claim. And if you find the said mill and its contents was set on fire by sparks communicated thereto from a locomotive being operated on defendant's railroad, defendant is liable to plaintiff for burning said mill and its contents, and if you so find you should find for the plaintiff and allow him the full amount of the injury done to his property without considering and without regard to any amount of insurance money he may have received.⁹¹

The court instructs the jury that, if they find from the evidence that plaintiff had procured insurance upon the barn in controversy, and upon a portion of its contents, prior to the burning of the barn, and that after the burning of said barn he received certain moneys in settlement of said insurance, said insurance money so received cannot go to diminish the amount of plaintiff's claim, if any, against the defendant; but if the jury, under the evidence and instructions, find that defendant is liable to plaintiff for the burning of the barn and its contents, they must allow plaintiff the full amount of the injury done to his property, without regard to the amount of insurance money he received.⁹²

⁹⁰ *Chicago & A. R. Co. v. Pennell*, 110 Ill. 435.

⁹² *Matthews v. Missouri Pac. Ry. Co.*, 44 S. W. 802, 142 Mo. 645.

⁹¹ *Price v. St. Louis, I. M. & S. Ry. Co.*, 170 S. W. 925, 185 Mo. App. 432.

CHAPTER CCXXXV

RAPE

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A. CRIMINAL LIABILITY

1. *In General*

§ 4503. Capacity to commit crime

The jury are instructed that, although you may believe from the evidence that defendant was not ——— years of age at the time of the commission of the alleged rape of ———, yet if you believe from the evidence beyond a reasonable doubt that defendant was much more than ——— years old, and that he was physically capable of committing the crime of rape, and that he was mentally capable of understanding that it was wrong to do such an act, then you should find him guilty, if you believe from the evidence beyond a reasonable doubt that every fact necessary to establish the crime of rape by defendant, as defined in other instructions has been proved.¹

§ 4504. Elements of offense

§ 4504(1). Iowa

The jury are instructed that rape is the act of sexual intercourse, accomplished with a female not the wife of the perpetrator, when she resists, but her resistance is overcome by force or violence, or when she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution.²

§ 4504(2). Kentucky

You are instructed that if you shall believe from the evidence beyond a reasonable doubt that the defendant, in this county, and before the finding of this indictment, had unlawful carnal knowledge of ——— by force or by putting her in fear of her life and against her will, you should find him guilty of rape, and fix his punishment at confinement in the state penitentiary for not less than ——— nor more than ——— years, or at death in your discretion.³

§ 4504(3). Missouri

The court instructs the jury that the defendant in this case is charged with the crime of rape, alleged in the indictment to have been committed upon one ———, at the county of ———, in the state of ———, on the ——— day of ———. And the jury are instructed that if they believe from the evidence in this case, and beyond a reasonable doubt, that the defendant, on the ——— day

¹ Davidson v. Commonwealth, 47 S. W. 213, 20 Ky. Law Rep. 540.

² State v. Morrison, 179 N. W. 321.

³ Bowman v. Commonwealth, 143 S. W. 47, 146 Ky. 486.

of ———, at the county of ———, in the state of ———, did forcibly ravish the said ———, they will find the defendant guilty as charged, and assess his punishment at death, or imprisonment in the penitentiary not less than ——— years, in the discretion of the jury.⁴

You are instructed that, if you believe and find from the evidence that the defendant, at the county of ——— and state of ———, on or about the ——— day of ———, at a time before the ——— day of ——— (being the date of filing the indictment herein), did feloniously and forcibly and against the will of the prosecuting witness, ———, make an assault upon her, the said ———, and feloniously and forcibly and against her will ravish and carnally know her, the said ———, then you will find the defendant guilty of rape as charged in the indictment. "Feloniously," as used in the indictment and the instructions, means wickedly, and against the admonitions of the law, and refers to the character of punishment prescribed by law.⁵

§ 4504(4). Texas

The jury are instructed that in this case, to warrant the conviction of the defendant of rape, it should appear from the evidence: First. That the defendant, in ——— county, state of ———, on or about the ——— day of ———, made an assault upon the alleged female, ———. Second. That by such assault and by actual force and threats as above defined, the defendant obtained carnal knowledge of the said ——— by actual penetration. Third. That such carnal knowledge of the said ——— was obtained by the defendant without her consent and against her will.⁶

§ 4505. Necessity of showing assault

You are instructed that, to constitute rape, there must be an assault. The use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to commit a battery, is an assault. The injury intended may be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind.⁷

⁴ State v. Miller, 90 S. W. 787, 191 Mo. 587.

⁵ State v. Boyd, 76 S. W. 979, 178 Mo. 2.

⁶ Fitzgerald v. State, 20 Tex. App. 281.

⁷ Fitzgerald v. State, 20 Tex. App. 281.

§ 4506. Want of consent or use of force as essential element of offense**§ 4506(1). Delaware**

You are instructed that rape is the carnal knowledge of a woman by force and against her will. Force, either actual or presumptive, is in legal parlance an indispensable element of rape. In a trial for rape the burden is upon the state to prove to the satisfaction of the jury, beyond a reasonable doubt, that the carnal knowledge or sexual intercourse charged was consummated or effected by force and against the will of the prosecuting witness, or by putting her in great fear and terror, before a conviction can be had.⁸

You are instructed that the prisoner denies that he committed an assault of any kind upon the prosecuting witness. He admits that he had sexual intercourse with her at the time and place alleged, but insists that such intercourse was had with her consent and not by force or against her will. If that be true he cannot be found guilty of the crime charged in the indictment, because rape, as we have said, is the carnal knowledge of or sexual intercourse with a woman, by force and against her will. If sexual intercourse is obtained by milder means, or with the consent or silent submission of the female, it cannot constitute the crime of rape in contemplation of law.⁹

§ 4506(2). Georgia

The court instructs the jury that there can be no rape, if there was any kind of consent of the woman; the whole transaction from beginning to end must be forcible and against her will. I charge you that, if the woman gave any kind of consent, it would not be rape. It matters not how that consent was obtained, or how reluctantly that consent might have been given, if there was the least part of consent on the part of the woman during the transaction, then a person charged with rape could not be convicted of rape.¹⁰

§ 4506(3). Illinois

You are instructed that, if the prosecution have failed to prove, beyond a reasonable doubt, not only that defendant had sexual intercourse with ———, but that said sexual intercourse was forcible on the part of defendant, and against the will of ———, then it is the duty of the jury, under the law, and under their oaths, to acquit the defendants.¹¹

⁸ State v. Brown, 83 A. 1083, 3 Boyce, 343.

⁹ State v. Brown, 83 A. 1083, 3 Boyce, 343.

¹⁰ Avery v. State, 77 S. E. 892, 12 Ga. App. 562.

¹¹ Sutton v. People, 34 N. E. 420, 145 Ill. 279.

§ 4506(4). Kentucky

The jury are instructed that, if you find the defendant guilty under the previous instructions the fact that ——— was at the time of the crime a woman of bad character would not relieve him from responsibility; but there can be no conviction if the woman consented to the sexual intercourse, and was not constrained by force or fear to submit to it, and in reaching your verdict you should take into consideration all the facts and circumstances shown in the case.¹²

§ 4506(5). Missouri

You are instructed that, by the term "forcibly ravish," as used above, is meant the carnal knowledge of a woman by a man, forcibly and against her will. If the jury believe from the evidence in this case there was any element of consent, or a passive submission, on the part of ——— to sexual intercourse with the defendant, at the time and place charged, in either instance not enforced by violence, or induced by fear or intimidation, then he is not guilty as charged, and the jury should so find; and in ascertaining whether the defendant had sexual intercourse with ——— at the time and place charged, by violence or fear, or by consent of the said ———, the jury should take into consideration all the facts and circumstances adduced in evidence.¹³

§ 4506(6). Texas

The court instructs the jury that the indictment charges a rape by force, and I charge you that force, within the meaning of this statute, is defined as follows: To constitute rape by force, the accused must have ravished the alleged injured female by having carnal knowledge of her without her consent and against her will by force, and the force used must have been such as might reasonably be supposed sufficient to overcome all resistance, within her power, taking into consideration the relative strength of the parties and other circumstances of the case, and penetration of the sexual organ of the female alleged to have been ravished by the male organ of the accused must be proved beyond a reasonable doubt.¹⁴

The court instructs the jury that if, from the evidence, you believe that the prosecutrix, ———, consented to have carnal intercourse with the defendant, or if you entertain a reasonable doubt as to whether or not she did consent, then it will be your duty to acquit the defendant. It is not necessary that consent be in words;

¹² Neace v. Commonwealth, 62 S. W. 733, 23 Ky. Law Rep. 125.

¹³ State v. Miller, 90 S. W. 767, 191 Mo. 587.

¹⁴ Wood v. State, 189 S. W. 474, 80 Tex. Cr. R. 398.

if she yields her person to the defendant, that would be, in law, consent.¹⁵

You are further charged, if you believe from the evidence that the said ———, by act or conduct towards the defendant which was reasonably calculated to induce the defendant to believe that he had the consent of the said ——— to have carnal intercourse with her, caused the defendant to believe that he had the consent of ——— to have such intercourse with her, and so believe the defendant had such carnal intercourse, if any, with the said ———, you will acquit him.¹⁶

§ 4507. Mental incapacity of prosecutrix to oppose act of sexual intercourse

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that defendant had carnal intercourse with ———, who was not his wife, at a time when she was so mentally diseased as to have no will to oppose the act of carnal knowledge, but you further find from the evidence that he did not know her condition to be such, or if you have a reasonable doubt whether he knew it, you must acquit him.¹⁷

§ 4508. Liability of husband for rape of wife

The jury are instructed that, if you believe from the evidence that defendant, at the time of the act charged in the indictment, was the husband of the prosecuting witness, and that the act of sexual intercourse in question was done by defendant himself, and that defendant did not procure another to commit such act, or aid or abet its commission by another, then you will find the defendant not guilty.¹⁸

§ 4509. Necessity of showing intent of defendant to overcome all resistance

§ 4509(1). Iowa

You are instructed that, in order to constitute the offense charged, the evidence must show that the defendant assaulted the prosecuting witness, not only with the intent to gratify his passions, but that he intended to do so at all events, notwithstanding her refusal, and any resistance she might be able to make against such assault. And before you can convict the defendant of the crime charged, you must find that he assaulted the said ——— as aforesaid with the intent and purpose to accomplish his design and

¹⁵ Wood v. State, 189 S. W. 474, 80 Tex. Cr. R. 398.

¹⁶ Wade v. State, 144 S. W. 246, 65 Tex. Cr. R. 125.

¹⁷ Caruth v. State (Tex. Cr. App.) 25 S. W. 778.

¹⁸ State v. Haines, 25 So. 372, 51 La. Ann. 731, 44 L. R. A. 837.

ravish said ———, notwithstanding her resistance, and was only prevented from accomplishing his design by the resistance of the said ———. Merely to solicit sexual intercourse, to propose it, or even to go to the extent of committing an assault, or an assault and battery, upon the said ——— in pressing such solicitation, would not be sufficient, unless you further find it was the design and purpose of the defendant to have sexual intercourse with the said ———, notwithstanding any resistance she might make, and that he was only prevented from doing so by the resistance of the said ———.¹⁹

§ 4509(2). Texas

You are instructed that the force mentioned in the foregoing definition as applied to rape and assault with intent to commit rape is such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case.²⁰

§ 4510. Necessity of use of force sufficient to overcome all resistance of woman

The jury are instructed that they must further believe, beyond a reasonable doubt, the force used by defendant, if any, was such as might reasonably be supposed sufficient to overcome all resistance of the prosecutrix within her power, and that she actually resisted such carnal knowledge of her person by the defendant, if any, to the utmost of her strength, and that they must further believe from the evidence, beyond a reasonable doubt, that she was overcome by superior force by the defendant, and in determining this issue they must take into consideration the relative strength of the parties, and all other circumstances of the case.²¹

§ 4511. Constructive force—Duress or fear

You are instructed that the force need not be actual physical force. It is sufficient if it was a constructive force, such as duress or being put in fear.²²

§ 4512. Threats as equivalent to force

§ 4512(1). Iowa

You are instructed that rape is a carnal knowledge of a female, forcibly and against her will; and where threats of personal violence are made to overcome her will, and she believes that her person is in danger from said threats, and has sexual connection with

¹⁹ State v. Harrison, 149 N. W. 452, 187 Iowa, 334.

²⁰ Conger v. State, 140 S. W. 1112, 63 Tex. Cr. R. 312.

²¹ Salazar v. State, 116 S. W. 819, 53 Tex. Cr. R. 307.

²² Posey v. State, 38 So. 1019, 143 Ala. 54.

her, then the law considers such carnal knowledge as having been forcibly had, and against the will of the female.²³

§ 4512(2). *Michigan*

The jury are instructed that, if they find from all the evidence in the case beyond a reasonable doubt that the respondent, ———, was acting in concert with his codefendant, ———, and that while they were so acting in concert and together either or both of them used threats or other conduct calculated to intimidate the complaining witness, and that such threats and other conduct resulted in placing complaining witness in fear of great bodily harm, and that by reason thereof the respondent had sexual intercourse with said complaining witness, and if the jury find from the evidence beyond a reasonable doubt that she did not resist by reason of the threats and other conduct referred to, and the fears engendered thereby, but that said intercourse was against her will—against the will of the said complaining witness—then you should convict the respondent.²⁴

§ 4512(3). *Missouri*

The court instructs the jury that rape is carnal knowledge of a female, forcibly and against her will, and where threats of personal violence are made to overcome her will, and she believes that her person is in great danger from such threats, and is induced thereby to submit to the will of the person making such threats and has sexual connection with her under such circumstances, then the law considers such carnal knowledge as having been forcibly had and against the will of the female. And if the jury in this case believe from the evidence in this case that the defendant compelled the prosecuting witness by threats of personal violence to submit her person to him in sexual intercourse against her will, and that she submitted through fear of great violence or death, then the jury should find the defendant guilty of rape as charged in the indictment, and assess his punishment at death or imprisonment in the penitentiary for not less than ——— years in the discretion of the jury.²⁵

The court instructs the jury that if they believe from the evidence in this case that the defendant compelled the prosecuting witness by threats of personal violence to submit her person to him in sexual intercourse, and against her will, and that she submitted through fear of great violence or death, then the jury should find the defendant guilty as charged in the indictment even though

²³ State v. Urie, 70 N. W. 603, 101 Iowa, 411.

²⁴ People v. Flynn, 55 N. W. 834, 96 Mich. 276.

²⁵ State v. Miller, 90 S. W. 767, 191 Mo. 587.

the jury should further believe from the evidence that the prosecuting witness did not offer the utmost resistance to the defendant at the time of said act of sexual intercourse.²⁶

§ 4512(4). Texas

You are instructed that rape is the carnal knowledge of a woman without her consent, obtained by force or threats. The force employed to obtain such carnal knowledge must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The threats employed must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties, as to health, strength, and all other circumstances of the case.²⁷

§ 4513. Inducing sexual intercourse by fraud—Sham marriage

You are instructed that in this case the means charged to have been used in committing the alleged rape is fraud. The fraud must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband. It is a presumption of law which cannot be rebutted by testimony that no consent was given when the intercourse was had by fraud as above defined. Stratagem means the use of any artifice or trick, and to constitute the fraud essential to render the act of copulation rape the stratagem resorted to must have been intended by the offender to induce, and must have induced, the injured female to believe that the offender was her husband.²⁸

You are instructed that, if you believe from the evidence beyond a reasonable doubt that in ———, on or about ———, the defendant did represent to ——— that he had procured a marriage license to marry her, and that he carried her to the ——— Hotel, in the city of ———, to marry her, and that he sent out for a person authorized to marry them, and had brought into the said hotel the person introduced by the defendant to the said ——— as a minister of the gospel, and had said person to perform the marriage ceremony and marry him, the defendant, to the said ———, and that by virtue of the said ceremony said ——— believed, and was induced thereby to believe, that the defendant was her husband, and that the defendant intended by telling her of said marriage license, and sending for and introducing said person as a minister, and having him perform the marriage ceremony, to have her believe that he was her husband, and that defendant resorted to said acts for the

²⁶ State v. Miller, 90 S. W. 767, 191 Mo. 587.

²⁷ Fitzgerald v. State, 20 Tex. App. 281.

²⁸ Lee v. State, 72 S. W. 1005, 44 Tex. Cr. R. 354, 61 L. R. A. 904.

purpose of having carnal knowledge of the said ——— and that he did by said means have carnal knowledge of her, and that she submitted to his embraces, believing then and there that he was her husband; and you further find that said marriage ceremony was a sham, and said marriage a mock marriage, and that defendant then and there knew it to be a sham and mock marriage; and you further find that defendant was then and there an unmarried male person over the age of ——— years, and that said ——— was then and there over the age of ——— years—then the defendant would be guilty of rape as charged, and you will so find, affixing the penalty thereto.²⁹

§ 4514. Necessity of resistance by female

§ 4514(1) Indiana

You are instructed that, if you find from the evidence in this case that an act of sexual intercourse did take place between the defendant and the prosecuting witness, as averred in the indictment, the question as to whether or not the prosecuting witness voluntarily consented to such act, is a question of fact for you to determine from the evidence in the case. The defendant insists that she did thus voluntarily consent thereto, and that he used no force or coercion of any kind to compel such consent, but that she yielded to his desires upon his request alone. The prosecution insists that she did not voluntarily consent, but that she resisted to the full extent of her ability, and only yielded when her will was overpowered, and that if she finally submitted to her fate, it was against her will and for fear of more serious consequences. You are to say, from the evidence, which, if either, is right; and if, after giving due weight to all the evidence, you find the prosecuting witness did voluntarily consent to such act of intercourse, and not under coercion, you should acquit; but if you find, beyond a reasonable doubt, that the act was by force, and against her will, and find the other facts averred in the indictment established beyond a reasonable doubt, you should convict.³⁰

§ 4514(2). Iowa

The jury are instructed that they must be satisfied from the evidence, beyond a reasonable doubt, that defendant had carnal knowledge of the said ——— forcibly and against her will, and that she did not yield her consent during any part of the act. To constitute the crime of rape, the will of the female alleged to have been outraged must have been overcome by force. If she consents in the

²⁹ Lee v. State, 72 S. W. 1005, 44 Tex. Cr. R. 354, 61 L. R. A. 904.

³⁰ Anderson v. State, 4 N. E. 63, 104 Ind. 467.

least during any part of the act, there is not such an opposing will as the law requires to convict on the charge of rape.³¹

§ 4514(3). North Carolina

The jury are instructed that, if they believe that the prosecutrix offered to allow the defendant to have connection with her for — cents, and he refused to pay that sum, and attempted to have connection with her against her will and by force, he would be guilty of the crime charged in the bill of indictment.³²

§ 4514(4). Texas

You are instructed that, if you believe that the defendant had carnal knowledge of the said — at the time and place charged, with her consent, or that she yielded to such carnal knowledge, if any, without sufficient resistance thereof, as hereinbefore defined and explained, or if, from all the facts and circumstances in evidence before you, you have a reasonable doubt thereof, you will acquit the defendant. And you are instructed that in determining these issues you will take into consideration the acts, manner, and condition of the said — at the time and just after said carnal knowledge, if any, and all the other facts and circumstances in evidence before you in this case.³³

You are instructed that, if you find from the evidence that defendant had carnal knowledge of the woman —, then consent on her part to such carnal knowledge would be presumed until the state proves beyond any reasonable doubt that said prosecutrix used every means within her power to prevent such intercourse.³⁴

§ 4515. Degree of resistance by woman

§ 4515(1). Arkansas

You are instructed that it was the duty of — to use all means within her power consistent with her safety to prevent the defendant from accomplishing his designs, when said alleged assault was made upon her, and you are further instructed that it was also her duty to give alarm and make an outcry, when she first learned of the defendant's designs to have sexual intercourse with her, and it is your sworn duty in this case to consider her failure to make such outcry at the time said alleged assault was made upon her by the defendant in this case, together with all the other facts and circumstances proven in this case.³⁵

The jury are instructed that force is a necessary element in the

³¹ State v. Whimpey, 118 N. W. 281, 140 Iowa, 199.

³² State v. Long, 93 N. C. 542.

³³ Salazar v. State, 116 S. W. 819, 55 Tex. Cr. R. 307. The specific objection to this instruction was that it

was on the weight of evidence and singled out facts.

³⁴ Perez v. State, 87 S. W. 350, 48 Tex. Cr. R. 225.

³⁵ Threet v. State, 161 S. W. 139, 110 Ark. 152.

crime of rape. The carnal knowledge must be had by the male against the will of the female alleged to have been raped. The proof must show beyond a reasonable doubt that the woman did not consent, and that her resistance was not a mere pretense, but was in good faith. If the woman submitted from terror or dread of a greater violence, the intimidation becomes equivalent to force. The word "force" is taken in its ordinary acceptation. I mean by it common physical force. If by acts of violence the woman is so much in fear of her life or bodily harm that she is unable to make resistance, that is equivalent to force.³⁶

§ 4515(2). Connecticut

You are instructed that, if she was incapable of resistance through fear, or if resistance was entirely useless, there might be rape if no resistance was in fact made. It is to be expected that resistance will be made, unless the mind of the woman is so overcome by fear that she is incapable of resistance, or unless there is such an exhibition of brute force as to make resistance useless or impossible.³⁷

You are instructed that you must be satisfied that there was no consent during any part of the act, and the degree of resistance is an essential matter for you to consider in determining whether the alleged want of consent was honest and real.³⁸

§ 4515(3). Indiana

You are instructed that it is not the law of this state that a woman assaulted with an intent to commit rape upon her is required to resist by all violent means within her power. The law requires only that the case be one in which the woman did not consent. Her resistance must not be mere pretense, but in good faith. The law does not require that the woman shall do more than her age, strength, and all attendant circumstances make it reasonable for her to do in order to manifest her opposition. The question of resistance is a question of fact for you to determine and find, and not a question this court can decide.³⁹

§ 4515(4). Iowa

You are instructed that the force necessary, on the one hand, to commit the crime of rape, and the resistance required, on the other hand, to constitute the crime, depend upon the relative mental and physical strength of the parties, and the circumstances surrounding them at the time of the alleged assault.⁴⁰

³⁶ Davis v. State, 39 S. W. 356, 63 Ark. 470.

³⁷ State v. Long, 43 A. 493, 72 Conn. 39.

³⁸ State v. Shields, 45 Conn. 256.

³⁹ Rahke v. State, 81 N. E. 584, 168 Ind. 615.

⁴⁰ State v. Robinson, 152 N. W. 590, 170 Iowa, 267.

§ 4515(5). Michigan

You are instructed that, to constitute the crime of rape, it will be necessary for you to find beyond all reasonable doubt that this defendant had carnal knowledge of the body of this young lady by force and against her will, and that she did everything she could under the circumstances to prevent defendant from accomplishing his purpose. If she did not do that it is not rape. It will be necessary for you to find that the act of sexual intercourse, if you find there was such an act, was committed by force, as far as the young man is concerned, and against the will of the girl. You must find that she was overcome and overpowered, and that resistance must have continued from the inception to the close, because, if she yielded at any time, it would not be rape.⁴¹

The jury are instructed that, to authorize a conviction for rape the jury must believe that the offense was accomplished by force, and against the will of the woman; and that there was the utmost reluctance and resistance on her part, or that her will was so overcome by fear that she did not dare to resist. And in this case, if the jury find that sexual connection was had with the witness, ———, and that ——— was unwilling to submit to such intercourse, but finally consented or yielded through mere weakness of will, without any threats being made, or without fear of consequences if she resisted, then the offense would not be rape.⁴²

The jury are instructed that if the jury find that sexual intercourse was had with said ———, and that she did not willingly submit to such intercourse, but submitted because of threats made against her if she did not yield to such intercourse, and through fear and apprehension of dangerous consequences or great bodily harm, and that her mind was so overpowered by fear that she did not dare to resist, then the offense would be rape, although she may have made little or no physical resistance to such connection.⁴³

§ 4515(6). Minnesota

You are instructed that, in order to find the defendant guilty, you must find, as I have stated, that she (the complaining witness) resisted the attempt to the utmost extent of her ability, and that her resistance was forcibly overcome by the defendant. To authorize the conviction of a rape, the jury must find from all the evidence beyond a reasonable doubt that the defendant had carnal connection with the prosecuting witness, and that that carnal connection was forcible and against her will, and that she did not

⁴¹ People v. Murphy, 108 N. W. 1009, 145 Mich. 524.

⁴² People v. Flynn, 55 N. W. 834, 96 Mich. 276.

⁴³ People v. Flynn, 55 N. W. 834, 96 Mich. 276.

give her consent to the act. To constitute the crime of rape, the will of the female must have been outraged, and her will must have been forcibly overcome, and, as I have stated, she must resist to the utmost of her ability, to the utmost extent of her ability.⁴⁴

§ 4515(7). Nebraska

You are instructed that the charge made against the defendant is, in its nature, a most heinous one, and well calculated to create strong prejudice against the accused; and the attention of the jury is directed to the difficulty, growing out of the nature of the usual circumstances connected with the commission of such a crime, in defending against the accusation of rape. It is your duty to carefully consider all the evidence in the cause, and the law as given you by the court, in arriving at what your verdict shall be in this case. You must find on the part of the woman not merely a passive policy, or equivocal submission to the defendant. Such resistance will not do. Voluntary submission on the part of the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. If the carnal knowledge was with voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape; and, in determining whether she did resist to the extent of her ability in this case, you may take into consideration her physical condition at the time of the alleged rape, and the further fact that she had but recently given birth to a child.⁴⁵

§ 4515(8). Oklahoma

You are instructed that rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where she resists, but her resistance is overcome by force and violence. And in this connection the court instructs you that if you find by the degree of evidence stated in these instructions that the defendant, alone or aided by any other person or persons, within the county of _____ and state of _____, as charged in the indictment, did unlawfully, wrongfully, and feloniously accomplish an act of sexual intercourse with one _____, the prosecuting witness herein, and that said defendant accomplished said act of sexual intercourse by force and violence and against her will, and that said _____ was a female, and at said time was not the wife of the defendant, then and in that event you should find the defendant guilty as charged in the indictment. But, in order to convict the defendant, the state must also establish by the degree of evi-

⁴⁴ State v. Ingraham, 136 N. W. 258, 118 Minn. 13.

⁴⁵ Welsh v. State, 82 N. W. 368, 60 Neb. 101.

dence stated in these instructions that the said prosecuting witness resisted to her utmost capacity, and that her resistance was overcome by force and violence. On the other hand, if you should entertain a reasonable doubt as to whether the defendant accomplished an act of sexual intercourse with the prosecuting witness, ———, as charged in this indictment and as defined in these instructions, you should return a verdict of not guilty.⁴⁶

§ 4515(9). Oregon

You are instructed that, before you can convict the defendant of rape in this case, you must find that he, before the time of the indictment, had carnal knowledge of her, and did it by force, she at no time consenting to the act of intercourse; and, if she at any time consented to the intercourse, he would not be guilty of rape. There must be honest, actual, bona fide resistance. She must have used force to prevent him, the best she could. It must have been by force and against her will, and at no time consented to. So, if it was begun by force, and she actually consented before the act was completed, it would not be rape. The state must show beyond a reasonable doubt, before they can convict, that the act was committed by force and against the will of the prosecutrix, if committed at all.⁴⁷

§ 4515(10). South Carolina

The jury are instructed that, if ——— did not give her consent to sexual intercourse with defendant, and he used force, so that he by reason of that force had sexual intercourse with the prosecutrix, he would be guilty. If the prosecutrix withheld her consent, and she resisted him in good faith, and he accomplished his purpose, he would be guilty of rape.⁴⁸

§ 4515(11). Texas

You are charged that something more must be shown than a mere want of consent on the part of ——— to the intercourse, if any, with defendant, but it must appear from the evidence beyond all reasonable doubt that the said ——— made and used every exertion and means within her power, under the circumstances, to prevent intercourse, if any, with defendant; and, if the evidence in this case upon this subject is such as to raise reasonable doubt as to whether said woman did use every such exertion within her power, you will give defendant the benefit of such doubt, and acquit him.⁴⁹

⁴⁶ *Harmon v. Territory*, 79 P. 765, 15 Okl. 147.

⁴⁷ *State v. Colestock*, 67 P. 418, 41 Or. 9.

⁴⁸ *State v. Sudduth*, 30 S. E. 408, 52 S. C. 488.

⁴⁹ *Perez v. State*, 87 S. W. 350, 48 Tex. Cr. R. 225.

§ 4515(12). Wisconsin

The jury are instructed that mere verbal protests and refusals by the woman will not suffice as resistance, and that unless you find from the evidence beyond a reasonable doubt that there was active physical resistance by the prosecutrix to the act of sexual intercourse in question with defendant, if there was such an act, then your verdict must be not guilty.⁵⁰

§ 4516. Duty of female to make utmost resistance possible

§ 4516(1). Missouri

You are instructed that you cannot find that such intercourse was forcible or against the will of said ———, or without her consent, unless you find that she made the utmost resistance of which she was capable to prevent it; and whether or not such consent was given should be determined from all the facts and circumstances which you consider proved by the evidence.⁵¹

The jury are instructed that, to accomplish the crime charged in the indictment, the alleged wrongful act of defendant must have been done by force, and the woman must have made such resistance as she was capable of making to prevent it, and she must not have consented thereto.⁵²

§ 4516(2). Texas

You are instructed as a part of the law in this case that the defendant stands charged with having carnal intercourse with the prosecutrix, ———, without her consent, and by force. You are therefore instructed that it devolves upon the state in this case to prove beyond a reasonable doubt that the defendant did have carnal intercourse with the prosecutrix by force and without her consent, and before you can convict the defendant you must believe from the evidence beyond a reasonable doubt that the prosecutrix, not only did not consent, but that she put forth her utmost resistance to prevent the defendant from having carnal intercourse with her, considering the relative size, and strength of the parties, and conditions surrounding them at the time, and all other circumstances in the case, and if you have a reasonable doubt as to whether or not the prosecutrix did put forth her utmost resistance to prevent said carnal intercourse, it will be your duty to return a verdict of not guilty.⁵³

⁵⁰ Brown v. State, 106 N. W. 536, 127 Wis. 193, 7 Ann. Cas. 258.

⁵¹ State v. Boyd, 76 S. W. 979, 178 Mo. 2.

⁵² State v. Harris, 51 S. W. 481, 150 Mo. 56.

⁵³ Wood v. State, 189 S. W. 474, 80 Tex. Cr. R. 398.

§ 4517. Necessity of penetration

§ 4517(1). Florida

You are instructed that the proof must show penetration of the female parts to some extent by the male organ. It is not necessary to prove emission of seed. Of course, the fact of penetration must be shown by the evidence to the exclusion of, and beyond, a reasonable doubt.⁵⁴

§ 4517(2). Georgia

The jury are instructed that there must be carnal knowledge of the female; that is, the organ of the male must penetrate the organ of the female. Slight penetration, however, is sufficient. The mere entering of the vulva of the female organ by the penis of the male would be sufficient penetration.⁵⁵

§ 4517(3). Idaho

The jury are instructed that to constitute the crime of rape it is necessary that penetration be shown, but if penetration be shown to have actually taken place, as a matter of fact, the degree of penetration is immaterial. Penetration, as herein used, means the penetration of the female organ of a female with the male member or organ of a man.⁵⁶

§ 4517(4). Michigan

I will now charge you in relation to the term "sexual intercourse" used by the complaining witness. She says she is a girl of ——— years of age at this time—she claims she will be ——— in ——— next. She made use of the term "sexual intercourse"—described the offense as taking place as an act of sexual intercourse. Witnesses are usually presumed to know the English language, the use and significance of common terms and phrases, to understand them, and make use of them as they are generally and commonly understood; and yet it is always a question of fact for the jury to determine, when phrases and terms are used, whether the witness did, in fact, know and understand the terms as they are ordinarily used. And in this case it is for you to consider whether the girl ——— actually did know and make use of the term in its usual and ordinary meaning and significance. In rape it is necessary that there should be penetration, that the male sexual organ should actually enter, penetrate the female organ; this is the sexual offense charged, and that is what is meant, ordinarily, by the term sexual intercourse—the penetration of the female or sex organ by the male organ or sex organ of the man, and in rape

⁵⁴ *Williams v. State*, 43 So. 431, 53 Fla. 84.

⁵⁵ *Loyd v. State*, 105 S. E. 465, 150 Ga. 803.

⁵⁶ *State v. Pettit*, 193 P. 1015.

as it was formerly understood there must be emission. These two things must concur, but, in the offense charged here, under this statute it is necessary that there should be penetration of the female organ by the male organ to constitute the offense as charged—of rape—and that is what is ordinarily meant by the term “intercourse,” sexual intercourse, and in this case it is for you to say, considering the age of the witness, her education, her bringing up to this time, her environment or surroundings, it is for you to say when, on the witness stand, she testified that she had sexual intercourse with ——— on the ——— day of ——— last, it is for you to say whether there was actual penetration; as, under the statute, to make out the claim of rape there must have been penetration as I have made use of the term, the entering of the female sex organ by the male sex organ. Penetration is all that is necessary to show in order to constitute this offense. The girl ——— has been before you, you have heard her testimony, you have been able to ascertain and determine her degree of intelligence and her use of the words and phrases in the English language; it is for you to say whether, when she made use of the term “sexual intercourse,” she meant such a use of the term as is generally understood by the use of that phrase as I have defined it. If she did, then you should consider that she meant to make use of that phrase in its full significance; if she did not so make use of the term “sexual intercourse,” then there is absolutely no testimony in this case that the respondent is guilty of the offense charged. If, when she made use of the term “sexual intercourse,” she understood the term and used it in its ordinary significance, then there is testimony in the case from which you might find the respondent guilty, in connection with the other testimony in the case, if you believe it.⁵⁷

§ 4517(5). Missouri

You are instructed that, before you can find the defendant guilty of rape, you must believe and find from the evidence that the defendant forcibly assaulted and had sexual intercourse with the said ——— at the time and place mentioned in the preceding instruction, against her will. You cannot find that there was such sexual intercourse unless you believe from the evidence that the defendant penetrated the private parts of the body of the said ——— with his private parts, to some extent. But to constitute such intercourse it is not necessary that you should believe that there was an emission or discharge.⁵⁸

⁵⁷ *People v. Smith*, 158 N. W. 849, 192 Mich. 355.

⁵⁸ *State v. Boyd*, 76 S. W. 979, 178 Mo. 2.

§ 4518. Effect of intoxication of defendant**§ 4518(1). Alabama**

You are instructed that the presumption in this case is that the defendant is innocent until the state has proven beyond all reasonable doubt that he is guilty; and if the jury have a reasonable doubt, growing out of all the evidence, as to whether he was sufficiently sober to form the specific intent to ravish, then the jury cannot find the defendant guilty of an assault with intent to ravish.⁵⁹

§ 4518(2). Iowa

You are instructed that the defendant, as one of his defenses, says that at the time of the commission of the alleged crime as charged in the indictment the defendant was drunk. You are instructed that if you find from the evidence that the defendant, at the time of the alleged assault, was in such a state of drunkenness or intoxication that he was incapable of forming an intent to ravish the said ———, then defendant would not be guilty of assault with intent to commit rape; and you will then determine whether or not defendant, by reason of drunkenness or intoxication, was incapable of forming an intent to commit one of the lesser crimes included in the charge and defined in these instructions, and if you find the defendant was, at the time of the alleged assault, in such a state of drunkenness or intoxication as to render him incapable of forming an intent to commit assault and battery, or simple assault, then you should find the defendant not guilty.⁶⁰

§ 4519. Parties to offense

The jury are instructed that, if you believe from the evidence that ———, ———, and ——— committed an outrage on prosecutrix, but that defendant took no part in the same, you cannot convict him on said account, and you cannot convict him unless you believe from the evidence beyond a reasonable doubt that he, himself, used violence on the person of the prosecutrix and had carnal intercourse with her against her consent, and if she was willing to meet defendant's embraces, you should find him not guilty.⁶¹

§ 4520. Principals and accessories**§ 4520(1). North Carolina**

The jury are instructed that if defendants made the prosecuting witness drunk, and the male defendant had sexual intercourse with her, aided by the female defendant, both would be guilty.⁶²

⁵⁹ Whitten v. State, 22 So. 433, 115 Ala. 72.

⁶⁰ State v. Harrison, 149 N. W. 452, 167 Iowa, 334.

⁶¹ Segrest v. State (Tex. Cr. App.) 57 S. W. 845.

⁶² State v. Hairston, 28 S. E. 492, 121 N. C. 579.

§ 4520(2). *Texas*

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that ——— and ———, within ——— years before the finding of this indictment, had carnal knowledge of ———, who was not the wife of either the said ——— or the said ———, or of defendant, at a time when she was so mentally diseased as to have no will to oppose such act of carnal knowledge, and that defendant, knowing that her mental condition was so diseased, aided, assisted, or advised the said ——— and ———, or either of them, to have such carnal knowledge, you will find him guilty.⁶³

2. Statutory Rape§ 4521. *Elements of statutory rape*§ 4521(1). *Arkansas*

The court instructs the jury that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant had sexual intercourse with the prosecuting witness, and, at the time he had such intercourse, ——— was under the age of ——— years, the defendant would be guilty, and you should so find.⁶⁴

§ 4521(2). *California*

You are instructed that by the law of this state a female child under the age of ——— years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection with such a child by one not her husband will constitute the crime of rape, whether with or without the consent of such child, and in this case, if you believe from the evidence beyond a reasonable doubt that the defendant had sexual connection with the prosecuting witness on or about ———, as alleged in the information and that at the time she was under the age of ——— years and not the wife of the defendant, then the defendant is guilty of rape, and you should so find.⁶⁵

§ 4521(3). *Indiana*

The jury are instructed that if you, and each of you, are satisfied of the guilt of this defendant, as charged in the indictment, that at the time and place and in the manner charged in this affidavit, this defendant had carnal knowledge of ——— (prosecuting witness), a female child under the age of ——— years, then you should find the defendant guilty as charged. And it is immaterial, if you find she was under ——— years of age, whether she con-

⁶³ Caruth v. State (Cr. App.) 25 S. W. 778.

⁶⁴ Curtis v. State, 117 S. W. 521, 89 Ark. 394.

⁶⁵ People v. Liggett, 123 P. 225, 18 Cal. App. 367.

sented to said acts or not; whether she made any outcry or resistance. Under the law of this state a female child under the age of _____ years is incapable of giving her consent to the act of sexual intercourse. This provision of the law is for her protection, because of her age.⁶⁶

§ 4521(4). New Mexico

The jury are instructed that, if any person shall unlawfully and carnally know and abuse any female child under the age of _____ years, he shall be punished as provided by law.⁶⁷

§ 4521(5). Utah

You are instructed that, if you find from the evidence beyond a reasonable doubt that the prosecutrix, the female named in the complaint, was not the wife of the defendant at the time alleged in the information, and was under the age of _____ years, which is commonly referred to as the age of consent, and further find from the evidence beyond a reasonable doubt that the defendant committed an act of sexual intercourse with her at the place and on or about the time charged in the information, then such act of sexual intercourse constituted an offense under the statute, whether she consented or not. If such facts are proven beyond a reasonable doubt, it is immaterial whether she had been previously chaste or not, or whether she may have been unchaste with some other person; and it is immaterial that she did not resist or make an outcry, or whether she consented, or whether she received money for the act. None of these facts, if proven, constitute any defense, if you find from the evidence beyond a reasonable doubt that an act of sexual intercourse was committed by the defendant with her at the time and place and under the circumstances as charged in the information.⁶⁸

§ 4522. Debauching unmarried female under certain age

You are instructed that sexual intercourse with an unmarried female of previous chaste character, who is between the ages of _____ and _____ years, is a violation of the law, with or without her consent.⁶⁹

The court instructs the jury that if you shall find from the evidence that at the county of _____ and state of _____, at any time within _____ years next before _____, the defendant did feloniously assault and carnally know the witness _____, and that the said _____ at the time of said assault is charged to have been made was over the age of _____ years, and under the age

⁶⁶ Zell v. State, 127 N. E. 1, 9 A. L. R. 336.

⁶⁷ State v. Ellison, 144 P. 10, 19 N. M. 428.

⁶⁸ State v. Bayes, 155 P. 335, 47 Utah, 474.

⁶⁹ State v. Knock, 44 S. W. 235, 142 Mo. 515.

of ——— years, and that the said ——— was at the time an unmarried female of previous chaste character, and that the defendant was at the time over the age of ———, you will find the defendant guilty, and assess his punishment at imprisonment in the penitentiary for a term of ——— years, or by imprisonment in the county jail for a term not less than ——— months and not more than ——— months, or by a fine of not less than ——— dollars and no more than ——— dollars, or by both such fine and imprisonment. "Feloniously" means wickedly, and against the admonition of the law.⁷⁰

§ 4523. Necessity of showing penetration

You are instructed that, in order to convict the defendant of the charge of rape, as stated in the information, it must have been shown by the evidence that there was actual penetration of the female organ of the prosecutrix by the male organ of the accused, and, as there has been no testimony introduced tending to prove such penetration, you cannot convict defendant of rape, but only of assault with intent to ravish, as elsewhere defined in these instructions.⁷¹

§ 4524. Effect of previous unchastity of female

§ 4524(1). California

You are instructed that if you are satisfied from the evidence to a moral certainty and beyond all reasonable doubt that the defendant had sexual intercourse with one ———, on or about the time alleged in the information, and that the said ——— was then under the age of ——— years, and not the wife of the defendant, it is your duty to find him guilty; and it is no defense that some other person may have had such intercourse, as that is no defense, nor does it mitigate the offense of the defendant.⁷²

You are instructed that it is wholly immaterial whether ———, the prosecuting witness, was of previous chaste character or not, at the time of the alleged offense. Want of chastity of a female under the age of ——— years is no defense to a charge of rape upon her. Any statement reflecting on the previous chastity of ——— is to be wholly disregarded by you.⁷³

§ 4524(2). Nebraska

You are instructed that under the law a girl under the age of ——— years is incapable of consenting to an act of sexual intercourse, and that in the prosecution for rape upon such a girl it is

⁷⁰ State v. Knock, 44 S. W. 235, 142 Mo. 515.

⁷¹ State v. Headley, 123 S. W. 577, 224 Mo. 177.

⁷² People v. Currie, 117 P. 911, 16 Cal. App. 731.

⁷³ People v. Davenport, 110 P. 318, 13 Cal. App. 632.

immaterial whether or not she gave consent to such sexual intercourse. But in this connection you are instructed that unless you believe, beyond a reasonable doubt, that ——— had sexual intercourse for the first time with this defendant, and never had sustained such relation with any other man than the defendant, you must find the defendant not guilty.⁷⁴

The court instructs the jury that the chastity or unchastity of the prosecutrix should not be considered, if the jury believe from the evidence beyond a reasonable doubt that she was under the age of ——— years at the time the crime charged in the information is alleged to have been committed. If, on the contrary, the jury believe from the evidence that the said ——— was over ——— years of age, and under ——— years of age, at the time of the assault charged in the information, and that the said ——— was unchaste as herein defined, or if you entertain a reasonable doubt as to her chastity, then you should acquit the defendant.⁷⁵

§ 4525. Subsequent marriage of prosecuting witness as defense

The court instructs the jury that if it finds from the evidence beyond a reasonable doubt that the defendant carnally knew ——— (prosecuting witness) at a time before she was ——— years of age, in ——— county, in the state of ———, then the fact, if it be a fact, that the defendant afterwards married ——— (prosecuting witness) would be no defense to the crime of rape as charged in the affidavit in this cause.⁷⁶

§ 4526. Proof of time and place

The law is, gentlemen, if the defendant had sexual intercourse with the girl, ———, and in addition to that, at the time of the act, she was under the age of ——— years, why, then, he would be guilty of the crime charged. It is necessary, therefore, for the state to prove to you, by the character of testimony I shall herein-after indicate, beyond a reasonable doubt, that all of the elements going to make up the crime charged existed at the time the crime is alleged to have been committed, or near the time the crime is alleged to have been committed, the particular date not being material, but the particular transaction being very material, and being absolutely material in this kind of a case. Of course it would make no difference, as far as the guilt of the defendant is concerned, if he had had sexual intercourse with her at many other times and different places. But it is incumbent upon the state to prove that he had sexual intercourse with this girl, ———, at the

⁷⁴ Leedom v. State, 116 N. W. 496, 51 Neb. 585. This was a prosecution for statutory rape of female not previously unchaste.

⁷⁵ George v. State, 85 N. W. 840, 61 Neb. 669.

⁷⁶ Zell v. State, 127 N. E. 1, 9 A. L. R. 336.

—— Hotel in this county and in this state some time near the time alleged in the indictment, and that at the specified time she was under the age of —— years. These are the elements going to make up the charge in this indictment, which they must prove to you beyond a reasonable doubt.⁷⁷

§ 4527. Method of proving age of prosecuting witness

The jury are instructed that the state is not required to show the age of said —— by a family record or any instrument in writing; such proof may be made by oral testimony of witnesses, and said —— is a competent witness as to her age, and such testimony may be based upon information with respect thereto, if any she may have, from her parents.⁷⁸

3. Assault with Intent to Rape

§ 4528. Elements of assault with intent to commit rape

§ 4528(1). Georgia

The court instructs the jury that, in order to authorize a conviction for the offense of assault with intent to rape, the evidence must show beyond all reasonable doubt (1) an assault; (2) an attempt to have carnal knowledge; and (3) a purpose to carry into effect the intent with force and against the consent of the female. If any of these three elements is lacking, the offense is not made out.⁷⁹

§ 4528(2). Idaho

You are instructed that, to warrant a conviction of the defendant, therefore, of the crime charged in the information, to wit, an assault with intent to commit rape, the state must prove beyond a reasonable doubt, first, that the defendant assaulted ——, the person named in the information, with the intent to then and there have sexual intercourse with her, the said ——; second, that at the time the said —— was a female, not the wife of the defendant; third, that such acts were committed within the county of ——, state of ——, at the time stated in the information, or within —— years prior to the filing thereof.

You are further instructed that, in order to convict the defendant of an assault with intent to commit rape, the jury must be satisfied beyond a reasonable doubt, from the evidence, that the defendant assaulted the prosecuting witness with the intent at the time to overcome any resistance which she might offer, and

⁷⁷ State v. Goddard, 138 P. 243, 69 Or. 73, Ann. Cas. 1916A, 146.

⁷⁸ State v. Scroggs, 96 N. W. 723, 123 Iowa, 649.

⁷⁹ McCullough v. State, 76 S. E. 393, 11 Ga. App. 612.

therefore, if you have any reasonable doubt as to whether the defendant intended to accomplish his purpose by force, you should find the defendant not guilty.⁸⁰

§ 4528(3). Illinois

The court instructs the jury that if you are satisfied beyond a reasonable doubt from the evidence that the defendant induced the prosecuting witness to enter his buggy under the inducement that he would take her home, and that after he got her in the buggy the defendant took hold of her with intent to have carnal intercourse with her, and against her will, and with an intent to accomplish his object at all events, by his strength and power, against any resistance which she might offer, then he was guilty of an assault with intent to commit rape, whether he succeeded in his purpose or not.⁸¹

§ 4528(4). Iowa

You are instructed that, if you are satisfied beyond a reasonable doubt, from the evidence, that the defendant took hold of the said ———, and tore open her cloak, and seized her arm, with the intent of having carnal intercourse with her against her will, and with the intent of accomplishing his object at all events, without regard to any resistance she would make, then he is guilty of an assault with intent to commit rape; and, if you are satisfied of this beyond a reasonable doubt, you should so find.⁸²

§ 4528(5). Nebraska

You are instructed that, to constitute the crime charged in the second count of the information, there must have been an attempt to commit rape, and that intent must have been manifested by an assault for that purpose upon the person of the prosecutrix, ———; and, in order to convict the defendant, the jury must be satisfied beyond a reasonable doubt that he did use force, and that against the will of the said ———, in an attempt to have sexual intercourse with her.⁸³

§ 4528(6). Texas

The court instructs the jury that the Penal Code of this state provides as follows: "If any person shall assault a woman with intent to commit the offense of rape he shall be punished by confinement in the penitentiary for any term of years not less than two." The assault spoken of must be accompanied with the specific intent to rape; that is, the party committing the assault must

⁸⁰ State v. Nell, 90 P. 860, 18 Idaho, 539.

⁸¹ Donovan v. People, 74 N. E. 772, 215 Ill. 520.

⁸² State v. Urle, 70 N. W. 603, 101 Iowa, 411.

⁸³ Dunn v. State, 79 N. W. 719, 58 Neb. 807.

at the time it is committed have the specific intention on his part to have carnal knowledge of the woman he assaults, without her consent, and to have carnal knowledge of her by force, and by the use of such force as is sufficient to overcome such resistance as the woman should make, taking into consideration the relative strength of the parties and the other circumstances and facts in the case.⁸⁴

Now, bearing in mind the foregoing charges or paragraphs of this charge, you are instructed that, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, in the county of ——— and state of ———, on or about the ——— day of ———, did then and there, in and upon ———, a woman, make an assault with intent to commit the offense of rape upon the said ———, by then and there attempting by force and without her consent to ravish and have carnal knowledge of the said ———, and that the said defendant was then and there an adult male, then you will find the defendant guilty as charged in the ——— count in the indictment, and assess his punishment at confinement in the state penitentiary of this state for any number of years, in your discretion, not less than ———. If you do not so find and believe beyond a reasonable doubt, you will acquit the defendant.⁸⁵

You are instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, in the county of ——— and state of ———, on or about the ——— day of ———, did then and there unlawfully make an assault in and upon the person of ———, with the intent then and there on the part of the said defendant to ravish and have carnal knowledge of her, the said ———, by then and there entering her female organ with his male organ by actual penetration, with or without her consent, and with or without the use of force, and if you further believe from the evidence beyond a reasonable doubt the said ——— was then and there a female under the age of ——— years, and that she was not at said time the wife of the defendant, then you will find the defendant guilty as charged in the indictment and assess his punishment at confinement in the penitentiary for any term of years, not less than ———, in your discretion.⁸⁶

§ 4529. Intent to have carnal knowledge

The court instructs the jury that, if the acts as testified to by the witness were done by the defendant without the intention of having carnal knowledge of her, the prosecuting witness, then they only amounted to indecent and lascivious conduct, and, however reprehensible morally, did not constitute an assault to commit a rape.⁸⁷

⁸⁴ *Morris v. State* (Cr. App.) 206 S. W. 82, 84 Tex. Cr. R. 100.

⁸⁵ *Morris v. State* (Cr. App.) 206 S. W. 82, 84 Tex. Cr. R. 100.

⁸⁶ *Vivian v. State*, 152 S. W. 895, 68 Tex. Cr. R. 358.

⁸⁷ *State v. Bowers*, 144 S. W. 97, 239 Mo. 431.

§ 4530. Use of force or intent to use force**§ 4530(1). Alabama**

You are instructed that if, from the evidence, you do not believe that the defendant had any intention to forcibly ravish — at the time he put his hands upon her, if you believe that he put his hands upon her, but that he was simply trying to persuade her to have sexual intercourse with him, and if from the evidence you believe the defendant did nothing more, you cannot convict him of an assault with intent to rape.⁸⁸

You are instructed that the word "intent" is not descriptive of a physical act, but describes the quality of the mind that induced or governed the act; and although you may believe from the evidence beyond a reasonable doubt that the defendant placed his hands upon the person of — without her consent, with a desire to satisfy his lustful passions, yet before you can find him guilty of assault with intent to rape you must believe beyond a reasonable doubt, from all the evidence, that at the time he intended to satisfy these desires without her consent and by force or by putting her in fear.⁸⁹

§ 4530(2). Arkansas

You are instructed that, before defendant can be convicted of assault with intent to commit rape, you must believe from the evidence that he assaulted the prosecuting witness, and that, at the same time, he had the intent to use whatever force was necessary to overcome said witness, in order to have sexual intercourse with her, and unless you so find, you should acquit him of the felonious assault.⁹⁰

You are instructed that, unless you believe from all the evidence in this case, beyond a reasonable doubt, that the defendant assaulted the prosecuting witness with the intent of ravishing her, and that he intended to use so much force as would be necessary to accomplish that purpose and overcome her resistance, then you are authorized to find the defendant not guilty of an assault to commit rape.⁹¹

§ 4530(3). Delaware

You are instructed that, in order to convict the prisoner, it is necessary that you shall believe the alleged assault was committed by force and against the will of the prosecuting witness. If it was done with her consent, he would not be guilty of any offense.⁹²

⁸⁸ Brooks v. State, 64 So. 295, 185 Ala. 1.

⁸⁹ Brooks v. State, 64 So. 295, 185 Ala. 1.

⁹⁰ Benson v. State, 166 S. W. 549, 112 Ark. 442.

⁹¹ Benson v. State, 166 S. W. 549, 112 Ark. 442.

⁹² State v. Honey, 80 A. 240, 2 Boyce, 324.

§ 4530(4). *Georgia*

You must be satisfied from all the evidence, gentlemen, under the law, that the defendant—and you will look to all of the evidence, all of the circumstances surrounding the case, everything connected with it that has been admitted before you, and determine from that evidence whether or not the defendant took hold of this girl—made this assault upon her by laying his hands upon her with the intent to have carnal knowledge of her forcibly and against her will. It is necessary that you be satisfied of this fact before you would be authorized to convict the defendant of the offense of assault with intent to rape.⁹³

§ 4530(5). *Nebraska*

You are instructed that, to sustain a conviction for assault with intent to commit rape, the evidence must show that the accused had a purpose; not only to have sexual intercourse with the prosecutrix, but must have intended also to use whatever degree of force might be necessary to overcome her resistance and accomplish his object.⁹⁴

§ 4530(6). *Texas*

You are instructed that, if you believe from the evidence in this case that ——— willingly accepted the embraces of the defendant, or consented or willingly engaged in a scuffle with him, if she did do so, or if she was willing to or consented to the actions of the defendant toward her, whatever you may believe from the evidence they were, at the time and place it is alleged that he assaulted her, or if you have a reasonable doubt as to whether she did or not, you will acquit the defendant.⁹⁵

Upon this count the jury are instructed, if they believe from all the evidence before them, beyond a reasonable doubt, that the defendant did, in ——— county, state of ———, on or about the time charged in the indictment, attempt to commit a rape upon the person of ———, by having and obtaining carnal intercourse with her, the said ———, without her consent, and against her will, by the use of such threats as might reasonably create a just fear of death or great bodily injury, in view of the relative condition of the parties as to health, strength, and other circumstances of the case, and that he had at the time the ulterior intent to accomplish carnal intercourse with the prosecutrix by means of the threats used, then it would be the duty of the jury to find the defendant guilty of an attempt to commit rape, and to assess his

⁹³ Carter v. State, 49 S. E. 280, 121 Ga. 360.

⁹⁴ Dunn v. State, 79 N. W. 719, 58 Neb. 807.

⁹⁵ Morris v. State (Cr. App.) 206 S. W. 82, 84 Tex. Cr. R. 100.

punishment at confinement in the penitentiary for any term not less than ——— years.⁹⁶

§ 4531. Female under age of consent

§ 4531(1). Illinois

The jury are instructed that if you find from the evidence, beyond a reasonable doubt, that on the date mentioned in the indictment the defendant was above the age of ——— years, and that the prosecuting witness was under the age of ——— years; and if you further find from the evidence, beyond a reasonable doubt, that the defendant and the prosecuting witness were then in the office of the defendant, and that the defendant then and there had the intent and purpose to have carnal intercourse with ———, either with or without her consent, and that in pursuance of and in furtherance of such intent and purpose the defendant then and there did acts toward the accomplishment of such intent and purpose, and that he had then and there the present ability to accomplish such intent and purpose—then you should find the defendant guilty as charged.⁹⁷

§ 4531(2). Indiana

You are instructed that, if the state has satisfied you beyond a reasonable doubt that the defendant either had sexual intercourse with the prosecuting witness, or that he laid his hands upon her with the intent and purpose of having sexual intercourse with her, and that she was under ——— years of age, they have made out a case.⁹⁸

§ 4532. Prosecution for attempt to have carnal knowledge of female child

§ 4532(1). Alabama

I charge you, gentlemen of the jury, that if you believe from all the evidence and beyond all reasonable doubt that the defendant attempted to have carnal knowledge of ———, and at the time defendant attempted to have carnal knowledge of her, she was under the age of ——— years of age, and that there was an injury, though slight, to her sexual organs, caused by the defendant in his attempt to have carnal knowledge of ———, then you should find the defendant guilty.⁹⁹

I charge you, gentlemen of the jury, that if you believe beyond a reasonable doubt, after considering all of the evidence in this case, that any part of the sexual organs of ——— were abused by

⁹⁶ Moon v. State (Cr. App.) 45 S. W. 806.

⁹⁷ Addison v. People, 62 N. E. 235, 193 Ill. 405.

⁹⁸ Hanes v. State, 57 N. E. 704, 155 Ind. 112.

⁹⁹ Sims v. State, 41 So. 413, 146 Ala. 109.

the defendant in an attempt to have sexual intercourse with ———, and that ——— at that time was under ——— years of age, then you should convict the defendant.¹

I charge you, gentlemen, that it is not necessary that there should be an actual penetration of the sexual organs of ——— by the defendant in his attempt to have carnal knowledge of ———; but if you believe beyond a reasonable doubt, after weighing and considering all the evidence in this case, that the defendant attempted to have carnal knowledge with ———, and in such attempt he abused or injured the inner or outer part of ———'s sexual organs, then you should convict the defendant.²

§ 4532(2). Georgia

You are instructed that, if you believe from the evidence that the female alleged to have been assaulted was a child under the age of ——— years, it is not necessary, in order to convict the defendant, to show that he went so far as to attempt physical entrance into, or even so much as touched, the private organs of the female alleged to have been assaulted. It is only necessary to show that in attacking her, if he did attack her, his purpose was to have sexual intercourse with her.³

§ 4532(3). Missouri

The court instructs the jury that, if they find and believe from the evidence that at the county of ——— and state of ———, at any time within ——— years next before ———, the date of the filing of the information in this case, the defendant in and upon one ——— feloniously and unlawfully did make an assault with the felonious intent then and there, her, the said ———, then and there unlawfully and feloniously to ravish and carnally know and abuse, and that she, the said ———, was then and there a female child under the age of ——— years, to wit, of the age of ——— years, then you will find the defendant guilty of assault with intent to ravish, and assess his punishment at imprisonment in the state penitentiary for a term of not less than ——— years and not more than ——— years, or by imprisonment in the county jail not less than ——— months nor more than ——— months, or by a fine not less than \$——— and imprisonment in the county jail not less than ——— months nor more than ——— months, or by a fine not less than \$———. "Feloniously," as used in these instructions, means wickedly and against the admonition of the law; that is, wickedly and unlawfully.⁴

¹ Sims v. State, 41 So. 413, 146 Ala. 109.

² Sims v. State, 41 So. 413, 146 Ala. 109.

³ Williams v. State, 82 S. E. 908, 15 Ga. App. 306.

⁴ State v. Headley, 123 S. W. 577, 224 Mo. 177.

§ 4532(4). Virginia

The court instructs the jury that, if you believe from the evidence beyond a reasonable doubt that ——— is under ——— years of age, and if you further believe from the evidence beyond a reasonable doubt that the accused, ———, attempted by force to have intercourse with her, and that he did any overt act toward carrying out that purpose, such as taking hold of her, or throwing her down, then he would be guilty of attempted rape as charged in the indictment in this case.⁵

§ 4533. Conviction of aggravated assault

You are instructed that if you believe from the evidence beyond a reasonable doubt, that the defendant is guilty of some grade of offense, but have a reasonable doubt as to whether or not he is guilty of the offense of an assault with intent to rape—that is, as to whether or not he is guilty of the offense of attempting to have carnal knowledge of the said ——— by then and there actually penetrating her female organ with his male organ—then you will give the defendant the benefit of such doubt and acquit him of the offense of an assault with intent to rape, and next consider whether he is guilty of the offense of an aggravated assault. And upon the latter issue you are instructed, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, in the county of ——— and state of ———, on or about the date laid in the indictment, made an assault in and upon the person of ———, with intent to injure her, the said ———, with or without her consent and with or without the use of force, and you further believe from the evidence that said ——— was then and there a female or child under the age of ——— years, and that the defendant was then and there an adult male, but you should have a reasonable doubt as to whether or not he intended at the time to enter the person of the said ——— by entering her female organ with his male organ by actual penetration, but should further believe beyond a reasonable doubt that he was guilty of using undue familiarity with the said ——— by then and there fondling her person and by then and there putting his male organ against her female organ, but you have a reasonable doubt as to whether or not the defendant did intend to penetrate ———'s female organ with his male organ, then you will find the defendant guilty of an aggravated assault, and so say in your verdict, and assess his punishment at a fine of not less than \$——— nor more than \$———, or by imprisonment in the county jail for not less than ——— month nor more

⁵ *Lufty v. Commonwealth* (App.) 100 S. E. 829, 126 Va. 707.

than _____ years, or by both such fine and imprisonment, in your discretion.*

You are instructed that if you have acquitted the defendant of an assault with intent to commit the offense of rape, and if you believe from the evidence beyond a reasonable doubt that _____, a male, in the county of _____ and state of _____, about the time alleged in the indictment, made an assault upon the person of the said _____, a female, but not with the intent to commit the offense of rape upon her by force and against her will and without her consent, and if you believe from the evidence beyond a reasonable doubt that the defendant did then and there assault her, the said _____, with the intent to have sexual intercourse with her, the said _____, a female, then and in such case you will find the defendant guilty of an aggravated assault.⁷

You are instructed that, if you believe from the evidence that defendant tried to hug and kiss _____ (prosecutrix) at the time alleged in the indictment, or if you believe that he did hug and kiss her at the time, but did so with no intention to injure her or her feelings, and at said time had probable grounds to believe, and did believe, that such trying to kiss her, or hug and kiss her, would not be objectionable to her, or would not be offensive to her feelings, then he would not be guilty of an assault or aggravated assault.⁸

4. *Pleading and Evidence*

§ 4534. Necessity of proving time as alleged in indictment

You are instructed that the exact date of this occurrence, if you find from the evidence beyond a reasonable doubt that it did occur, is not necessary, so long as the occurrence happened within _____ years prior to the filing of the information in this case. By this I mean that the people are not obliged to prove that the crime was committed exactly on the _____ day of _____, the day laid in the information, but that they can prove the crime to have been committed at any time within _____ years prior to the filing of the information, so long as they prove the crime to be the crime alleged to have been committed by the defendant in the house known as No. _____, _____ street, in the city of _____, county of _____, state of _____.⁹

§ 4535. Variance with respect to name of prosecuting witness

The defendant has raised the question that there is a variance between the allegations of the indictment and the proof as to the

* *Vivian v. State*, 152 S. W. 895, 68 Tex. Cr. R. 358.

⁷ *Neill v. State*, 91 S. W. 791, 49 Tex. Cr. R. 219.

⁸ *Kearse v. State* (Tex. Cr. App.) 88 S. W. 363.

⁹ *People v. Sykes*, 101 P. 20, 10 Cal. App. 67.

name of the prosecuting witness. The court instructs the jury that such variance is not material, unless it is of such character as to mislead the defendant, or to hamper him in making his defense, or to expose him to the danger of being put twice in jeopardy for the same offense. Either the true name, or the name by which the prosecuting witness was commonly known, will be sufficient, if alleged in the indictment and supported by the proof. Whether the name in the indictment is sufficiently supported by the proof is for you to determine from the evidence introduced in this case, in the same manner as you should determine any other material allegation of the indictment.¹⁰

§ 4536. Presumption as to intent

You are instructed that the law justifies you in concluding that a man intends the natural and reasonable consequences of his own acts. However, it is solely a question for you to say whether or not an intention to do a particular thing is proper to be drawn from a particular act shown; and if you should be satisfied from the evidence, beyond a reasonable doubt, that the defendant did take hold of the prosecuting witness, it is for you to say whether or not, under all the circumstances, the intention to have intercourse with the girl was then in his mind, and that it was with that purpose, and with that intention in his mind, that he laid his hands upon her, remembering all the time that you are the judges of the fact; that it is for you to say whether or not that fact did exist in the case; and that it is for you to say, if it did exist, what the proper inference to be drawn from it was, remembering all the time that all reasonable doubts arising in the case are to be resolved in favor of the defendant.¹¹

§ 4537. Matters considered in determining issues

§ 4537(1). Delaware

You are instructed that, in determining whether the crime of rape, with which the prisoner is charged, was committed, you should carefully consider all the testimony, and whether from that testimony the child, upon whom the assault is alleged to have been committed, acted at or about the time as one of her age, condition, and surroundings would naturally and probably have acted if she had been assaulted as charged in the indictment. In this connection, for the purpose of reaching a conclusion, you may take into consideration the place and time of the alleged assault, any outcries or resistance made by the prosecuting witness, or the absence of outcries or resistance, the proximity of other

¹⁰ State v. Alva, 134 P. 209, 18 N. M. 143.

¹¹ Hanes v. State, 57 N. E. 704, 155 Ind. 112.

people, if it appear from the testimony that there were persons sufficiently near at the time to hear or to know of such outcries, or resistance, if any were made; and you should also take into consideration the testimony respecting any complaint or mention of the assault made by the prosecuting witness, when it was made, if made at all, to whom it was made or not made, and how soon after the alleged assault it was made. We mean by this that you may consider all such facts and circumstances as shown by the testimony, in order to satisfy yourselves whether the testimony respecting the guilt of the prisoner is or is not true.¹²

§ 4537(2). Florida

You are instructed that the request of the defendant to the prosecutrix to consent to an improper intercourse may be taken in consideration by the jury to disprove the fact that the defendant intended to commit rape.¹³

§ 4537(3). Texas

You are instructed that, if you find from the evidence that the face of the said ———, or any portion thereof, was bruised, or in some manner injured, and that such bruises and injuries, if any, were caused by the said ——— falling upon the steps of the ——— Hotel, if you believe that she did so fall, or if you find from the evidence that the said injuries, if any, were caused by the said ——— running against the door facing at room No. ———, in the said ——— Hotel, if you believe that she did run against the door facing of said room, or if you find from the evidence that the said ——— received such injuries, if any, in any other manner than by an assault and battery or some character of force used by the defendant, then and in that event the court charges you that you cannot consider the said injuries, if any, in determining whether the said defendant is guilty of any offense submitted to you in the general charge of the court.¹⁴

§ 4538. Effect, as evidence, of prompt complaint by prosecuting witness

§ 4538(1). California

The jury are instructed that, upon the trial of a defendant accused of the crime of rape, the fact that the prosecutrix made prompt and early complaint of the wrong and injury committed upon her person, and to her character and chastity, is independent and original evidence, and is admissible and may be received

¹² State v. Colombo, 75 A. 616, 1 Boyce, 96.

¹³ Hunter v. State, 10 So. 730, 29 Fla. 486.

¹⁴ Caples v. State, 167 S. W. 730, 74 Tex. Cr. R. 127.

and considered by the jury in corroboration of her other testimony given in the case.¹⁵

§ 4538(2). Illinois

The court instructs you that, if you believe from the evidence that the prosecuting witness told her father of the assault alleged to have been made on her, at the earliest opportunity, then that is a corroborating circumstance, tending to sustain the truth of her statement on the trial that such an assault was made.¹⁶

§ 4538(3). New Mexico

The court instructs the jury that, if the prosecutrix told her mother and others of the assault upon her at the earliest opportunity, then this would be a corroborative circumstance, tending to sustain the truth of her statements as made upon the stand.¹⁷

§ 4539. Failure of woman to make outcry or delay in making complaint

§ 4539(1). Arkansas

The court instructs the jury that, if they find from the evidence that ——— failed to make complaint immediately after the alleged commission of said offense, the jury may consider this upon the matter as to whether she gave her consent or not.¹⁸

§ 4539(2). Michigan

The jury are instructed that it was not necessary for the complaining witness to tell her mother at once of the alleged rape upon her; and if the jury believe from the evidence that the defendant is guilty of the crime charged in the information, and that she by reason of the threats made to her by her ravishers and the treatment that she had received was induced thereby to refrain from informing her mother what had taken place, then the complaining witness would be excused from not communicating the knowledge of the injury to others. At the same time it is true that you may take into account, in determining the truth of ———'s story, the circumstances whether she did or did not make complaint of it afterwards, and how recently. You may take that into account in connection with all of the facts and circumstances of the case. If you find that she did not complain of it because nothing of the kind happened, why, then, of course you would so consider it. If you find that she made no complaint because of the feelings of terror and mortification induced by what had happened

¹⁵ *People v. Keith*, 75 P. 304, 141 Cal. 686.

¹⁶ *Bean v. People*, 16 N. E. 656, 124 Ill. 576.

¹⁷ *State v. Ellison*, 144 P. 10, 19 N. M. 428.

¹⁸ *Jackson v. State*, 122 S. W. 101, 92 Ark. 71.

to her, then, of course, she would be excused for not making the complaint.¹⁹

§ 4539(3). *Missouri*

The court instructs the jury that although they may believe from the evidence in this case that the prosecuting witness did not make any outcry on the straw stack at the time she claims defendant ravished her, and did not make any complaint of the defendant having ravished her until a few days thereafter, yet if the jury further believe from the evidence in this case that the prosecuting witness had good reason to believe it would have been useless and dangerous for her to make any outcry on said straw stack at the time she claims she was ravished, and for that reason did not make any outcry, and that she made complaint of having been ravished as soon thereafter as she had suitable opportunity to do so, and that the reason she did not make complaint any sooner was because she was under the duress of the defendant caused by his threats, then the jury under those circumstances should consider such facts in explanation why prosecuting witness did not make any outcry, and why she delayed making such complaint.²⁰

The court instructs the jury that if they believe from the evidence that the defendant threatened the prosecuting witness, or by any means placed her under fear of death or of great violence to her person so that her will was overcome, and that by reason of her fear so caused she did not make any outcry at the time she claims she was ravished, and did not resist her ravisher with all of her power and did not make complaint for several days after the time she claims she was ravished, then such fear so produced overcomes the presumption that she consented, arising from her failure to make outcry, and her failure to make complaint, and her failure to use all of her power in resisting her assailant.²¹

You are instructed that it was the duty of the prosecuting witness, the said ———, at the time of the alleged assault, to make an outcry, and, as soon as an opportunity offered, to complain of the alleged offense to others; and unless you believe from the evidence that she did make such outcry at the time, and did make such complaint as soon as the opportunity offered, then you should take such circumstances of omission to make an outcry or complaint, or both, into consideration, with all the other evidence, in determining whether or not in fact a rape was committed. But such complaints, if any were made, are not to be considered as evidence

¹⁹ *People v. Flynn*, 55 N. W. 834, 96 Mich. 276.

²¹ *State v. Miller*, 90 S. W. 767, 191 Mo. 587.

²⁰ *State v. Miller*, 90 S. W. 767, 191 Mo. 587.

of the matters complained of, but only as tending to corroborate or not to corroborate her testimony, so far as you may believe they do tend to corroborate or fail to corroborate the same.²²

The jury are instructed that the charge of rape made by _____ against defendant remains uncorroborated by any evidence in the cause. Now, if the jury shall believe from the evidence in the cause that said _____ concealed the alleged rape until _____ after the alleged commission of such rape upon her, then the law presumes such concealment inconsistent with defendant's guilt.²³

You are instructed that, if the jury believe from the evidence that, at the time the offense is alleged to have been committed, the prosecuting witness made no outcry, and did not, as soon as an opportunity offered, complain of the offense to others, but concealed it for a considerable length of time thereafter, then the jury should take this circumstance into consideration with all the other evidence in determining the guilt or innocence of the defendant, and whether in fact a rape was committed or not.²⁴

§ 4539(4). New Mexico

You are instructed that, if you find that the prosecuting witness made no complaint of a rape immediately after the alleged crime, or as soon as her friends came, then this is a circumstance which you ought to consider.²⁵

§ 4539(5). New York

The jury are instructed that, if they believe from the evidence that the prosecuting witness failed to make prompt disclosure of the alleged rape, this is a circumstance against her, and tends to disprove the truth of her charge.*

§ 4540. Subsequent friendly relations of parties

See, also, post, § 4557.

§ 4540(1). Arkansas

The court instructs the jury that, if they find from the evidence in this case that the defendant and the prosecutrix remained friendly for some time after the alleged outrage, this can be considered upon the question whether the sexual intercourse was by consent or not.²⁶

§ 4540(2). Indiana

You are further instructed that it is proper for you to consider the conduct of the prosecuting witness toward the defendant after

²² State v. Boyd, 76 S. W. 979, 178 Mo. 2.

²³ State v. Patrick, 15 S. W. 290.

²⁴ State v. Witten, 13 S. W. 871, 100 Mo. 525.

²⁵ Territory v. Pino, 58 P. 393, 9 N. M. 598.

* People v. Astell, 94 N. Y. S. 748, 106 App. Div. 516.

²⁶ Jackson v. State, 122 S. W. 101, 92 Ark. 71.

the alleged commission of the crime complained of. You may consider whether or not, subsequent to such time, she treated him with scorn and contempt, or whether the relations were courteous and friendly, and if you should find from the evidence in this case that, at times subsequent to the alleged commission of the crime charged against the defendant, the prosecuting witness voluntarily consulted him in personal matters and called at his office at divers times and through a long period, for treatment, you may take these facts into account in determining the probability or improbability of the commission of the crime.²⁷

§ 4540(3). Missouri

The jury are instructed that the charge of rape made by the prosecutrix, ———, against defendant, remains uncorroborated by any evidence in the cause. Now, if the jury believe from the evidence in the cause that, after the alleged rape upon said ———, she continued friendly intercourse with defendant, then the law presumes such friendly intercourse inconsistent with defendant's guilt, and renders her charge of rape against defendant improbable.²⁸

§ 4541. Evidence of other acts of sexual intercourse than that alleged in indictment

You are further instructed that evidence of previous act of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant herein, and as having a tendency to render it more probable that the act of sexual intercourse charged in the information was committed on the ——— day of ———, and for no other purpose.²⁹

§ 4542. Effect of evidence as to bad moral character of plaintiff

See, also, ante, § 4506(4).

You are instructed that evidence has been introduced as to the moral character of the prosecuting witness, and as to her reputation for chastity and virtue. You are not to understand from this that a rape cannot be committed on a woman of bad moral character. A woman may be a common prostitute, and may still be the victim of a rape. This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being

²⁷ Clokey v. State, 107 N. E. 273, 182 Ind. 589.

²⁹ People v. Edwards, 73 P. 416, 139 Cal. 527.

²⁸ State v. Patrick, 15 S. W. 290.

voluntary or against her will—upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste. So that whatever conviction this evidence may produce in your minds as to whether she is of good or bad moral character, or as to whether she is chaste or unchaste, you will treat it as a circumstance affecting her credibility to aid you in determining whether her story is true or false, and the act of intercourse voluntary or against her will.⁸⁰

§ 4543. Limiting effect of evidence—Showing adulterous disposition of defendant

The court instructs you that evidence of previous acts of sexual intercourse between the defendant and the prosecutrix and of improper familiarities on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant herein, and as having a tendency to render it more probable that the act of sexual intercourse charged in the information was committed on or about the —— day of ——, and for no other purpose.⁸¹

§ 4544. Sufficiency of evidence

§ 4544(1). Florida

You are instructed that, if the jury has a reasonable doubt as to whether the defendant was, at the time he put his hands upon the prosecutrix, trying to get her to consent to an improper intercourse, or commit the crime of rape, you should give him the benefit of the doubt, and acquit him.⁸²

§ 4544(2). Kentucky

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that, in this county and before the finding of the indictment, the defendant had unlawful carnal knowledge of —— by force and against her will, you should find him guilty of rape and fix his punishment at confinement in the penitentiary for not less than —— years nor more than —— years, or at death, in your discretion.⁸³

§ 4544(3). Missouri

You are instructed that the charge of rape is, in its nature, a most heinous one, likely to create a strong prejudice against the

⁸⁰ *Anderson v. State*, 4 N. E. 63, 104 Ind. 467.

⁸¹ *People v. Price*, 147 P. 591, 26 Cal. App. 544.

⁸² *Hunter v. State*, 10 So. 730, 29 Fla. 486.

⁸³ *Lowry v. Commonwealth*, 65 S. W. 434, 23 Ky. Law Rep. 1553.

accused. It is a charge easy to make and hard to disprove. On this account you should bear in mind the difficulty of defending against such charge, and consider most carefully all the evidence and the instructions in making up your verdict.³⁴

§ 4545. Same—As to identity of perpetrator of assault

The jury are instructed that, in weighing the testimony of the prosecuting witness, you have the right and it is your duty to take into consideration the fact that, before she identified the defendant as her assailant, she had identified another and different person as the guilty one who perpetrated the assault in dispute. In this connection you are told that, in the event you find that she had identified such other person as the guilty one, you have the right to consider her condition, surroundings, and all the facts and circumstances shown to exist at the time she made such identification.³⁵

§ 4546. Credibility of prosecuting witness

§ 4546(1). Arizona

The jury are instructed that in this case the prosecution relies for a conviction upon the testimony of ———, the prosecuting witness, and no other witness was called by the territory to testify directly to the time and place or circumstances of the alleged offense; and you are instructed, in cases where the state relies upon the uncorroborated testimony of the prosecutrix, unsustained by other evidence, or by facts and circumstances corroborating it, that you should view such testimony with great caution, and it is the duty of the court to warn the jury of the danger of conviction on such testimony. You are further instructed that in considering her testimony you may take into consideration the facts and circumstances surrounding the place where the alleged offense is charged to have been committed—all the facts and circumstances at the time and immediately after the alleged offense was committed—in determining the weight of her testimony, and the reasonableness thereof, as tending to show to your minds the credit to be given to the same.³⁶

§ 4546(2). Georgia

The jury are instructed that, in cases of this character the party or woman alleged to have been injured is a competent witness; but the degree of credit given her testimony, her evidence, depends more or less upon the concurrence of the circumstances of the fact

³⁴ State v. Boyd, 76 S. W. 979, 178 Mo. 2.

³⁵ Shular v. State, 66 N. E. 746, 160 Ind. 300.

³⁶ Trimble v. Territory, 71 P. 932, 8 Ariz. 273.

with her testimony. You may look to the evidence to see whether she concealed the injury for any considerable length of time after she had an opportunity to complain. Did she, or not, make pursuit of the offender? Was the place of the act said to have been done remote from neighbors or passengers, or was it near a neighbor, or common recourse of passengers? Did she make any outcry or did she not, or did she make no outcry where the act was done when and where it is possible she might have been heard by others? These and all other circumstances in the case may be taken into consideration by the jury in determining what weight you will give her testimony.³⁷

§ 4546(3). West Virginia

The court instructs the jury that if they believe from the evidence that the only evidence tending to prove the guilt of the defendant is the testimony of the prosecuting witness, ———, and that her testimony on any material point is untrue, then the jury is at liberty to disregard her whole testimony.³⁸

The court instructs the jury that if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, ———, then they should scrutinize her testimony with care and caution.³⁹

§ 4547. Necessity of corroboration of prosecutrix

§ 4547(1). California

The court instructs the jury that it is not essential to a conviction in this case that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular acts constituting the offense. It is sufficient if you believe from her evidence and all the other testimony and circumstances in proof in the case beyond a reasonable doubt that the crime charged has been committed. While it is the law that the testimony of the prosecuting witness should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; by the law of this state, a female child under the age of ——— years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection with such a child by one not her husband will constitute the crime of rape, whether with or without the consent of such child, and in this case, if you believe from the evidence beyond a reasonable doubt that the defendant had sexual connection with the prosecuting witness on or about ———, as alleged in the information, and that at the time she was under the

³⁷ *Ryals v. State*, 54 S. E. 168, 125 Ga. 266.

³⁸ *State v. Perry*, 24 S. E. 634, 41 W. Va. 641.

³⁹ *State v. Perry*, 24 S. E. 634, 41 W. Va. 641.

age of ——— years, and not the wife of the defendant, then the defendant is guilty of rape, and the jury should so find.⁴⁰

The court instructs the jury that it is not essential to a conviction in this case that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular acts constituting the offense. It is sufficient if you believe from her evidence and all the other testimony and circumstances in proof in the case, beyond a reasonable doubt, that the crime charged has been committed.⁴¹

You are instructed that, while it is the law that the testimony of the prosecuting witness should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; and, if you believe the prosecuting witness, it is your duty to render a verdict of guilty.⁴²

§ 4547(2). Nebraska

You are instructed that in the case of rape it is not essential that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense, and if the jury believe from the testimony of the prosecutrix, and the corroborating circumstances and facts testified to by other witnesses, that the defendant did make the assault as charged, the law would not require that the testimony of the prosecutrix should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the assault was made.⁴³

§ 4548. Sufficiency of corroboration of prosecuting witness

§ 4548(1). Iowa

The court instructs the jury that a conviction cannot be had upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. This does not mean that the state is required to prove the act by direct testimony other than that of the prosecutrix, or by eyewitnesses of the transaction. It does, however, mean that there must be other testimony than hers, a showing of other facts and circumstances than those shown by her testimony, which shall tend to connect the defendant with the act charged. Complaints made by the prosecutrix to her parents are not alone sufficient to constitute that corroboration required by the law. Evidence of such complaints are admitted, and may be considered, as tending to confirm and strengthen the truth of her testimony. A failure by the prosecutrix to complain at once is looked

⁴⁰ *People v. Williams*, 142 P. 124, 24 Cal. App. 646.

⁴¹ *People v. Scott*, 141 P. 915, 24 Cal. App. 440.

⁴² *People v. Liggett*, 123 P. 225, 18 Cal. App. 367.

⁴³ *Dunn v. State*, 79 N. W. 719, 58 Neb. 807.

upon as a suspicious circumstance, indicating that her story may be a fabrication. Hence testimony of such complaints are admitted and may be considered as confirming or disparaging the accuracy and veracity of the prosecuting witness, and for no other purpose. Testimony that the genital organs of the prosecuting witness were injured, or the hymen ruptured, is not of itself sufficient to constitute that corroboration required by the law. Such testimony is admitted, and may be considered, as tending to strengthen the testimony of the prosecuting witness, and as evidence tending to show that a rape had been committed by some one. Evidences of bruises on other parts of the body, and of torn and soiled clothing, are not alone corroboration, for none of these may tend to connect the defendant with the offense charged. But testimony as to these may be considered as showing, or failing to show, that a crime had been in fact committed, and that resistance had been or had not been made by the prosecutrix. Opportunity is not enough of itself to constitute the corroboration required by the law. But, while mere opportunity does not of itself amount to corroboration, yet, if opportunity is shown to have been defendant's intention, if he took occasion to bring it about, and if it was with apparent deliberation, such facts, if shown, may be considered with other facts, if any are shown, tending to connect the defendant with the offense charged. Any independent testimony which has been introduced on the trial of the case which tends to identify and single out the defendant as the perpetrator of the crime charged, and which, considered in connection with the testimony of the prosecuting witness, establishes the essential elements of the crime as herein stated, is properly to be considered as corroborating testimony, and the sufficiency is to be passed upon by the jury.⁴⁴

You are instructed that, in consideration of the evidence as to whether or not the testimony of —— is corroborated as to whether or not the defendant had sexual intercourse with her, the fact that a child was born to her is not a fact to be considered as corroborative on that point.⁴⁵

The jury are instructed that no conviction can be had, unless there is evidence corroborative of the testimony of the prosecuting witness tending to connect the defendant with the commission of the crime charged, and you are further told that stains on the garments of the prosecuting witness are not alone sufficient corroborating evidence, unless you further find that they were produced by the sexual intercourse of defendant with the prosecutrix.⁴⁶

⁴⁴ *State v. McGhuey*, 133 N. W. 678, 153 Iowa, 308.

⁴⁵ *State v. Blackburn*, 114 N. W. 531, 136 Iowa, 743.

⁴⁶ *State v. Norris*, 104 N. W. 282, 127 Iowa, 683.

§ 4548(2). New York

The jury are instructed that the mere fact that, under the circumstances, this defendant was alone in the house some of the nights during the period between ——— and ——— with the complaining witness, ———, is not a corroboration of the charge of rape in the second degree.*

§ 4548(3). Washington.

You are instructed that no conviction shall be had for the crime charged in this information upon the testimony of the female, unless supported by other evidence. The testimony of the female child upon or regarding where the crime was committed must be supported or corroborated by credible evidence. It is not necessary that her testimony be corroborated substantially in every detail. It is not necessary that the corroborative evidence be sufficient of itself without the aid of her testimony to prove guilt. The slightest corroboration of her testimony may be sufficient if it tends to connect defendant with the commission of the offense. Whether it is sufficient or not is a question for the jury, and depends upon the consideration of all the evidence, including that of the female, as well as the corroborating testimony, if there is any. Your minds must be satisfied beyond a reasonable doubt as the court has heretofore defined the same.⁴⁷

*5. Included Offenses***§ 4549. Right to convict of lesser offense included in that charged**

You are instructed that, if you should find that the defendant did not, as alleged, have carnal knowledge of the said ——— by actual penetration, that is, if you believe that actual penetration has not been shown beyond a reasonable doubt, but should believe from the evidence that the defendant did, in the county, and at or about the time laid in the indictment, make an assault upon the said ———, with the intent to commit the crime of rape, that is, with intent, by force or threats, to have carnal knowledge with ——— without her consent and against her will, you will in that event find the defendant guilty of assault with the intent to commit the offense of rape, and assess his punishment at confinement in the penitentiary for any period not less than ——— nor more than ——— years.⁴⁸

You are instructed that, if you believe from the evidence that there was not such a penetration, but that the defendant made an assault upon the person of ———, not with intent to commit rape

* *People v. Kingslee*, 151 N. Y. S. 980, 166 App. Div. 320.

⁴⁷ *State v. Hess*, 150 P. 6, 86 Wash. 240.

⁴⁸ *Fitzgerald v. State*, 20 Tex. App. 281.

upon her, but with intent to have sexual intercourse with her, with her consent, then you will find the defendant guilty of an aggravated assault, and assess his punishment at a fine in any sum not less than ——— nor more than ——— dollars, or at imprisonment in the county jail, not less than ——— month, nor more than ——— years.⁴⁹

6. *Form of Verdict and Punishment*

§ 4550. Form of verdict

§ 4550(1). Delaware

You are instructed that in this case you may find any one of three verdicts, as the evidence shall warrant and justify, viz.: If you are satisfied beyond a reasonable doubt from the evidence in the case that the prisoner committed an assault upon the prosecuting witness with intent to commit rape, as alleged in the indictment, your verdict should be guilty in manner and form as he stands indicted. If you are not satisfied that the prisoner committed the assault with intent to commit rape, but nevertheless believe beyond a reasonable doubt that he did commit an assault upon the prosecuting witness, your verdict should be not guilty in manner and form as he stands indicted, but guilty of an assault only. But if you are not satisfied beyond a reasonable doubt that the prisoner committed an assault upon the prosecuting witness with intent to commit rape, or even that he committed an assault upon her, your verdict should be not guilty.⁵⁰

§ 4550(2). Missouri

The court instructs the jury as follows: The defendant is charged in the indictment with rape, and the jury will either find him guilty of rape as charged in the indictment, or find him not guilty, as you may believe and find from the evidence, under the instructions. If you find the defendant not guilty, you will simply so state in your verdict. If you find the defendant guilty, you will state in your verdict that you find the defendant guilty of rape as charged in the indictment, and will assess his punishment at imprisonment in the state penitentiary for a term of not less than ——— years, or at death.⁵¹

§ 4551. Punishment

The court instructs the jury that the penalty prescribed by statute for the offense of rape is death or confinement in the penitentiary for life, or for any term of years not less than ———, in the

⁴⁹ *Fitzgerald v. State*, 20 Tex. App. 281.

⁵⁰ *State v. Honey*, 80 A. 240, 2 Boyce, 324.

⁵¹ *State v. Boyd*, 76 S. W. 979, 178 Mo. 2.

discretion of the jury. Accordingly you are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendant did, as charged in the indictment, on or about the _____ day of _____, in the county of _____ and state of _____, make an assault in and upon the said _____, a woman, and did then and there by force violently ravish and have carnal knowledge of her, the said _____, without her consent and against her will, you will find the defendant guilty as charged, and assess his punishment at death, or at confinement in the penitentiary for life, or, in your discretion, at such confinement for any term of years, not less than _____.⁵³

B. CIVIL LIABILITY

§ 4552. Elements of cause of action

The court instructs the jury that, if they believe from a preponderance of the evidence that on the night of _____, while the plaintiff was riding in a buggy with defendant, he took hold of plaintiff and against her will laid his hands upon her in a lustful way, without her consent and against her will, then your verdict must be for plaintiff.⁵³

§ 4553. Necessity of showing lack of consent of woman

You are instructed that if the jury believe, from the evidence, that the defendant was the father of the child referred to in the testimony, and that the act of copulation, at the time said child was begotten, was a voluntary act on the part of the plaintiff, and not the result of, or induced by, any violence or threats of the defendant on that occasion, then the plaintiff is not entitled to any damages by reason of said act, or of her pregnancy and sickness, or of her confinement, or the birth of the child, or of any pain, suffering, or expense connected therewith or resulting therefrom.⁵⁴

§ 4554. Use of force by defendant and resistance by female

The court instructs the jury that the plaintiff, in order to maintain the action, must satisfy them, from all the proofs, that, if the defendant had criminal connection with her, it was accomplished with the intent on his part to effect said purpose in defiance of all resistance, and that it took place without her consent, against her will, and that she resisted to the best of her ability, under all the circumstances.⁵⁵

⁵³ Wood v. State, 189 S. W. 474, 80 Tex. Cr. R. 398.

⁵⁴ Boohar v. Trainer, 157 S. W. 848, 172 Mo. App. 376.

⁵⁵ Beseler v. Stephani, 71 Ill. 400.

⁵⁵ Dean v. Raplee, 39 N. E. 952, 145 N. Y. 319.

§ 4555. Effect of failure of plaintiff to make outcry or complaint**§ 4555(1). New York**

The court instructs the jury that the fact that plaintiff did not disclose the assault complained of within a reasonable time after the opportunity presented itself for her to do so, was in itself a reason for impeaching the veracity of her story.⁵⁶

§ 4555(2). Washington

You are instructed that if at the time of the alleged assault, or within a reasonable time thereafter, the plaintiff did not make an outcry, and she did not do so as soon thereafter as opportunity offered itself, unless she was prevented from making such outcry by fear and threats, or if the plaintiff failed to disclose the alleged outrage said to have been committed within a reasonable time after she had opportunity to do so, these would be circumstances which you may consider as tending to impeach the truth of her story.⁵⁷

§ 4556. Evidence showing lascivious disposition

The court instructs you that evidence of previous acts of sexual intercourse between the defendant and the prosecutrix and of improper familiarities on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant herein, and as having a tendency to render it more probable that the act of sexual intercourse charged in the information was committed on or about the —— day of ——, and for no other purpose.⁵⁸

§ 4557. Sufficiency of evidence

You are instructed that, if the jury believe from the evidence that at the time the alleged assault on plaintiff is alleged to have been committed, or within a reasonable time thereafter, the plaintiff had an opportunity to make an outcry, and that she did not do so, and did not as soon as an opportunity offered, or at any time prior to the time her baby was born, complain of the alleged assault to any person, and that she continued on friendly relations with the defendant after the date of said alleged assault, then the jury should take these circumstances into the case in determining whether the defendant did in fact have carnal knowledge of the plaintiff by force and against her will; and if you believe from all these circumstances and all the evidence in the case that the de-

⁵⁶ *Young v. Johnson*, 25 N. E. 363, 123 N. Y. 226.

⁵⁷ *Jensen v. Lawrence*, 162 P. 40, 91 Wash. 148, Ann. Cas. 1917E, 133.

⁵⁸ *People v. Price*, 147 P. 591, 26 Cal. App. 544.

defendant did not have sexual intercourse with the plaintiff, or even if you believe that he did have sexual intercourse with her by her consent, then the defendant is not liable in this case, and your verdict must be for the defendant.⁵⁹

§ 4558. Damages

§ 4558(1). California

You are instructed that compensatory damages should be given in such amount as in your judgment will fairly compensate her for the injury she has received by reason of the act complained of, taking into consideration her physical suffering and disability during pregnancy and in child birth, if you find the pregnancy was the result of the defendant's act, also her mental suffering, shame, and disgrace, and her loss of social standing, and all other harm you find she suffered as the natural result of the wrong.⁶⁰

§ 4558(2). Michigan

You are instructed that if you find the defendant guilty in this case, you have the right to give the plaintiff such an amount of damages as will compensate her for the injury done as shown by the evidence in this case. Compensation to the plaintiff is the purpose in view, and, when that is accomplished, anything beyond, by whatever name called, is unauthorized. It is not the province of the jury after damages have been found for the plaintiff so that she is fully compensated for the injury to mulch the defendant in an additional sum to be handed over to the plaintiff as punishment for the alleged wrong.⁶¹

§ 4558(3). Nebraska

It is well to remind the jury that this is neither an action of slander nor libel, but an action for damages for an alleged assault. If you fail to find the assault alleged, you will find for the defendant; if you find the assault alleged, you will find for the plaintiff. If for the plaintiff, you can only find damages resulting from the assault. The damages must be actual compensation for the injuries sustained by reason of the assault. All your findings must be from the evidence admitted during the trial.⁶²

§ 4559. Exemplary damages

The jury are instructed that, if you find for plaintiff, you may consider the character of the attack on plaintiff, and in your discretion allow her exemplary damages.⁶³

⁵⁹ *Champagne v. Hamey*, 88 S. W. 92, 189 Mo. 709.

⁶⁰ *Valencia v. Milliken*, 160 P. 1086, 31 Cal. App. 533.

⁶¹ *Totten v. Totten*, 138 N. W. 257, 172 Mich. 585.

⁶² *Atkins v. Gladwish*, 41 N. W. 347, 25 Neb. 390.

⁶³ *Mallett v. Beale*, 23 N. W. 269, 66 Iowa, 70.

CHAPTER CCXXXVI

RECEIVERS

§ 4560. Right of receiver with respect to accommodation paper payable to insolvent.

§ 4560. Right of receiver with respect to accommodation paper payable to insolvent

The jury are instructed that this action is brought by the receiver, and he occupies the same position that the ——— Bank would had it brought the action in its own name before it was placed in the hands of a receiver. The receiver has no greater rights in this case than the ——— Bank possessed. It does not occupy the position of purchaser for value.¹

The jury are instructed that, where an accommodation note is diverted from the purpose for which it was given, one who takes it with knowledge cannot recover from the accommodation party, and in this case the receiver possesses, as a matter of law, all the knowledge that the ——— Bank possessed upon the subject of this note.²

¹ Chicago Title & Trust Co. v. Brady, 65 S. W. 303, 165 Mo. 197.

² Chicago Title & Trust Co. v. Brady, 65 S. W. 303, 165 Mo. 197.

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